

(2018) 01 AHC CK 0037
In the Allahabad High Court
Case No : 27407 of 2017

Uday Bahadur And Others

APPELLANT

Vs

State Of U.P. And Others

RESPONDENT

Date of Decision : 25-01-2018

Acts Referred:

Constitution of India, Article 226 -
Power of High Courts to Issue certain writs
Code of Criminal Procedure, 1973, Section
156 (3) - Police officers power to Investigat

Citation : (2018) 01 AHC CK 0037

Hon'ble Judges : Shashi Kant Gupta, Rajeev Misra

Bench : Division Bench

Advocate : Alok Ranjan Mishra, Raj Hans Pandey, Sri?Gopal S. Chaturvedi, Aditi Tambi, Rajeev Sharma?A.G.A., Sanjay Kumar Singh, Sudhashu Srivastava, Suresh Kumar Gupta, V.P.Srivastava

Final Decision : Dismissed

Judgement

1. By means of the present writ petition under Article 226 of the Constitution of India, the petitioners have challenged the impugned F.I.R. dated 17.11.2017 lodged by the respondent No. 4 Mr. Oran Tsatsis, with the police of Police Station Sahibabad, District Ghaziabad, resulting in Case Crime No. 3213 of 2017, under sections 420, 467, 468, 471 and 120 B I.P.C.

2. We have heard Mr. Gopal Swaroop Chaturvedi, learned Senior counsel assisted by Mr. Alok Ranjan Mishra and Mr. Raj Hans Pandey, Advocates for the petitioners, Mr. V.P. Srivastava, learned Senior counsel assisted by Mr. Sanjay Kumar Singh, Mr. Sudhanshu Srivastava and Miss Aditi Tambi for the complainant-respondent and Mr. Rajeev Sharma, the learned A.G.A. for the respondent Nos. 1, 2 and 3.

3. Brief facts, antecedent to the impugned F.I.R. dated 17.11.2017, are as follows:-

4. The Government of India, in order to give boost to the economy recognized the necessity of having Foreign Direct Investment in different sectors. Accordingly, in consonance with the aforesaid, the Government of India issued Press Note 2 (2005) dated 3.3.2005 laying down the method and methodology regarding Foreign Direct Investment in Real Estate Sector.

5. In the light of the aforesaid, it appears that some deliberation took place in between the petitioner No. 1 Uday Bahadur and Messrs. Kopastin Holding Ltd., a company duly incorporated and registered under the laws of Cyprus for jointly undertaking the Real Estate Development Projects compliant with the above mentioned F.D.I. policy of the Government of India.

6. As a consequence of the aforesaid, a joint venture agreement dated 3.3.2008, in between Messrs. Kopastin Holding Ltd., on the one hand and Mr. Vijay Bahadur & Messrs. Indo Real Infrastructure Pvt. Ltd., came to be entered into. The same is on the record as Annexure 2 to the writ petition. Consequently, a new company namely Messrs. Amireyaygan Indo Real Infrastructure Pvt. Ltd., came into existence.

7. Messrs. Amireyaygan Indo Real Infrastructure Pvt. Ltd., is a company duly incorporated under the Companies Act. The petitioner No. 1 Uday Bahadur is a Director, the petitioner No. 2 Kumbashi Sri Niwasanirubha is an Additional Director, the petitioner No. 3 Mr. Ankit Gulati Ambey is also a Director and the petitioner No. 4 Mr. Sanjay Kumar is also a Director of the aforesaid Company.

8. The joint venture agreement dated 3.3.2008, is exhaustive in as much as it contains detailed provisions regarding the working of the joint venture agreement.

9. According to clause 3.3 of the joint venture agreement dated 3.3.2008, Messrs. Kopastin Holding Pvt. Ltd., was to initially invest a sum of 5 million U.S. Dollars, whereas Messrs. Amireyaygan Indo Real Infrastructure Pvt. Ltd., was to invest a sum of .5 million U.S. Dollars. It is not in dispute that the foreign investors invested a sum of Rs. 3.85 million U.S. Dollars. The investment, if any, made by the Indian Partner has been specified to have been made in the writ petition, but no document evidencing the same has been placed before us.

10. On 05.05.2008, the new entity Amireyaygan Indo Real. Pvt. Ltd., entered into a joint development agreement with Samia International Builders Pvt. Ltd., for joint development projects at Nistauli, Loni Road, Ghaziabad, U.P. in terms with the consortium agreement dated 28.4.2008 entered into with Air Force Naval Housing Board, (AFNHB) on profit sharing basis by jointly developing the said project in co-operation and association of each other.

11. Subsequently, the petitioner No. 1 Mr. Udai Bahadur on behalf of the new entity Messrs. Amireyaygan Indo Real. Pvt. Ltd., purchased approximately 11 acres of land through SIBPL-AG at village Nistauli, Loni Road, District Ghaziabad, for the sale consideration of Rs. 102881089/-.

12. It is, further, alleged that on 24.12.2008, the Board of Directors of the new entity Messrs. Amireyaygan Indo Real. Pvt. Ltd., with the approval and consent of Messrs. Kopastin Holding Ltd., decided to appoint a land agreeegator. Thereafter, the new entity appears to have entered into an agreement to sell dated 31.12.2008 through Samia International Builders Pvt. Ltd. Amireyaygan i.e. SIBPL AG with the Land Agreeegator i.e. Messrs. Callow Estate Pvt. Ltd., for 22 acres of land in village Nistatuli, Loni Road, District Ghaziabad.

13. In furtherance of the aforesaid agreement, the company is alleged to have made an advance of Rs. 3.80 crores, out of the total amount of Rs. 4 crores. The balance amount of Rs. 20 lacs could not be paid. Consequently, the aforesaid amount is alleged to have been forfeited. As a result of the aforesaid, proceedings under the Arbitration and Conciliation Act, 1996 were initiated. The Arbitrator, ultimately gave the award dated 27.4.2011 in favour of Samia International Builders Pvt. Ltd. The right of the new entity namely Messrs. Amireyaygan Indo Real. Pvt. Ltd. to recover the amount was lost and the advance paid was to stand forfeited, in favour of Messrs. Callow Estate Pvt. Ltd.

14. Apprehending misuse of the advance made to the tune of Rs. 3.85 million U.S. Dollars, the foreign investor namely Messrs. Kopastin Holding Ltd., filed an application under section 9 of the Arbitration and Conciliation Act, 1996 in the Delhi High Court. The same was registered as Original Misc. Application No. 117 of 2016. In the aforesaid Original Misc. Application, an interim order dated 25.4.2016 was passed by the Delhi High Court. This interim order was challenged by the petitioner No. 1 Uday Bahadur on the appellate side in the Delhi High Court. As such, Appeal (FAO- COMM) No. 138 of 2016 came into existence. The Appellate Court passed the order dated 9.12.2016, whereby the effect and operation of the interim order dated 25.4.2016 was stayed. Ultimately, the aforesaid Appeal was allowed, vide order dated 26.7.2017, the order dated 25.4.2016 was set aside and the matter was remanded before the Trial Court to be decided afresh in the light of the observations made in the order dated 26.7.2016 itself.

15. At this stage, it appears that the matter was taken up before the Hon''ble Supreme Court, whereby the Hon''ble Apex Court passed an order dated 14.2.2017 appointing Mr. Justice R.C. Chopra (Retd.) as the sole arbitrator to decide the dispute between the parties (leaving it open to the parties to raise all the issues, claim and counter claim before the arbitrator in consonance with law).

16. Thereafter, the foreign investor namely Messrs. Kopastin Holding Pvt. Ltd., filed their claim before the sole arbitrator, vide claim dated 24.4.2017. The aforesaid claim was resisted by the petitioner No. 1 as a Director of the company. Accordingly, the defence along with counter claim was filed.

17. The proceedings before the arbitrator appointed by the Hon''ble Supreme Court are stated to be still pending.

18. Subsequent to the aforesaid the impugned F.I.R. dated 17.11.2017 was

lodged by the respondent No. 4 Mr. Oran Tsatsis with the police of Police Station Sahibabad, District Ghaziabad, resulting in Case Crime No. 3213 of 2017, under sections 420, 467, 468, 471 and 120 B I.P.C. In the aforesaid F.I.R. six persons have been named namely Uday Bahadur, Son of Suraj Bahadur, Kumbashi Srinivasanirudha (wrongly mentioned in the F.I.R. as Shri Kumashi Shri Niwasnirudha), son of Kumashi, Ankit Gulati Ambady, son of Mr. Govind Ambady, Step Son of Mr. Uday Bahadur, Sanjay Kumar, Son of Sri Premchand, Vandana Shraddha, wife of Gopal Sharda, S.K. Dwivedi. The said F.I.R. came into existence subsequent to an order passed by the Court concerned in proceedings under Sections 156 (3) Cr. P. C.

19. Feeling aggrieved by the aforesaid F.I.R., four of the named accused namely Uday Bahadur, Son of Suraj Bahadur, Kumbashi Srinivasanirudha (wrongly mentioned in the F.I.R. as Shri Kumashi Shri Niwasnirudha), son of Kumashi, Ankit Gulati Ambady, son of Mr. Govind Ambady, Step Son of Mr. Uday Bahadur, Sanjay Kumar, Son of Sri Premchand have filed the present Criminal Misc. Writ Petition.

20. A perusal of the impugned F.I.R. will go to show that the same is a very long and elaborate F.I.R. The allegations made therein can be safely divided into two broad categories i.e. the appointment of Kumbashi Srinivasanirudha (wrongly mentioned in the F.I.R. as Shri Kumashi Shri Niwasnirudha) as an Additional Director and secondly the various actions which are complained of have been taken contrary to the provisions of the joint venture agreement, resulting in misappropriation of the investment made by the foreign investor.

21. Mr. Gopal Swaroop Chaturvedi, learned Senior counsel appearing for the petitioners submitted with much vehemence before us that the impugned F.I.R. lodged against the petitioners is liable to be quashed on two short grounds. He firstly submits that the appointment of the petitioner No. 2 Kumbashi Srinivasanirudha (wrongly mentioned in the F.I.R. as Shri Kumashi Shri Niwasnirudha) is as an Alternative Director and not as an Additional Director as suggested in the impugned F.I.R. According to the learned Senior counsel, it is submitted that as per clause 7.6.5 of the joint venture agreement, there is a clear provision for appointment of an Alternative Director. As such, the allegation made in the F.I.R. to the contrary is manifestly incorrect. With regard to the allegations made in the F.I.R., complaining about the various actions taken contrary to the joint venture agreement, it is submitted that subsequent to the order dated 14.2.2017 passed by the Apex Court, Justice R.C. Chopra, a retired Judge of the Delhi High Court has been appointed as the Arbitrator and the parties have put in appearance before the sole Arbitrator. Elaborating his submission, the learned Senior Counsel submits that once the parties had been relegated to the Arbitrator, then all disputes can and shall be decided by the Arbitrator. As such, by lodging the impugned F.I.R., a purely civil dispute has been dragged into criminal proceedings.

22. Mr. V.P. Srivastava, learned Senior counsel representing the respondents

assisted by Mr. Sanjay Kumar Singh and others has submitted before us that mere pendency of arbitral proceedings is not a bar to initiate criminal proceedings. Referring to various judgements of the Apex Court, the learned Senior counsel submits that the law stands crystallized that civil and criminal proceedings can go on simultaneously. He thus submits that the impugned F.I.R. is not liable to be quashed on account of the pendency of the arbitral proceedings.

23. Extending his arguments, the learned Senior counsel further submits that the scope of the arbitration proceedings is only to decide the claims and counter claims raised by the parties. The Arbitrator cannot decide the question of fraud raised against the petitioners in the impugned F.I.R.

24. He further submits that the petitioners are habitual offenders. On account of the conduct of the petitioners, an F.I.R. dated 22.9.2017 has been lodged by Ali Raza Khan against Uday Bahadur, Sanjay Kumar, Ankit Gulati and Gopal Sharda for an offence punishable under sections 420, 467, 468, 471 and 120 B I.P.C. with the Police Station Sahibabad, District Ghaziabad, resulting in Case Crime No. 2505 of 2017.

25. Learned A.G.A. Mr. Rajiv Sharma submitted before us that the impugned F.I.R. is not liable to be interfered with. Prima facie, the F.I.R. discloses the commission of a cognizable offence. There is no such material on the record on the basis of which, prima facie the allegations made in the F.I.R. could not be looked into as per the judgement of the Apex Court in the case of Bhajan Lal.

26. Having heard the learned counsel for the parties, we are of the view that the issue involved in the present writ petition is whether on account of the pendency of the arbitration proceedings between the parties, the impugned F.I.R. is liable to be quashed or not.

27. Before proceeding further, it will be useful to refer to the judgement of the Apex Court in the case of Indian Oil Corporation Vs. NEPC India Ltd., as reported in 2006 (6) SCC, 736. Paragraphs 13, 14, 15, 16 and 17 of the aforesaid judgement are relevant which are reproduced herein below:- "13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged. In G.Sagar Suri vs. State of U.P. [2000 (2) SCC 636], this Court observed : "It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short

cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under section 250 Cr.P.C. more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may.

15. Coming to the facts of this case, it is no doubt true that IOC has initiated several civil proceedings to safeguard its interests and recover the amounts due. It has filed C.S. No.425/1997 in the Madras High Court and O.S. No.3327/1998 in the City Civil Court, Chennai seeking injunctive reliefs to restrain the NEPC India from removing its aircrafts so that it can exercise its right to possess the Aircrafts. It has also filed two more suits for recovery of the amounts due to it for the supplies made, that is CS No.998/1999 against NEPC India (for recovery of Rs.5,28,23,501/90) and CS No.11/2000 against Skyline (for recovery of Rs.13,12,76,421/25), in the Madras High Court. IOC has also initiated proceedings for winding up NEPC India and filed a petition seeking initiation of proceedings for contempt for alleged disobedience of the orders of temporary injunction. These acts show that civil remedies were and are available in law and IOC has taken recourse to such remedies. But it does not follow therefrom that criminal law remedy is barred or IOC is estopped from seeking such remedy.

16. The respondents, no doubt, have stated that they had no intention to cheat or dishonestly divert or misappropriate the hypothecated aircraft or any parts thereof. They have taken pains to point out that the aircrafts are continued to be stationed at Chennai and Coimbatore Airports; that the two engines of VT-NEK though removed from the aircraft, are still lying at Madras Airport; that the two DART 552 TR engines of VT-NEJ were dismantled for the purpose of overhauling/repairing; that they were fitted to another Aircraft (VTNEH) which had been taken on lease from "M/s Aircraft Financing and Trading BV" and that the said Aircraft (VT-NEH) has been detained by the lessor for its dues; that the two engines which were meant to be fitted to VT-NEJ (in places of the removed engines), when sent for overhauling to M/s Hunting Aeromotive, U.K., were detained by them on account of a dispute relating to their bills; and that in these peculiar circumstances beyond their control, no dishonest intent could be

attributed to them. But these are defences that will have to be put forth and considered during the trial. Defences that may be available, or facts/aspects when established during the trial, may lead to acquittal, are not grounds for quashing the complaint at the threshold. At this stage, we are only concerned with the question whether the averments in the complaint spell out the ingredients of a criminal offence or not.

17. The High Court was, therefore, justified in rejecting the contention of the respondents that the criminal proceedings should be quashed in view of the pendency of several civil proceedings."

28. Thus, there is no dispute on the proposition that irrespective of the pendency of civil proceedings, criminal proceedings can be initiated.

29. Admittedly, from the perusal of the F.I.R. it is apparent that allegations of fraud have been made by the Foreign Investor against the petitioners and others. We raised a pointed query to the learned Senior counsel appearing for the petitioners as to what has happened to the investment made by the Foreign Investor, which is to the tune of 3.85 million U.S. Dollars. No satisfactory reply could be placed before us, nor any such document could be shown evidencing the presence of substantial amount invested by the Foreign Investor in the book of account of the company, the existence of land in favour of the company equivalent to the investment made by the Foreign Investor. Learned counsel representing the respondent No. 4 drew the attention of the Court to paragraph 26 (xii) of the counter affidavit which reads as follows:- "That petitioner No. 1 fraudulently withdrew remuneration of Rs. 1,08,00,000/- (Rupees One Crore Eight Lacs Only) per year from the JV Company without any knowledge or consent of the M/s Kopastin Holdings Ltd. Pertinently, the Accused, Petitioner No. 1 had already drawn salary of more than Rs. 6,48,00,000/- till date."

30. The question of fraud cannot be decided in arbitration proceedings as has been held by the Apex Court in the case of A Ayyasamy Vs. A Paramasivam & others, 2016 Law Suit (SC) 966. Paragraph 6 of the aforesaid judgement is relevant for the controversy in hand and the same is reproduced herein below:- "The respondents are four in number who are brothers of the appellant. These five brothers are the partners. Their father A. Arunagiri was also a partner along with them who died on 28.04.2009. These six partners had 1/6th share each in the partnership business. Disputes arose between the brothers after the demise of their father. It is the allegation of the respondents, as contained in the plaint, that the subject matter of the suit "Hotel Arunagiri" was managed and administered by their father in a disciplined manner till his death. After his death, the appellant being the eldest brother wanted to take the administration of "Hotel Arunagiri" with the assurance that he will be following the foot prints of his father. The respondents had no other alternative except to accept the said proposal in good faith. It was, at that time resolved by all the brothers, that the daily collection of money from "Hotel Arunagiri" should be deposited on the very next day into the hotel Current Account No.23 maintained with the Indian

Overseas Bank, Tirunelveli Junction. It was agreed that about rupees ten to fifteen thousand may be kept as cash for urgent expenses. The respondents reposed confidence with the appellant and believed that his administration would never be detrimental to the smooth running of the business. On the aforesaid understanding, administration of the hotel was taken over by the appellant. But he did not adhere to the said understanding and failed to deposit day to day collection into the bank account as promised."

31. Placing reliance upon the judgement of the Apex Court in the case of Kamla Devi Agarwal Vs. State of West Bengal as reported in 2001 Law Suit (SC) 1391, it was urged that on the same arguments as raised in the present writ petition, the High Court had quashed the proceedings, but the judgement of the High Court was set aside by the Apex Court.

32. Lastly, reference was made to the judgement of the Apex Court in the case of M. Krishnan Vs. Vijay Singh, 2001 Law Suit (SC) 1352, in support of the proposition that where the F.I.R. even when taken on its face value does not disclose the commission of a cognizable offence only then can the same be quashed. Paragraph 9 and 10 of the aforesaid judgement were relied upon and the same are extracted herein below:- "Right from the case of R.P. Kapur v. State of Punjab, AIR (1960) SC 866, this Court has held that revisional or inherent powers for quashing the proceedings at the initial stage can be exercised only where the allegations made in the complaint or the first information report, even if taken at their face value and accepted in their entirety, do not prima facie disclose the commission of an offence or where the uncontroverted allegations made in the FIR or complaint and the evidence relied in support of the same do not disclose the commission of any offence against the accused, or the allegations are so absurd and inherently improper that on the basis of which no prudent person could have reached a just conclusion that there were sufficient grounds in proceeding against the accused or where there is an express legal bar engrafted in any provisions of the Code or any other statute to the institution and continuance of the criminal proceedings or where a criminal proceeding is manifestly actuated with malafide and has been initiated maliciously with the ulterior motive for wrecking vengeance on the accused and with a view to spite him due to private and personal grudge.

Applying the aforesaid test, it cannot be said that the complaint filed by the appellant did not disclose the commission of an offence or there existed any other circumstance which can be made the basis for quashing the proceedings. In fact allegations made in the complaint required adjudication and the complaint could not have been aborted in the manner it has been done by the High Court vide the impugned order."

33. Upon perusal of the impugned F.I.R., it cannot be said with certainty that the same does not disclose the commission of a cognizable offence. Sitting under Article 226 of the Constitution of India, this Court cannot delve into the exercise of appreciation of evidence and record a finding one way or the other. It is for the

Investigating Officer to find out the truth. We have not proceeded to examine the allegations made in the F.I.R. in detail as any finding recorded by us might prejudice any of the parties during trial. This being the position, we decline to exercise our discretionary jurisdiction.

34. The writ petition, accordingly, fails and is dismissed.