
(2013) 04 MP CK 0085

In the Madhya Pradesh High Court

Case No : Criminal Revision No. 2149 of 2009

Suresh Patil

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 02-04-2013

Acts Referred:

Penal Code, 1860 (IPC) — Section 120B, 354, 406, 409, 420

Citation : (2013) 2 JLJ 174

Hon'ble Judges : N.K. Gupta, J

Bench : Single Bench

Advocate : Vivek Rusia, for the Appellant; Prakash Gupta, Panel Lawyer and Shri Ishteyaq Husain, for the Respondent

Judgement

N.K. Gupta, J.—This criminal revision has been preferred by the applicant against the order dated 30.11.2009 passed by the Additional Sessions Judge, Burhanpur in ST No. 154/2009, whereby the charges of offence punishable under Sections 120-B, 420 and 409 of IPC were framed against the applicant. The brief facts of the case relating to the present revision are that being a partner in a partnership firm "M/s. Shree Shai Developers" the applicant obtained some property to be mortgaged before the bank to get some loan for the firm, and therefore with the help of co-accused Smt. Sushma Pathak the property was mortgaged and a loan of Rs. 40 lakhs was obtained on that property. Actually the property was not solely owned by Smt. Sushma Pathak, but Smt. Tara Bai and other persons were co-owners of the property, who were not informed about that mortgage. When they knew about that fact, Smt. Tara Bai with the help of complainant Mamta Agnihotri had lodged an FIR before the concerned police and after due investigation a charge sheet was filed against the applicant and other co-accused persons.

2. I have heard the learned counsel for the parties at length.

3. The learned counsel for the applicant has submitted that the mortgage of the property was done for the partnership firm "M/s. Shree Shai Developers",

whereas only the present applicant was held liable for that firm. The learned counsel for the applicant has discussed about the various partnership deeds to show about the existence of the partnership. It is further submitted that no cheating has been done by the applicant with the complainant and no offence u/s 420 of IPC was made out against the applicant. Actually there was a civil dispute between Smt. Sushma Pathak and Smt. Tara Bai etc. A civil suit was also prosecuted in which a compromise took place between the parties and the suit was disposed off. The learned counsel for the applicant has also invited attention of this Court to the compromise application dated 6.12.2008. It is also submitted that the complainant Mamta Agnihotri had lodged a false FIR against the applicant for the offence u/s 354 of IPC due to enmity, and therefore a false case has been prepared against the applicant due to enmity. He has further submitted that the civil dispute between the parties cannot be decided by a criminal matter. In support of his contention, he has placed his reliance upon the judgment of Hon'ble the Apex Court in the case of Md. Ibrahim and Others Vs. State of Bihar and Another, , and therefore it is prayed that the applicant may be discharged from the aforesaid charges.

4. The learned counsel for the State has submitted that out of partners of the firm "M/s. Shree Shai Developers", it was the applicant who was known to Smt. Sushma Pathak, and therefore nothing was to be done against other partners for the mortgage of the property in favour of the partnership firm done by Smt. Sushma Pathak. The applicant cannot shift his guilt to the accused Smt. Sushma Pathak, because he got the advantage of the crime committed by Smt. Sushma Pathak, and therefore he was liable for all the crimes committed by Smt. Sushma Pathak u/s 120-B of IPC.

5. The learned counsel for the objector has also submitted in the same tune. He has submitted that it was nowhere mentioned before the bank that Smt. Sushma Pathak was not the sole owner of the property, and therefore Smt. Sushma Pathak mortgaged the property fraudulently before the bank so that the applicant and his firm could get a loan of Rs. 40 lakhs. If the loan is paid and nothing remains undisputed, then still the crime was committed and it cannot be set aside by payment of the loan. It was not a civil dispute to be decided by the criminal side. On the contrary in the compromise application, Smt. Sushma Pathak has accepted that she mortgaged the share of the Smt. Tara Bai and she would see that no recovery be done from Smt. Tara Bai and share of Smt. Tara Bai should not be sold if any recovery is done. Under such circumstances, present criminal case is not filed to solve any civil dispute, but a crime was already committed. Thereafter when the complainant received the information about the recovery and crime, then she lodged an FIR against all the culprits.

6. After considering the submissions made by the learned counsel for the parties, and looking to the facts and circumstances of the case, prima facie it is apparent that a loan of Rs. 40 lakhs was obtained by the firm "M/s. Shree Shai Developers" by mortgaging the property of Smt. Sushma Pathak. Smt. Sushma

Pathak would not have mortgaged her property, if she was not instigated by the applicant. It is nowhere shown that Smt. Tara Bai was co-sharer of the property, whereas the property was mortgaged with the false representation that it was of Smt. Sushma Pathak. It is true that the document was submitted to the bank and prima facie it appears that no cheating was caused with the complainant. However, if the property of Smt. Tara Bai was mortgaged and if it would be auctioned by the bank for recovery, then certainly a damage was to be caused to Smt. Tara Bai and if bank was unable to auction the share of Smt. Tara Bai, then loss was to be caused to the concerned bank, and therefore it cannot be said that since the bank had not lodged any FIR, therefore the applicant cannot be prosecuted for the offence u/s 420 of IPC. A fraud has been done by Smt. Sushma Pathak and the applicant had common intention with Smt. Sushma Pathak, because he was the beneficiary of that transaction through his firm. Therefore, prima facie the offence u/s 420 read with Section 120-B of IPC is made out against the present applicant.

7. The learned counsel for the applicant has placed his reliance upon the judgment of Hon'ble the Apex Court in the case of Mohammed Ibrahim (supra) with the pretext that civil dispute should not be solved by criminal proceeding. In the present case, it is apparent that Smt. Sushma Pathak knew that it was not her sole property, and still she mortgaged the entire property by a fraud, therefore civil proceeding was initiated by Smt. Tara Bai thereafter. If the compromise application filed by the parties before the civil Court is perused, then it is accepted by Smt. Sushma Pathak that she would cure the wrong committed to Smt. Tara Bai and the entire dues should be deposited by her. If any portion of the property owned by Smt. Tara Bai is sold, then she would set off that damage. Under such circumstances, it is apparent that it is not a criminal case to solve the present civil dispute, but a cheating as well as forgery has been done by the accused persons. Therefore the judgment of Hon'ble the Apex Court in the case of Mohammed Ibrahim (supra) cannot be applied in the present case.

8. The learned counsel for the applicant has submitted the copy of the judgment passed by the Magistrate to show that the complainant Mamta Agnihotri was inimical to the applicant and she had lodged a false report against the applicant. In that case the applicant was acquitted by the learned JMFC Burhanpur. Actually if the date of incident of that crime is considered along with the date of FIR in the present case, then it would be clear that though Smt. Sushma Pathak was disbelieved by the magisterial court, but possibility cannot be ruled out that the applicant would have visited the house of Smt. Sushma Pathak to terrorize her and outraged her modesty, and therefore by that acquittal, it cannot be said that the complainant Mamta Agnihotri was inimical to the applicant. Secondly Mamta Agnihotri had lodged an FIR for Smt. Tara Bai, and therefore in the present FIR there was no interest of the complainant Mamta Agnihotri of her own, and therefore if she was inimical, then it makes no difference.

9. So far as the charge u/s 409 of IPC is concerned, it is apparent that the

applicant was neither a public servant nor any property was entrusted to him. Being co-sharer, such type of notional trust could be presumed against Smt. Sushma Pathak, but no such trust could be presumed against the applicant, and therefore prima facie no charge u/s 409 of IPC was constituted against the applicant. However, a charge u/s 406 of IPC may be constituted against him with the help of Section 120B of IPC.

10. On the basis of the aforesaid discussion, the revision filed by the applicant is hereby partly allowed. The impugned order dated 30.11.2009 is hereby set aside relating to the charge u/s 409 of IPC, whereas the remaining impugned order shall remain intact. The applicant is discharged from the charge of offence u/s 409 of IPC. The trial Court is directed to frame a charge u/s 406 with the help of Section 120-B of IPC against the applicant because prima facie the property was kept by Smt. Sushma Pathak as a trustee being co-sharer and breach of trust was done by Smt. Sushma Pathak due to connivance of the applicant. A copy of this order be sent to the trial Court for information and compliance with a direction that the stay order granted by this Court is hereby vacated and the trial Court shall proceed with the case as per the provisions of the law.