
(2019) 08 BOM CK 0027
In the Bombay High Court
Case No : Writ Petition No. 4087 Of 2016

Rohan Dukle And Anr

APPELLANT

Vs

State Of Maharashtra And Anr

RESPONDENT

Date of Decision : 08-08-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 482
Indian Penal Code, 1860 — Section 120B, 405, 406, 420
Constitution Of India, 1950 — Article 226

Citation : (2019) 08 BOM CK 0027

Hon'ble Judges : Ranjit More, J; Bharati H. Dangre, J

Bench : Division Bench

Advocate : Atul G. Damle, Abdullah Qureshi, K.V. Saste, S.A. Sawant

Final Decision : Disposed Off

Judgement

Ranjit More, J

1. Rule. Rule made returnable forthwith and the matter is taken up for final hearing.

2. The writ petition is filed invoking extraordinary writ jurisdiction of this Court under Article 226 of the Constitution of India and under Section 482 of the Code of Criminal Procedure, 1973 (for short "the Cr.PC.") for quashing the FIR bearing CR No.320 of 2016 initially registered with Dadar Police Station at the instance of respondent No.2-complainant for the offences punishable under Sections 406, 420 and 120B of the Indian Penal Code, 1860 (for short "the IPC"). Subsequently, the investigation was transferred to Economic Offences Wing, Unit IX, CB-CID, Mumbai and renumbered as CR.No.71 of 2016.

3. The case of the complainant-respondent No.2 as disclosed in the FIR is as follows:

Respondent No.2 is the Director/Promoter of the companies by name M/s. Fortune Financial Services (India) Limited and Fortune Credit Capital Limited.

Somewhere around July-2013, the petitioners being Promoters, Founders and Directors of Xperitus Insurance Brokers Pvt. Ltd. and Magus Corporate Advisors Pvt. Limited, had approached respondent No.2's company and represented that they are in the business of distribution of insurance products and advisory services in relation to settlement of insurance claims and promised excellent returns on investment and profitability of the Company. After various meetings, the complainant-company decided to purchase 51% shares of M/s. Xperitus Insurance Brokers Pvt. Ltd. and Magus Corporate Advisors Pvt. Ltd. and, accordingly, by the end of the year 2013 invested an amount of Rs.3,00,50,000/- as advance for share purchase and Rs.1,40,00,000/-towards inter-corporate deposit from the accounts of the complainant's company. 16 separate Memorandum of Understanding (MOUs) were entered into by the complainant and different shareholders of the petitioners' company. That in early 2014, the complainant suspected foul play as the petitioners visits to the complainant's company had reduced. There was no communication from the petitioners and after rigorous follow-up, certain details and figures of the petitioners' companies were provided which revealed total mismanagement of the petitioners' companies. This was contrary to the facts and representations made to the complainant. The complainant found that after parting with huge and substantial amounts, the petitioners' company suddenly started making losses. The complainant also found that compliances were not made by the petitioners relating to direct and indirect taxes. The complainant's company thereafter decided not to invest further amount in Xperitus Insurance Brokers Pvt. Ltd. The complainant stopped remaining payment and asked the petitioners to return their money already deposited. The shares of the petitioners' companies were not to be transferred till permission of the IRDA is not obtained. The petitioners had knowledge that the selling of their shares requires IRDA permission. The complainant further wrote a letter to IRDA and in their reply dated 29th July, 2016, they informed that no request has been received from Xperitus Insurance Brokers Limited regarding change in shareholding. In short, it is the case of the complainant that the petitioners by making false representations and suppression of facts had induced the complainant's company to invest an amount of Rs.4,40,50,000/- for purchase of shareholdings of Xperitus Insurance Brokers Pvt. Ltd. and Magus Corporate Advisors Pvt. Ltd. though they were fully aware that their companies were commercially imbalanced.

4. It is the case of the petitioners that in/or around the end of 2012, they were approached by M/s.Fortune Financial Services (India) Ltd. (for short "Fortune") through their representatives with a request to consider selling equity shares of Xperitus Insurance Brokers Pvt. Ltd. and Magus Corporate Advisors Pvt. Limited to Fortune. It was represented to the petitioners that Fortune was interested in diversifying into insurance business. It was also informed to the petitioners that Fortune is applying for banking license and hence was acquiring various companies to show strength.

In the month of February, 2013, Fortune through Mr. Sudhir Valia and Mr.Vijay

Choraria drew out the Terms of Agreement to finalize the entire transaction. Initially, the petitioners had offered only 20% of the stakes of both the companies. However, the complainant-respondent No.2 induced the petitioners to part with 51% of the stake in Xperitus Insurance Brokers Pvt. Ltd. and 49% of the stake Magus Corporate Advisors Pvt. Ltd. to ensure that the said companies can become subsidiaries of Fortune. As against the said shares apart from the consideration aforementioned, Fortune offered its 12,00,000/- shares in stake swap. Due diligence was conducted by the Chartered Accountant appointed by Fortune, valuation of the said companies was revised by them and subsequently MOU and Terms of Agreement were drawn by Fortune. Thereafter, the same were forwarded to the petitioners' companies through their email dated 18th July, 2013, to be signed by all the concerned parties. Thereafter 12 MOUs with various shareholders of M/s.Xperitus Insurance Brokers Pvt. Ltd., came to be executed on 22nd July, 2013. Along with the said MOUs, Terms of Agreement was entered into on 23rd July, 2013, between Fortune, Xperitus Insurance Brokers Pvt. Ltd. and Magus Corporate Advisors Pvt. Ltd. and it was decided to conclude the transaction as per the terms and conditions mentioned therein.

As per the terms and conditions of the Agreement dated 23rd July, 2013, Fortune had inter alia promised and obliged to perform as under :-

- i) Acquisition of shares equivalent to 51% of the said companies equity from other shareholders by paying 50% upfront and supporting to complete the entire transaction within 9 months of date of agreement, that is by 23rd April, 2014.
- ii) 12,00,000 shares in Fortune to be allotted to Magus.
- iii) Salaries to 4 key promoters amounting to Rs.150 Lacs per year.
- iv) Introduction of funds as and when required for operations/acquisitions at rate of interest not exceeding 15%.
- v) Access to Fortune/its promoter's business contacts/ relationships/companies for the growth of the company.

It is the case of the petitioners that Fortune, however, failed to deliver on contracted terms, as result of which, the petitioners' companies suffered losses. It is the case of the petitioners that in pursuance of the said Agreement, their companies undertook plan of action for next 15 months by way of including all the prospective clients that Fortune/its representatives would bring in for insurance business. Accordingly further plan for expansion of business including distribution of retail insurance products were put in place. The petitioners companies took upon themselves to employ more staff and train them accordingly and further infrastructure was increased, which involved funds being spent by the said companies. It is the specific case of the petitioners that all the business plans were shared with Fortune and its promoters/authorized representatives and all the expansion/increase in infrastructure were carried by their companies keeping Fortune/its representatives duly informed.

It is the case of the petitioners that Fortune, however, failed to deliver on contracted terms, as a result of which, their companies started suffering losses. This was repeatedly brought to the notice of Fortune but inspite of this, there was no substantial efforts on the part of Fortune to comply with the terms of the contract. Fortune even after repeated requests failed to reconcile the accounts or came forward to conclude the transaction and left the petitioners' and their companies in a hapless situation.

The petitioners received a letter dated 27th July, 2016 from IRDA inter alia informing that by an email dated 6th June, 2016 from Fortune informed that they had entered into an MOU with Xperitus Insurance Brokers Pvt. Ltd. in July, 2013 and in connection with the same, IRDA asked Xperitus Insurance Brokers Pvt. Ltd. to furnish information. The petitioners vide letter dated 8th August, 2016, replied to the said letter of IRDA clarifying all the queries raised by IRDA. However, the petitioners were shocked when they received a letter dated 6th October, 2016 from their banker informing that the Office of EOW, Unit IX has ordered their banker to defreeze the current accounts of the petitioners' companies with reference to the subject CR. That is how the petitioners came to know about registration of FIR and they have from time to time given reply to the EOW explaining their position and pointing out that no criminal offence is made out.

5. The writ petition was placed for admission before the Division Bench (Coram :A.S.Oka and Anuja Prabhudessai, JJ.) on 18th January, 2017. On that day, after hearing learned counsel for the petitioners and learned APP, the Court granted ad-interim relief and thereby directed respondent No.1 not to file charge-sheet against the petitioners in the subject crime.

6. Mr. Damle, learned senior counsel appearing for the petitioners, submitted that bare perusal of the subject FIR would sufficiently reveal that the entire dispute is arising out of share purchase agreement entered into between the parties and, therefore, this case is predominately of civil nature and, hence, availing criminal remedy to settle the same is gross abuse and misuse of law. Mr. Damle, learned senior counsel, took us through the FIR and MOUs and submitted that the petitioners companies were very much viable and making profits, however, Fortune had miserably failed to complete their end of bargain and hence the petitioners' companies were put in such position that they were unable to conclude the transaction as per the terms and conditions of the Agreement dated 23rd July, 2013 and this resulted in petitioners' companies running into huge losses which were time and again being diligently informed to Fourtune. As a matter of fact, other directors of Fortune viz. Mr.Sudhir Valia and Mr. Vijay Choraria are qualified Chartered Accountants and they entered into MOUs only after conducting due diligence of the accounts of the petitioners' companies through Shailesh Bathiya and Associates, Chartered Accountants. Mr. Damle, learned senior counsel, also pointed out that there is an arbitration clause in MOUs and instead of resorting to the said remedy, the present FIR is filed in

abuse of the process of law. It is also submitted that the petitioners were and are ready and willing to perform their part of the contract, however, respondent No.2 failed to comply their part of the contract. He lastly submitted that in the light of the said facts, the subject FIR which is filed after 3 ½ years is a gross abuse of the process of law.

7. Per contra, Mr. Sawant, learned counsel for respondent No.2 submitted that the contents of the FIR clearly reveal commission of cognizable offence like cheating and fabrication of accounts etc. and merely because civil remedy is available, the complaint cannot be quashed at the threshold itself. Mr. Sawant, learned counsel, submitted that the petitioners induced respondent No.2's company to enter into MOUs by making false representations thereby compelling respondent No.2 to part with huge amounts and, therefore, offences as alleged in the complaint are made out. Mr. Sawant also invited our attention to the order dated 8th May, 2019, passed by the Hon'ble Apex Court in SLP (Crl) No.3930 of 2019 and submitted that the petitioners were granted eight weeks' time to surrender before the Trial Court and, in the meantime, liberty was granted to the petitioners to apply for regular bail. Mr. Sawant invited our attention to the submissions of the petitioners' lawyer before the Hon'ble Apex Court that he is willing to deposit some amount on behalf of the petitioners and also the observation of the Apex Court that the Trial Court is directed to take note of the suggestion at the time of consideration of the matter. Mr. Sawant lastly submitted that the present case is not a case which can be quashed in exercise of extraordinary jurisdiction conferred upon this Court under Article 226 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973,

8. The moot question, in the light of the above submissions, therefore, arising for our consideration in this petition is, whether the dispute between the parties is predominately of civil nature which is tried to be converted into criminal nature so as to recover the amount which respondent No.2 has invested in the petitioners' companies towards share purchase agreement and inter-corporate deposit. The offences alleged against the petitioners are under Section 406, 420 and 120B of the IPC. It is the specific allegation of respondent No.2 that the petitioners have tempted him to believe false representations and suppressed facts that their companies were making losses in the year July, 2013 and induced him to invest the amount of Rs.4,40,50,000/ for purchase of shareholdings of the petitioners' companies though they were fully aware that their companies were economically imbalanced.

9. Section 405 of the IPC defines "criminal breach of trust" which is made punishable under Section 406 of the said Act. In order to attract the offence of criminal breach of trust, following ingredients must be complied with:

A person"

A) being in any manner entrusted with property or

B) with any dominion over property; dishonestly,

1. misappropriates;
2. converts to his own use that property;
 - i. in violation of any direction of law prescribing the mode in which such trust is to be discharged or
 - ii. of any legal contract, express or implied, which that person has made touching the discharge of such trust or
 - iii. willfully suffers any other person so to do.

Bare reading of the entire complaint, in our considered opinion, does not make out any offence of criminal breach of trust under Section 406 of the IPC. The complainant nowhere alleges that the petitioners dishonestly misappropriated or converted to their own use the property invested in Xperitus Insurance Brokers Pvt. Ltd. and Magus Corporate Advisors Pvt. Limited. It is also not the case of the complainant that the petitioners used or disposed off their property in violation of any direction of law and/or legal contract.

10. So far as the offence of cheating under Section 420 of the IPC is concerned, the law is fairly well settled in various judgments of the Apex Court. Mr. Damle, learned senior counsel for the petitioners, relied upon the decision of the Apex Court in Hridaya Ranjan Prasad Verma versus State of Bihar (2000) 4 SCC 168, wherein it was observed that :

"It is held time and again that the distinction between mere breach of contract and the offence of cheating is a fine one. It would depend upon the intention of the accused at the time of 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 transaction that is the time when the offence is said to have been committed. Therefore, it is the intention which is gist of the offence. To hold a person guilty 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 an culpable intention right at the beginning that is when he made the promise cannot be presumed."

Perusal of the above observation makes it abundantly clear that in order to make out the offence of cheating, fraudulent or dishonest intention is required to be shown right at the beginning of the transaction. In the light of this principle, let us consider whether the complainant made out offence under Section 420 of the IPC.

Contrary claims are made by the parties whether the petitioners approached the respondent No.2 or Fortune-respondent No.2's company approached the petitioners first. It is the case of the complainant that the petitioners promised high interest rates and painted rosy picture of their companies and, thus induced

Fortune to enter into MOUs and Agreement. On the contrary, it is the petitioners' case that Fortune wanted to apply for banking licenses and, hence, it was acquiring various companies to show its strength. However, the fact remains and it is the specific case of the petitioners that due diligence was conducted by the chartered accountants appointed by Fortune. The petitioners gave specific statement before the Investigating Agency, a copy of which is annexed at page 99. In paragraph 6.11, the petitioners have made following averments :

"6.11 On or about the end of February, 2013, FFSIL appointed M/s. S. H. Bathiya and Associates to conduct a Due Diligence process of our financial books of accounts. The said process was accomplished over a period of more two months and it was only after Mr. Sudhir Valia and Mr. Vijay Choraria were fully satisfied on all accounts that a Written Agreement dated 23.07.2013 came to be executed between FFSIL, Xperitus, Magus and "Team Magus". Even this Written Agreement was drafted by the Chartered Accountants appointed by FFSIL/Mr.Sudhir Valia/Mr.Vijay Choraria, namely M/s.S.H. Bathiya and Associates and no room was given to us to effect any modifications as a result of which we were virtually required to sign on the dotted line."

The above averment of the petitioners is not even denied by respondent No.2 either by filing an affidavit-in-reply or in an argument before us. As a matter of fact, the terms of MOUs and Agreement were settled down by Fortune and the same were forwarded to the petitioners' companies by email dated 18th July, 2013. Due diligence of the petitioners' companies before the subject transaction was conducted by respondent No.2's company through professionally qualified chartered accountants and, only thereafter, respondent No.2 company entered into MOUs with individual shareholder of the petitioners' companies and the Agreement was also prepared. These facts unequivocally show that everything including viability of the petitioners' companies was in order at the time of the impugned transaction. Had that not been the case, then Fortune, respondent No.2's company would not have entered into MOUs and Agreement. This conclusion is also supported by respondent No.2's contention that the petitioners' companies suddenly started suffering losses only after execution of MOUs. Thus the record shows that the petitioners' companies started suffering losses subsequent to the execution of MOUs/Agreement. The version of the parties, as to why the petitioners' companies started suffering losses, is contradictory. The petitioners version is that the same was due to failure on the part of Fortune in concluding terms of contract. As stated earlier, at the cost of repetition, we must state here that even the complainant's case is that subsequent to the execution of MOUs/Agreement, the petitioners visit to Fortune reduced and suddenly petitioners' companies started suffering losses. In the facts and circumstances, in our considered view, the FIR does not disclose that the petitioners entered into MOUs/Agreement with respondent No.2 company with fraudulent or dishonest intention. Therefore, the offence under Section 420 of the IPC is not made out.

11. This takes us to consider the 3rd limb of the argument of Mr.Damle, learned

senior counsel for the petitioner that the dispute between the parties is predominately of civil nature. We find merit in this contention. The MOUs dated 22nd July, 2013 are the part of record and we have perused the same. We have also perused the Terms of Agreement dated 23rd July, 2013, which are quoted at page 8 of the petition. In terms of this MOUs/Agreement, the respective parties were required to discharge their obligations. Both the parties are blaming each other and, therefore, intended transaction viz. acquisition of 51% share in Xperitus Insurance Brokers Pvt. Ltd. and Magus Corporate Advisors Pvt. Limited could not be completed. We are not called upon to go into the question as to which party is at fault. The limited issue pressed before us is whether the offences as alleged in the FIR are made out or not. Respondent No.2 contends that transaction could not be completed because of non-cooperation of petitioners in obtaining permission from IRDA. The petitioners, on the contrary, relied upon the reply to the IRDA dated 8th August, 2016. It is the case of the petitioners that permission could not be obtained on account of failure on the part of respondent No.2 in complying with the terms of MOUs/Agreement. Be that as it may, clause 4 of the MOUs reads as follows:

"4. All disputes, differences and questions whatsoever arising either during the continuance of this Memorandum of Understanding or afterwards between the parties hereto or their respective representatives touching these presents or the construction or application thereof or as to any act deed or omission of any of the parties hereto in any way relating to these presents shall be referred to a Sole Arbitrator as may be mutually decided by all parties. Such arbitration shall be held in Mumbai and shall be in accordance with the Arbitration and Conciliation Act, 1996 or any other statutory modification or re-enactment thereof for the time being in force in India. The award of the Arbitrators shall be final. Fees that may be incurred on the Arbitration shall be shared by the Selling Shareholder on one part and Acquirer on the other part, equally."

Thus, in our considered opinion, a mechanism is provided in MOU itself to arbitrate the dispute between the parties. The parties are also at liberty to avail civil proceedings to redress their grievance as permissible under law. However, in the above stated facts, in our considered opinion, the offence being not made out, the FIR could not have been registered and that too, after a delay of 3 ½ years.

12. The Hon'ble Apex Court in the case of State of Haryana v. Bhajan Lals 1992 Supp (1) SCC 335 held that where a criminal proceedings is manifestly attended with malafide intention and/or the proceedings is maliciously instituted with object to serve the oblique purpose of recovering the amount, such proceeding needs to be quashed and set-aside. In the case at hand, the allegation made in the subject complaint, even if taken as they are, does not make out ingredients of the criminal offence, though at the most they may attract civil dispute, for which the mechanism is already provided in MOUs and, therefore, on this count also, the complaint needs to be quashed and set-aside.

13. Before parting with this order, we must make a reference to the argument of Mr. Sawant, learned counsel for respondent No.2, in respect of the order of the Apex Court in SLP (Crl) No.3930 of 2019. That SLP was filed by the petitioners, being aggrieved by the order of learned Single Judge of this Court dated 25th March, 2019 in Anticipatory Bail Application No.1977 of 2016. The Apex Court refused to interfere in the said SLP. However, the Apex Court granted petitioners eight weeks' time to surrender before the Trial Court, and in the meanwhile, the petitioners were also granted liberty to apply for regular bail with further directions to the Trial Court to decide the same expeditiously. The Apex Court noted the suggestion of the petitioners' counsel that he will deposit some money on behalf of the petitioners with further directions to the Trial Court to note the same. The petitioners have approached this Court invoking jurisdiction under Article 226 of the Constitution of India and Section 482 of the Cr.PC.. By giving detailed reasons, we have come to the conclusion that the dispute between the parties is predominately of civil nature and offences under Sections 406 and 420 of the IPC are not made out and, therefore, we do not find any merit in the said submission advanced by Mr.Sawant, learned counsel for respondent No.2.

14. In the light of the above discussion, we allow the writ petition in terms of prayer clauses (a) and (b). Resultantly, the CR. No.71 of 2016 investigated by EOW, Unit IX, CB, CID, Mumbai, is quashed and set-aside. Since we have quashed the subject CR., the bank accounts of the petitioners, set out in schedule at Exhibit -G, Page 88 of the petition, which are freezed at the instance of Investigating Agency, are directed to be defreezed.

15. The writ petition is disposed off.