

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.M.C. No.2626/2006

% Judgment reserved on: 03rd October, 2011
Judgment delivered on: 23rd November, 2011

GOPAL AWASTHI Petitioner
Through: Mr. Gaurav Duggal &
Mr. Amit Mahajan, Advs.
versus

STATE & ORS. Respondent
Through: Mr. Neeraj Chaudhari, CGSC
& Mr. Akshay Chandra, Adv for UOI.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

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| 1. Whether the Reporters of local papers
may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported
in the Digest? | Yes |

SURESH KAIT, J.

1. Vide the instant petition, the petitioner has assailed the order dated 15.05.2007 passed by learned Additional Chief Metropolitan Magistrate, in complaint case titled 'Serious Fraud Investigation Office v. Daewoo Corporation & Ors' whereby summons were issued on the complaint being filed by respondent No.2 for the commission of offence under Section 120B read with Section 420/468/471 Indian Penal Code, 1860.

2. In brief, the facts of the case are that during the year 1995-96, Mr.Y.N. Wang (respondent No.4) was the executive vice president of DWC whereas Mr.Shiv Gopal Awasthi (petitioner herein) was the managing director and Mr.M.S.Bhang (respondent No.6) was the deputy managing director of Daewoo Motors India Limited (hereinafter referred to as 'M/s DMIL') and in their said capacities they are responsible for the affairs of the aforesaid company.

3. It was revealed in the investigation, the M/s.DMIL and M/s.Daewoo Corporation, entered into a contract for supply of machinery for Cielo car engines and trans axles for a total sum of USD 619.67 Million on 25.03.1995, which was signed by respondent No.4, petitioner (herein) and respondent No.6.

4. As per article 5.3(a) of the contract, M/s DMIL was to pay US \$ 608.773 Millions in foreign currency and US \$ 10.897 Million was to be paid in local currency. As per clause 5.3(b), base exchange rate was taken as One US \$ = ₹ 32/- for exchange rate purposes. Further, this article, provided that RBI rate prevailing on the date of the payment will be taken into consideration and if RBI rate varies more than (+ or -) 3%, same would be reflected in the invoice amount. Further the base rate was agreed upon in terms of article 5.3(c) for purpose of plant and equipment is given below:-

- a) 1 US \$ = 90 Japanese Yen
- b) 1 US \$ = 1½ Geman Mark
- c) 1 US \$ = 777 Korean Won

5. The said contract was amended for the first time on 25.05.1995 and in this amended contract, article 5.3 (a) and (b) were deleted and article 5.3(c) was renumbered as 5.3 and therefore, the amended contract retained the earlier provision that the benefit accruing out of the exchange fluctuations was to be passed on respondent No.5.

6. It is vital to note that inadvertently, when the complaint was filed by respondent No.2 before learned Chief Metropolitan Magistrate, Delhi, the copy of the agreement dated 25.05.1995 annexed with the complaint by the department at the time of filing of the complaint was of another agreement, which was also titled as “First amendment to the contract for supply of machinery and equipment” dated 25.05.1995, which is annexed as R-3.

7. The allegations against the petitioner i.e. act of fraud and forgery committed by the petitioner and respondent Nos.3 to 6 are not limited to the creation of two sets of first amendment dated 25.05.1995 only. In fact, the minutes of 7th managing committee meeting held on 18.05.1996 and signed by petitioner on 31.05.1996, which is annexed at page No.39 also revealed that M/s.DWC sent draft 2nd amendment reviewing the amended contract dated 25.05.1995 for review to M/s.DMIL in the mid of April, 1996.

8. It is also important to note that draft second amendment which was sent to M/sDMIL by M/s DWC for review in April, 1996 as is clear from the minutes of 7th managing committee held on 18.05.1996 was antedated and signed with back dated i.e. 20.03.1996, which is

annexed as Annexure – R-4 with an intention to give undue benefit to M/s.DWC arising out of the exchange rate fluctuation between Korean Won and other currencies like Japanese Yen, US Dollar, German DM etc.

9. Since the exchange rate of the said currencies had depreciated against USD, if the second amendment agreement would not have been signed with back dated of 20.03.1996, the benefit of exchange rate fluctuation would have been to M/s.DMIL but this back dated second amendment gave undue benefit to M/sDWC of US \$ 28.96 Million.

10. Mr.Gaurav Duggal, learned counsel for petitioner submits that the prosecution has based its case primarily on three documents as follows:-

- i) A supply contract dated 25.03.1995 ('Agreement') executed between M/s.Daewoo Corporation (Korean Company) and Daewoo Motors India Limited (respondent No.5/Indian Company);
- ii) The first amendment to agreement dated 25.05.1995 (first amendment);
- iii) The second amendment to the agreement dated 20.03.1996 (second amendment).

11. It is further submitted that the Indian company is a subsidiary company of the Korean Company.

12. The sum and substance of the prosecution case, as stated in the

instant petition, is as follows:-

a) Clause 5.3 of the agreement provides for the total consideration of the agreement and clause 5.3(c) talks about the amount of exchange rate fluctuation to be paid by the Indian Company to the Korean Company;

b) As per the complaint, when first amendment was executed, clause 5.3 (a) and (b) were deleted and they were replaced with clause 5.3 (c) and retained the exchange rate fluctuation cause:

c) It is further alleged that when the second amendment was executed, it deleted the clause 5.3(c) of the first amendment and entirely replaced the same with a new clause 5.3 when the clause with respect to exchange rate fluctuation was taken out in entirety;

d) It is also alleged that the second amendment dated 20.03.1996 was antedated; and

e) The complaint alleges that by failing to disclose this antedating of the second amendment, the bank and financial institutions have parted with funds, which they would not have otherwise done and the Indian Company (respondent No.5) also suffered huge losses.

13. Learned counsel for petitioner submits that on the basis of aforesaid allegations, learned Magistrate took the cognizance and

issued the process vide impugned order dated 15.07.2005 under the provisions, as mentioned above.

14. The contentions raised by petitioner in the instant petition are as under:-

i) That there neither was, nor could there be any offence of cheating committed; nor was any wrongful loss caused to the Indian Company or to the financial institutions.

ii) The very premise of the complaint is that clause 5.3(c) of the agreement dated 25.03.1995 became the amended clause 5.3 vide the first amendment dated 25.05.1995 is unfounded as the document dated 25.05.1995 placed on record with the complaint contains a totally distinct clause. The much relied upon clause 5.3(c) was deleted in the first amendment itself. The entire complaint is based on the premise that article 5.3(c) was retained in the first amendment and was deleted in the second amendment. This is entire incorrect as is also admitted by the respondent.

iii) As per clause 5.3, as amended vide first amendment dated 25.05.1995, there could be no effect caused by the second amendment allegedly dated 20.03.1996 and it is purely presumptive of the prosecution to claim a loss, where none could or ought to have been caused. The complaint is based on incorrect premises in this respect.

iv) If there is no wrongful loss caused or liable to be caused,

there would not be any element of dishonesty or fraud and hence, assuming though not accepting the allegations of antedating, there was never any forgery or any false document created under Section 464 or 463 Indian Penal Code and hence no occasion for the commission of the offence of forgery for the purpose of cheating under Section 468 Indian Penal Code or using as genuine a forged document under Section 471 Indian Penal Code.

v) In so far as the conspiracy issue is concerned, apart from a vague and bald averment, the ingredients of the offence are not met and it cannot be said on a reading of the complaint in its entirety or the material annexed thereto which form the basis of the order issuing process, that the offence of conspiracy is attracted. In so far as the petitioner is concerned, the mere act of signing of second amendment would not by itself create an inference of his having participated. Furthermore, there is no concept of vicarious liability under the Indian Penal Code and hence, the petitioner could not be made liable or prosecuted merely by virtue of designation.

vi) In so far as the loss to banks and financial institutions is concerned, it is an admitted position that till date, not one complaint has been filed by either of the banks or financial institutions qua the alleged losses. The prosecution has not filed any documentary proof or substantiated this alleged loss. The premise of the complaint that banks and financial institutions

were directors on the board of the Indian Company and therefore, they were at all times party to and aware of the execution of the second amendment.

15. Learned counsel has pointed out that in short-affidavit, respondent No.2 has alleged that there two versions of the first amendment and they had wrongly filed the version that carried signatures of both the executors (petitioner and respondent No.4) of the document.

16. In para No.4 of the short-affidavit of the, the prosecution has admitted as follows:-

“.... however, unfortunately, copy which was annexed with the complaint as (Annexure C-6) was of another agreement dated 25.05.1995 (Annexure R-3) which, as per the complaint, had been falsely created by the beneficiaries of the said agreement. The documents were also seized during the investigation. There were voluminous records/documents recovered in the present case. By inadvertent mistake, Annexure R-2 (herein) was left out from being filed before the Ld.Trial Court and what got filed was only the copy of the forged and fabricated agreement allegedly of the same date.”

17. Learned counsel submits that the correct version of the first amendment was one that bears the signatures of petitioner only and was not admittedly executed by the respondent No.4. This document

was not even a concluded contract, as it has not been executed by both the parties to the agreement. He submits that only reason for non-filing the alleged first amendment contract is on account of the fact that it was not a concluded contract. Further submits, it is an admitted position that the documents filed alongwith the complaint was a legally valid and correct document and was in fact “only” First amendment executed between the Korean company and the respondent No.5

18. Learned counsel has pointed out that in short affidavit reply it has also been alleged that the first agreement placed on record before learned ACMM; is a forged and fabricated document that had been falsely created by the beneficiaries of the said agreement.

19. It is further submitted that nowhere in the complaint, the complainant has alleged that there were two versions of first amendment and that version placed on record is a forged and fabricated document. The respondent No.2/complainant is attempting to improve its case in this petition.

20. Learned counsel for the petitioner submits that learned Magistrate while issuing the summons did not peruse the complaint and the documents annexed with it and in a pre-cursory manner issued the summons. He has submitted, the settled position in law is that the summons have to be issued only when the Magistrate, on scrutiny of complaint and documents filed alongwith therewith, satisfied that the allegations *prima facie*, prove the commission of alleged offences. However, in the present case, admittedly the documents filed

alongwith the complaint do not disclose any offence, whatsoever and the complaint has been filed only to harass the petitioner.

21. He further pointed that the prosecution has stated in their reply-affidavit that they would place the correct version of the first amendment before learned Magistrate. This admittedly, till date, has not been done and, in any event, this would not be permissible at this stage.

22. Learned counsel for petitioner has relied upon **Devender Kumar Mittal v. State & Ors SLP (Crl) No.3317/2008**, Hon'ble Apex Court has held that when the contents of complaint, if it is taken to be true on their face do not reveal commission of any offence, the Magistrate ought not to have been taken cognizance of the complaint at all.

23. On the other hand, Mr.Neeraj Chaudhari, learned Standing Counsel for Central Government submits that Section 464 Indian Penal Code defines "making of a false document" and present case specifically covered by illustration 'h' which is as under:-

"A sells and conveys an estate to Z. A afterwards, in order to defraud Z of his estate, executes a conveyance of the same estate to B, dated six months earlier than the date of the conveyance to Z, intending it to be believed that he had conveyed the estate to B before he conveyed it to Z. A has committed forgery."

24. Learned Standing Counsel further submits that second amendment agreement which was signed with back dated of

20.03.1996 has resulted in defrauding the financial institutions like IDBI, ICICI, Exim Bank, as this was done without their knowledge with the result that the financial institutions could not reduce their exposure by 24% against the total Foreign Currency Loan (FCL) to the extent of US\$ 150 Million which they would have done if it would have been brought to their knowledge.

25. He further submitted that petitioner alongwith other co-accused persons (respondent Nos.3 to 6) in conspiracy have cheated the said financial institutions to the extent of US\$ 28.96 Million, which was passed on to DWC fraudulently and thereby induced the said financial institutions to give credit facility.

26. Learned Standing Counsel further submits that powers of the Court under Section 482 Criminal Procedure Code has to be used sparingly and that too in a case which is very deserving where no case can be said to have been made out, even on the basis of the averments made in the complaint and the documents so annexed. Learned counsel submits that the present case is not of those exceptional cases as the petitioner is questioning the factual basis of the averments made in the complaint by way of his defence and as such is not fit case where this Court can be persuaded to exercise its discretionary powers under Section 482 Criminal Procedure Code.

27. Learned Standing Counsel has relied upon **Iridium India Telecom Limited v. Motorola Incorporated & Ors 2011 (1) SCC 74** wherein para Nos.75 and 76 it has been held as under:-

“75.The aforesaid observations leave no manner of doubt that the appellants were entitled to an opportunity to prove the averments made in the complaint. They were entitled to establish that they have been deliberately induced into making huge investments on the basis of representations made by respondent No.1 and its representatives, which representations subsequently turned out to be completely false and fraudulent. The appellants were entitled to an opportunity to establish that respondent No.1 and its representatives were aware of the falsity of the representations at the time when they were made. The appellants have given elaborate details of the positive assertions made by respondent No.1 which were allegedly false to its knowledge. It is also claimed by the appellants that the respondent No.1 and its representatives willfully concealed facts which were material and ought to have been disclosed, but were intentionally withheld so as to deceive the appellant into advancing and expending a sum of ₹500 Crores.

76. As noticed earlier, both the appellants and the respondents have much to say in support of their respective view points. Which of the views is ultimately to be accepted, could only be decided when the parties have had the opportunities to place the entire materials before the Court. This Court has repeatedly held that power to quash proceedings at the initial stage have to be exercised sparingly with circumspection and in the rarest of the rare cases. The power is to be exercised ex debito justitiae. Such power can be exercised where a criminal proceeding is manifestly attended with malafide and have been instituted maliciously with ulterior motive. This inherent power ought not to be exercised to stifle a legitimate prosecution.”

28. Learned Standing Counsel has also relied upon the another decision of Apex Court **CBI v. R. S. Pai & Anr 2002 (5) SCC 82** wherein in Apex Court has held that the additional documents can be filed by the prosecuting agency after filing of the charge-sheet. He has relied upon the para No.7 of the judgment, which reads as under:-

*7. From the aforesaid sub-sections, it is apparent that normally, the investigating Officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or charge-sheet, it is always open to the Investigating Officer to produce the same with the permission of the Court. In our view, considering the preliminary stage of prosecution and the context in which Police Officer is required to forward to the Magistrate all the documents or the relevant extracts thereof on which prosecution proposes to rely, the word 'shall' used in Sub-section (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during the investigation upon which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. Analogous provision under Section 173 (4) of the Code of Criminal Procedure, 1898 was considered by this Court in **Narayan Rao v. The State of Andhra Pradesh 1 AIR 1957 SC 737 = 1957 CriLJ 1320** and it was held that the word 'shall' occurring in Sub-section 4 of Section 173 and Sub-section 3 of Section 207A*

is not mandatory but only directory. Further, the scheme of Sub-section (8) of Section 173 also makes it abundantly clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to investigation. In such cases, there cannot be any prejudice to the accused. Hence, the impugned order passed by the Special Court cannot be sustained.

29. Additionally, learned Standing Counsel has also relied upon a decision rendered by this Court in **Sudhir Kumar Seth v. State of Delhi** 2008 (151) DLT 199 wherein it has been held in para No.19 of the decision as under:-

“19. Considering the preliminary stage of prosecution and the context in which Police officer is required to forward to the Magistrate all the documents or the relevant extracts thereof on which prosecution proposes to rely, the word ‘shall’ used in sub-section (5) of Section 173 (which stipulates that the police officer “shall” forward to the Magistrate along with the report all documents or relevant extracts and statements recorded under Section 161 on which the prosecution proposes to rely and whom the prosecution proposes to examine as its witnesses cannot be interpreted as mandatory, but is directory. Normally, the documents gathered during the investigation upon which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. Further, the scheme of sub-section (8) of S.173

Cr.P.C. also makes it abundantly clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to investigation. In such cases, there cannot be any prejudice to the accused.”

30. I have perused the complaint filed by the respondent No.2 before learned Trial Court.

31. In para No.10 it is averred that the said contract was amended for the first time on 25.05.1995 and in this amended contract article Nos. 5.3 (a) and (b) were deleted and article 5.3(c) was renumbered as 5.3 and therefore, the amended contract retained the earlier provision that the benefit accruing out of the exchange fluctuations was to be passed on respondent No.5/M/s.DMIL.

32. In para No.11 of the complaint, it is stated that the accused persons were party to a criminal conspiracy during the year 1996 at Delhi and at Korea with the object of obtaining undue pecuniary advantage and in pursuance of the said criminal conspiracy fraudulently and dishonestly antedated the second amendment dated 20.03.1996 to the contract dated 25.03.1995 with regard to the effect of exchange rate fluctuation in the value of the import of capital goods, for unauthorised obtaining undue pecuniary advantage for the parent company i.e. DWC.

33. In para No.12, it is stated that the minutes of 7th management

committee meeting held on 18.05.1996 also revealed that M/s.DWC sent draft second amendment reviewing the amended contract dated 25.05.1995 for review to M/s DIML. However, during investigation, the second amendment agreement signed by Mr.S. G. Awasthi on 31.05.1996 was recovered. It is also mentioned that the draft second amendment agreement which was sent to M/s.DIML by M/s.DWC for review in May, 1996 as is clear from the minutes of 7th management committee meeting held on 18.05.1996, was signed with back date of 20.03.1996 with an intention to give undue benefit to M/s.DWC arising out of the exchange rate fluctuations between the Korean currency and other currencies, like Japanese Yen, US Dollar, German DM etc. Since the exchange rate of the said currencies had depreciated against USD, if the second amendment agreement would not have been signed with back dated of 20.03.1996, the benefit of exchange rate fluctuation would have been to M/s.DMIL but this back dated second amendment gave undue benefit to M/sDWC of US \$ 28.96 Million.

34. In para No.13 of the complaint, it is stated that the second amendment agreement which was signed with back dated of 20.03.1996 has resulted in defrauding the financial institutions like IDBI, ICICI, Exim Bank, as this was done without their knowledge with the result that the financial institutions could not reduce their exposure by 24% against the total Foreign Currency Loan (FCL) to the extent of US\$ 150 Million which they would have done if it would have been brought to their knowledge.

35. It is also stated in para No.14 of the complaint that the accused

persons in conspiracy with each other cheated the said financial institutions to the extent of US \$ 28.96 Million which was passed to M/s.DWC fraudulently thereby induced the said financial institutions to give credit facility accordingly to M/s.DMIL; otherwise, they would have reduced it accordingly and thereby the accused persons cheated the aforesaid financial institutions.

36. In para No.15 of the said complaint, the allegations against the accused persons are that they fraudulently altered the clause of agreement dated 25.05.1995 by introducing the second amendment without the knowledge of the financial institutions and with back date with dishonest intention of getting the benefit of M/s.DWC on account of fluctuations of exchange rate of US\$ vis-a-vis other foreign currencies as mentioned above and thereby committed an offence of forgery for the purpose of cheating.

37. In para No.16, allegations against the accused persons that they fraudulently and dishonestly used the second amendment which was back dated without the knowledge of the financial institutions as genuine which they knew to be forged and thereby committed an offence of using forged documents.

38. The settled law even on discharge that if the evidence available goes un-rebutted, the person cannot be convicted.

39. The present has not reached even to that stage. Only summons have been issued against the petitioner. He has all liberty to submit before the Trial Court.

40. After hearing both the parties and going through the record available, I am of the considered opinion that there are sufficient allegations in the complaint filed by respondent No.2 to proceed against the petitioner even in the absence of the left out documents; and learned Additional Chief Metropolitan Magistrate has rightly issued the summons. I find no discrepancy in the impugned order passed by learned Trial Court. I conquer with the same.

41. If any document left out due to inadvertence, it can be filed with the evidence to be led by the party and document can be filed during pre-charge evidence. The petitioner would get the liberty to cross-examine and rebut the same. If the Trial Court find no force, then the charge can be dropped against the petitioner.

42. Before parting with the present order, I note that instant case pertains to the year 2005 and still languishing at the stage of appearance of accused persons. Therefore, I expect from learned Trial Court to proceed in the matter expeditiously, so as to conclude the trial within a reasonable time.

43. Consequently, Criminal M.C.No.2626/2006 is dismissed.

44. Vide order dated 06.07.2006, petitioner was exempted from personal appearance through Advocate before the Trial Court.

45. Since, the petition itself has been dismissed, the interim protection extended to petitioner vide above order also stands vacated.

46. Accordingly, petitioner shall appear before the Trial Court on

28.01.2012, the date already fixed for further direction.

47. Trial Court Record be remitted back forthwith.

48. No order as to cost.

SURESH KAIT, J

November 23, 2011

MR