
(2008) 01 AHC CK 0220
In the Allahabad High Court

Sri Ajay Kumar Goyal

APPELLANT

Vs

State of U.P. and Sri Mahesh Chand

RESPONDENT

Date of Decision : 24-01-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 154, 156, 482, 93
Penal Code, 1860 (IPC) — Section 120B, 406, 409, 420, 467
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 154, 156, 482, 93
Penal Code, 1860 (IPC) — Section 120B, 406, 409, 420, 467
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 154, 156, 482, 93
Penal Code, 1860 (IPC) — Section 120B, 406, 409, 420, 467

Citation : (2008) 01 AHC CK 0220

Hon'ble Judges : Vinod Prasad, J;Ajai Kumar Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Vinod Prasad, J.—Petitioner Ajay Kumar Goyal has approached us by invoking our extraordinary jurisdiction under Article 226 of The Constitution of India with the prayer to issue a writ order or direction in the nature of certiorari quashing the impugned FIR dated 27.10.2007 lodged at the police station Kotwali, district Ghaziabad, registered at Crime No. 881 of 2007 Under Sections 406, 409, 420, 467, 468, 471 and 120B IPC. The ancillary prayer is to pass any other writ, order or direction which this court deems fit and proper on the facts and circumstances of the case.

2. Before advertng to the contentions raised by the learned Counsel for the petitioner, a resume to the specific articulate facts generating this writ petition are briefed below.

3. The petitioner is the nephew of the respondent No. 3 Mahesh Chandra informant as Mahesh Chandra is the Phooofa of the petitioner. Mahesh Chandra

has got his abode and business place at 24 Naya Ganj Hall KH-2 Kavi Nagar, P.S. Kavi Nagar, district Ghaziabad. According to the allegations of the informant Ajai Kumar Goyal and his wife Smt. Prabha Goyal had got a proprietary Firm dealing in hardware business of steel in the name and style M/s Ajay Steel at 220 Hapur Road ,Ghaziabad of which Smt. Prabha Goyal is the side proprietor. In the month of February 1995 the present petitioner Ajay Kumar Goyal along with his wife Smt. Prabha Goyal approached Mahesh Chandra informant and asked for financial help and demanded Rs. 2 lakhs as they were unable to full fill the demand regarding the supply of steel rods. They also convinced the informant that they will give 12 % interest on the amount to be advanced by the informant along with some share in the profit in accordance with the balance sheet. Informant relying upon their fraudulent deception and dishonest inducement parted with Rs. 2 lakhs and handed over the same to the petitioner and his wife vide cheque No. 866414 dated 1.3.1995 of Vaishya Bank Ltd. Navyug Market, Ghaziabad. The aforesaid cheque was in the name of the firm M/s. Ajay Steel. In return thereof the petitioner paid Rs. 2,20,000/- through cheque signed by Smt. Prabha Goyal of Banaras State Bank Ghaziabad. According to the allegations this first transaction was a design and ploy to cheat the informant in future. On 2.9.1996 at 2 p.m. petitioner along with his wife again approached the informant respondent No. 3 and by fraudulently deceiving him induced him to pay Rs. 40 lakhs which amount they had no intention to repay at all from the very inception of the transaction. The informant on the said inducement and deception gave Rs. 40 lakhs through cheque No. 262930 dated 2.9.1996 from his Vaishya Bank Ltd. Ghaziabad to the petitioner and his wife. Since from the very inception of the said transaction the petitioner and his wife had no intention to repay the amount therefore they did not pay the same nor paid any heed to the demand for repayment. On 30.8.2007 at 7p.m. informant along with his brother Satya Prakash and one Pankaj Sharma came to the house of the petitioner and requested him to pay back his money, interest and profit but was threatened for his life through mercenary in Rs. one lakh so that the dispute of the money comes to an end. Informant was assaulted by kicks and fists and was pushed out from the house by the petitioner. His wife also threatened the informant that he can not realise any amount from their firm M/s. Ajay Steel as in the transaction of Rs. 40 Lakhs the cheque, statement of account and the TDS certificates all were signed by the petitioner and not by Smt Prabha Goyal, the sole proprietor of the firm. According to the case of the informant this threat again amounted to breach of trust and fraud played by the petitioner and his wife upon the informant. Further allegations are that the act of the accused persons in getting the aforementioned document signed by the petitioner amounts to manufacturing of false document and thereby committing offences Under Sections 467, 471, 120B IPC. The informant was cheated to a tune of Rs. 40 lakhs by fabrication of false documents and by fraudulent deception therefore, he approached S.S.P. Ghaziabad through an application dated 6.9.2007 for getting his FIR lodged but his report was not taken down by the police consequently on the aforesaid allegations he invoked the power of the Magistrate u/s 156(3)

Cr.P.C. On 12.9.2007 to get his FIR registered.

4. According to the pleadings made in this writ petition the aforesaid application u/s 156(3) Cr.P.C. was registered as Misc. Case No. 113/9 of 2007. Vide order dated 24.10.2007 ACJM, I Ghaziabad ordered for registration of the FIR and resultantly armed with the said order, the police registered the FIR against the petitioner as Crime No. 881 of 2007, Under Sections 406, 409, 420, 467, 468 and 471 IPC at P.S. Kotwali, district Ghaziabad on 27.10.2007 at 6.15 p.m. vide annexure No. 1 to this writ petition which FIR is impugned in this writ petition with the prayer that it be quashed.

5. In this writ petition Sri Mangla Prasad Rai and Sri S.P. Srivastava Advocates have filed a counter affidavit on behalf of informant respondent which was taken on record. Filing of rejoinder affidavit however was forgone by the learned Counsel for the petitioner.

6. On the aforesaid factual matrix we have heard Sri K.K. Arora learned Counsel for the petitioner in support of this writ petition and two learned counsels on behalf of the informant respondent No. 3 and learned AGA on behalf of respondent No. 1 and 2 and have perused the impugned FIR and other documents on record.

7. Sri K.K. Arora, learned Counsel for the petitioner contended that it is a case of pure civil dispute of loan amount and repayment thereof and therefore no offence at all is made out Under Sections 406, 409 and 420 IPC. Learned Counsel for the petitioner contended that since no document was manufactured, therefore, no offence Under Sections 467, 468 and 471 IPC is also made out against the petitioner. Haranguing the submissions learned Counsel contended that M/S Ajai Steel is a proprietary firm of which Smt. Prabha Goyal is the sole proprietor and therefore, so far as the petitioner is concerned, no offence at all is made out. Learned Counsel vehemently argued that the respondent informant had taken Rs. 75 lakhs by way of interest from the petitioner on the amount advance by him and because the petitioner fell ill and suffered losses in the business therefore malicious FIR has been lodged and the petitioner cannot be saddled with any criminal liability as there is absence of evidence of intention to cheat from the very beginning, which is sine-qua-non for making out an offence of cheating and criminal breach of trust and embezzlement.

8. Learned Counsel for the petitioner further contended that at the lime of advancing of Rs. 40 lakhs, there was no mes rea to commit the offence hence petitioner Ajai Kumar Goyal, who is no body in firm M/s. Ajai Steel cannot be said to have committed any offence. Pressing annexure No. 3 into argument which is the copy of the ledger register and also basing his contentions on para 8 of the writ petition wherein the statement of account of informant respondent No. 3 is mentioned, Sri Arora canvassed strenuously that no offence at all is made out. He harangued that statement of account vide para 8 of the writ petition is not denied in the counter affidavit vide para No. 9 thereof and a copy of the ledger

register indicates that it is a civil transaction in contradiction with criminal offence. Learned Counsel further contended that because of the balance amount of payment the impugned FIR has been lodged as an arm twisting device only to harass the petitioner so that the money advanced is paid back. Learned Counsel submitted that since the petitioner fell ill he could not returned the loan amount but this does not make out any offence. He also contended that the petitioner is ready to repay the balance amount due to the informant and therefore concluding his argument learned Counsel submitted that impugned FIR against the petitioner be quashed.

9. Learned counsels for the informant as well as learned AGA contrarily refuted the arguments and contentions of the learned Counsel for the petitioner and argued that at this stage the defence of the petitioner cannot be pressed into consideration nor can it be scanned meticulously only to fetch out a defence of the petitioner to thwart a legitimate investigation of cognizable offences more so when the investigation is yet to begin. In their submissions FIR discloses commission of cognizable offences, which requires investigation and therefore writ petition is bereft of any merit and deserves to be dismissed.

10. In this writ petition the petitioner has prayed for quashing of the impugned FIR which has been registered against him as Crime No. 881 of 2007, Under Sections 406, 409, 420, 467, 468 and 471 IPC, P.S. Kotwali, district Ghaziabad. Learned Counsel for the petitioner has laid much emphasis on the fact that it is a case of civil dispute but what we find is that the petitioner and informant are relatives of each other. The case of the informant is that the first advance taken from him by the petitioner and his wife was a deceptive device and a ploy to lure the petitioner to advance more loan of huge sum which they had no intention to repay from the very beginning and therefore intention to cheat was present from the very inception of second transaction. This allegation of the prosecution as is levelled by respondent No. 3 has to be taken to be correct prima facie. Under Article 226 of the Constitution of India we cannot critically scan the said allegation and it cannot be said that the said allegation is false and the malicious FIR has been registered as up till now only the FIR has been registered and the investigation is yet to commence. At this stage we have to accept the allegations levelled by first informant to be correct per se without any addition or subtraction and cogitating from the said angle it can not be said that no offence of any kind is not disclosed from the bare reading of the FIR.

11. It has been held by the Apex Court in the case of State of Haryana and others Vs. Ch. Bhajan Lal and others, that if the FIR discloses the commission of a cognizable offence then it can not be quashed and the investigation can not be nullified unless the allegations are vexatious and malafide. Legitimate investigation can not be quashed by looking into the defence of the accused at the very threshold of the registration of FIR when cognizable offence requiring investigation is prima facie disclosed by the said FIR. When cognizable offence is disclosed by the FIR then the defence of malafide and vexatious prosecution

relegates into the background as these are the matters which are circumscribed within the purview of investigation to be conducted by the I.O. and in such a situation neither the FIR can be quashed nor the investigation can be scuttled. It has been held by the apex court in the said judgement as follows:

41. We shall now examine as to what are the requirements to be satisfied by an Officer in charge of a police station before he enters into the realm of investigation of a cognizable offence after the stage of registration of the offence u/s 154(1). We have already found that the police have u/s 154(1) of the Code a statutory duty to register a cognizable offence and thereafter under Section 156(1) a statutory right to investigate any cognizable case without requiring sanction of a Magistrate.

12. The same view has been reiterated by the Apex court in the case of *Union of India v. W.N. Chadha* 1993 SSC (CrL.) 1171. In this respect we reiterate and reproduce the law laid down by the Privy Council in the case of *Emperor v. Khwaja Nazir Ahmad* AIR 1945 PC 17. It has been held in the aforesaid judgement as follows:

Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the Judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the Judicial authorities, and it would, as their Lordship think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complimentary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved u/s 491, Criminal P.C., to give directions in the nature of habeas corpus. In such a case as the present, however, the Court's functions begin when a charge is preferred before it and now until then.

Above view of the Privy Council has been confirmed by the Apex Court in the case of *Bhajan Lal (Supra)* and also in *Union of India v. W.N. Chaddha (supra)*. At this stage we have to take allegations levelled by the informant to be correct.

13. From the above discussion when we go through the contents of the FIR we find that the case of the informant is that the petitioner and his wife has no intention to repay the money advanced by the informant and hence intention to cheat was present in the transaction right from very inception. Sri Arora vehemently argued that Rs. 75 lakhs has been repaid to the informant by way of interest and at the time when the money was advanced there was absence of

mensrea. We are unable to appreciate the said contention of the learned Counsel for the petitioner for two primary reasons. Firstly it is the defence of the accused who has admitted that balance amount has not been paid to the informant. The defence of the petitioner at this stage can not be looked into to quash the FIR, when the investigation is yet to ensue. The Second primary reason is that whether Rs. 75 lakhs has been paid by way of interest or not because of the advance by the informant is a disputed question of fact. It is for the I.O. to look into the said defence of the petitioner and investigate the same. If the I.O. comes to a conclusion that the petitioner has paid the said amount he will be well within his right to submit a final report by reporting that the whole transaction is of the civil nature. This court in exercise of its power under Article 226 of The Constitution of India cannot enter into such an exercise which is outside its purview.

14. Another argument of Sri K.K. Arora, learned Counsel for the petitioner is that the FIR has been lodged maliciously only for the purposes of the harassment and the petitioner has nothing to do with the proprietary concern of which his wife Smt. Prabha Goyal is the sole proprietor. We are of the view that the said matter also requires investigation as it is a pure question of fact. In exercise of our power under Article 226 of the Constitution of India we cannot examine that aspect of the matter. It is for the petitioner to show the papers of the firm and convince the I.O. that he is not in-charge of and responsible for the conduct of the business of the Firm. The allegations, which have been levelled against the petitioner in the FIR are that he had put his signatures on the cheque, statement of account and TDS certificates and other documents maliciously and the said allegations prima facie indicate that it was the petitioner who was conducting the business of the proprietary firm and taking that into consideration this amounts to falsification of valuable securities by the petitioner to cheat the informant. Further the FIR has been registered u/s 120B IPC also for hatching up the conspiracy. The above referred to allegations are sufficient prima facie to also make the petitioner liable for the primary offences under which the FIR has been registered in conjunction with the said charge. We cannot, on the basis of an affidavit and counter affidavit in this writ petition record a finding that the petitioner had no concern with the proprietary concern which is the matter to be investigated and which falls squarely within the power of the I.O. Disputed questions of fact can not be examined by this court under Article 226 of The Constitution Of India to quash the FIR of cognizable offences.

15. Sri K.K. Arora learned Counsel for the petitioner has cited two judgements of the Apex Court before us. He relied upon a judgement of S.W. Palanitkar and Ors. v. State of Bihar and Anr. 2001 9 SC 15. Sri Arora has stressed on para 23 of the aforesaid ruling. We have ourselves gone through the said judgement. In our opinion the said judgment is of no help to the petitioner because of the reason that it was a case arising out of a complaint proceedings. In the aforesaid case complaint was filed in court and after following the procedure of the complaint case, CJM Patna had summoned the accused persons vide his order

dated 6.1.1998. It was after their summoning that the accused persons have approached the High Court by filing Criminal Misc. Application u/s 482 Cr.P.C. for quashing of the aforesaid proceedings pending before the Magistrate. The said petition filed by the accused persons was dismissed by the High Court and hence the accused persons in that case had approached the Apex Court. That is not the situation before us. In the present case the allegations levelled against the petitioner by the informant are yet to be investigated. Whether they are false or true, have to be judged and verified. No body has been summoned as an accused as yet by the court. The petitioner has a right to convince the I.O. during the investigation that he has not committed any offence. Once the allegations by the informant are that he was cheated by playing fraud and deceiving him, investigation can not be nipped into bud. In view of the aforesaid reason the above judgement of the Apex Court is of no help of the petitioner.

16. The second judgment relied upon by the learned Counsel for the petitioner is *Alpic Finance Ltd. Vs. P. Sadasivan and Another*, we are of the opinion that the said judgment is also of no help to the petitioner as that was the case under higher purchase transaction. It was the case where the appellant company had alleged that on the physical verification certain chairs were found missing from the premises of the respondent and thus they had committed cheating because the missing property belonged to the appellant. In that case appellant had filed a private complaint before CMM Bangalore u/s 420 and 120B IPC. In the aforesaid complaint search warrant u/s 93 Cr. P.C. was issued and seizer of property was prayed for. The learned Magistrate after taking cognizance of the offence on the basis of the complaint had passed an order u/s 93 Cr. P.C. that the premises be searched. These proceedings u/s 93 Cr.P.C. were challenged by the respondent u/s 482 Cr.P.C. before the Karnataka High Court. Hon"ble Single Judge of the Karnataka High Court had quashed the entire proceedings and had directed the appellant company to return all the property seized by the police in pursuant to the warrant issued by the learned Magistrate. Since all the proceedings were quashed by the High Court, the appellant had approached the Apex Court.

17. From the above it is clear that the same is not the situation before us Firstly, there is no controversy before us u/s 93 Cr.P.C. and secondly that in the complaint case cognizance had been taken by the Magistrate. Here before us the matter is still in its embryo. Investigation has not commenced as yet. All the matters have to be investigated. We cannot kill the right of investigation by looking into the defence. Thus we are unable to apply the law laid down by the Apex Court in this judgment on the facts of the present case.

18. Concludingly, we are of the opinion that the FIR of Crime No. 881 of 2007, Under Sections 406, 409, 420, 467, 468 and 471 IPC, P.S. Kotwali, district Ghaziabad cannot be quashed by invoking extra ordinary power under Article 226 of the Constitution of India by issuing a writ order or direction in the nature of certiorari. This writ petition is bereft of merit and hereby dismissed. However, on the facts and circumstances of the case, there shall be no order as to cost.