

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

Judgment Reserved on: November 07, 2013

Judgment Pronounced on: December 06, 2013

+ **CRL.M.C.3952/2012 & CrI.M.A. 18978/2012**

ABHAY KUMAR MISHRA

.....Petitioner

Through: Mr. Sunil K. Mittal and Mr. Kshitij
Mittal, Advocates

versus

THE STATE & ANR.

....Respondents

Through: Mr. Vinod Diwakar, Additional
Public Prosecutor for Respondent-
State with Inspector Nirmal Kumar
Jha

Ms. Rebecca M.John, Sr. Advocate
with Mr. Vikas Arora, Advocate
for respondent No.2

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

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JUDGMENT

1. On the application under Section 156 (3) of Cr.P.C. preferred by second respondent, trial court vide impugned order 26th September, 2012 (*Annexure-C*) has directed registration of an FIR on the complaint (*Annexure-B*) of second respondent. In pursuance to the impugned order, FIR No. 397/12 under Sections 195/409/420/467/468/470/471/477A/506/120-B of *IPC* was registered at P.S. Dabri, Delhi on 11th October, 2012. Quashing of impugned order (*Annexure-C*) is sought in this petition on merits, while investigation in this FIR case is in progress.

2. During the pendency of this petition, respondent-State has placed on record status report which narrates the factual background of this case and also takes note of the fact that at the instance of petitioner FIR No.191/11 was registered against second respondent for similar offences and the investigation is being carried out in respect of petitioner's FIR No.191/11 as well as FIR No.397/12 of second respondent and the investigation in both these FIRs is being carried out by Assistant Commissioner of Police, Economic Offences Wing, Crime Branch, New Delhi.

3. The factual narration in the status report is not disputed by either side, which reads as under: -

"In the first quarter of 2005, Hira Prasad Mishra and Abhay Kumar Mishra, alleged accused, approached and entered into negotiations with Siddharth Sareen and Shravan Gupta both Directors of MGF Company, which was in the process of incorporating a Joint Venture Company with Emaar Properties PJSC. Accused persons were thoroughly familiar with the areas in and around Delhi and have been indulging in sale/purchase of land on brokerage/commission basis for a long period. He was capable of locating and aggregating good marketable contiguous parcels of land for real estate projects for complainant company and also persuaded the land owners to sell their respective land in favour of the company at competitive prices, in and around Najafgarh. He had a sizeable land holding of his own and would be willing to sell it to the complainant company. Believing on the representation of accused persons that they would purchase land for the complainant company, the complainant company gave money for the purchase of land and the accused persons were to be given brokerage for the deal. Since the farmers were

apprehensive of selling land to unknown persons so they formulate a SPV to purchase land and the shares of which would be transferred to the complainant company.

The complainant company had entrusted and transferred total funds of Rs.91 cr. (Apprx.) to the accused persons. They rendered account with regard to Rs.64 cr. (approx.) only and rest of the balance of Rs.27 cr. (apprx.) was accounted towards payment of non-existent lands sold by fictitious farms. Thereafter, the accused approached the complainant companies with talks of reconciliation in November 2007, and wanted to make amends by agreeing to render accounts and returning the balance of Rs.26,92,21,428/- and also transferring the parcels of land, the agreements to sell for which were entered into the names of accused persons, with the way of future purchase of land through Accused 1 & 2, on a brokerage/commission basis.

That towards the end of January 2008, the reconciliation talks failed and the complainant companies realized that these talks were nothing but a ruse and accused persons never wanted to return the land and money, as above, which they had planned to cheat the complainant companies from the very inception.

That in January 2008, Accused persons threatened the complainant companies to injury for not only their investments and land in the name of complainant's special purpose vehicle companies by filing of claims against them to the tune of crores of rupees, with an intent to cause harm to the complainant companies and pressurize them to compromise with dividing the assets of the complainant company and outstanding cash balance with them on a 50:50 basis, as means of avoiding the execution of such threat.

That in February 2008, Abhay Kumar Mishra in conspiracy with other accused, filed a totally frivolous civil suit being CS (OS) No.260/2008, on behalf of complainant company

Hira Realtors Pvt. Ltd. with the purpose of setting up a defence in criminal proceedings that the matter between the parties is of a civil nature and is pending consideration before the Hon'ble High Court."

4. Impugned order (*Annexure-C*) takes note of the fact that Investigating Officer, who is investigating petitioner's FIR No.191/11, did not file any action taken report in respect of second respondent's complaint (*Annexure-B*) and had put forward lame excuse that he could not study this complaint as he was busy in other cases. It appears from the impugned order that trial court finds merit in the contention of counsel for second respondent-complainant about Investigating Officer of FIR No.191/11 deliberately avoiding to submit '*Action Taken Report*' on second respondent's complaint (*Annexure-B*). In the impugned order (*Annexure-C*), while taking note of the fact that FIR No.191/11 at the instance of petitioner against second respondent is pending investigation, trial court relies upon Apex Court's decisions in *Shiv Shankar Singh v. State of Bihar & Anr.* (2012) 1 SCC 130 and *Babu Bhai v. State of Gujarat & Anr.* (2010) 12 SCC 214 to order registration of FIR on second respondent's complaint (*Annexure-B*) by observing that to elicit true facts and actual version, registration of FIR under the relevant provision of law on second respondent's complaint is necessary.

5. At the hearing, learned counsel for petitioner had assailed impugned order by contending that direction to register FIR on second respondent's complaint by trial court has been passed in mechanical and biased manner. It was urged on behalf of petitioner that bald allegations regarding certain disputes relating transfer of shares and settlement of

accounts are the subject matter of civil proceedings initiated by petitioner and the allegations made in the complaint of second respondent on the basis of which FIR No.397/12 stands registered, are afterthought and frivolous.

6. During the course of hearing, it was vehemently urged by learned counsel for petitioner that on the same facts, there was no occasion for registration of another FIR and if the different version put forth by second respondent is found to be true, it can be investigated in petitioner's FIR and registration of FIR on second respondent's complaint is a blatant attempt to pressurize petitioner and is an abuse of process of the court and the reliance placed upon the two decisions of Apex Court by trial court in the impugned order is clearly misplaced. Lastly, it was submitted on behalf of petitioner that complaint (*Annexure-B*) is based on concocted facts and is a counter-blast to petitioner's FIR No.191/11, which is pending investigation and the appropriate course to adopt would be to get the version of second respondent investigated in petitioner's FIR, instead of getting another FIR registered on the belated version of second respondent, which is an afterthought. Thus, it was submitted that impugned order deserves to be quashed. Nothing else was urged on behalf of petitioner.

7. On behalf of second respondent-complainant, learned senior counsel had relied upon decisions in *Acharya Arun Dev v. State & Anr.* 2005 [2] JCC 897; *M/s. Hira Realtors Pvt. Ltd. & Ors. v. Sidharth Sareen & Ors.* in I.A. No.1/04/2008 in CS (OS) 260/2008 rendered on 27th February, 2008 & *Sidharth Sareen & Anr. v. M/s. Hira Realtors Pvt. Ltd. & Ors.*, FAO (OS) 93/2009 rendered on 23rd March, 2010 to

contend that prima facie case for police investigation on the version of second respondent is made out and since commission of cognizable offences by petitioner in respondent's complaint is disclosed, therefore, registration of FIR on second respondent's complaint giving different version of the same transaction is permissible in view of the dictum of the Apex Court in *Shiv Shankar (supra)* and for independent and transparent investigation and to find out the truth, police investigation is essential as there are specific allegations of petitioner fraudulently and dishonestly using forged documents to criminally misappropriate advance payment of ₹26,92,21,428/- (Rupees twenty six crores, ninety two lakhs, twenty one thousand and four hundred and twenty eight.) .

8. During the course of hearing, it was pointed out by learned senior counsel for second respondent that in petitioner's suit for declaration of forms filled by petitioner with Registrar of Companies as invalid, amendment of prayer for injunction was sought with a view to wriggle out of the admissions made regarding purchase of over 125 acres of land for different group of companies of petitioner and the said amendment was declined by a Division Bench of this Court vide order of 23rd March, 2010 which has attained finality. It was urged with much vehemence by learned senior counsel for second respondent that mere pendency of civil litigation is no ground to quash the criminal proceedings as it is settled legal position that civil and criminal proceedings and go on simultaneously if the ingredients of criminal offence exist. Thus, it was urged on behalf of second respondent that there is no illegality or infirmity in the impugned order and so, this petition deserves rejection.

9. The respective contentions advanced by both the sides, impugned order, the material on record and the decisions cited have been duly considered and thereupon, it emerges that what is required to be seen is whether trial court has exercised its jurisdiction while invoking Sub-Section (3) of Section 156 of Cr.P.C. within the parameters of the exercise of this jurisdiction as reiterated by a coordinate Bench of this Court in *Subhkaran Luharuka and Shree Ram Mills Ltd. Vs State (Govt. of NCT of Delhi) and Utility Premises Pvt. Ltd.* 170 (2010) DLT 516. The guidelines laid down in *Luharuka (supra)* pertaining to exercise of jurisdiction under Section 156 (3) of Cr.P.C. are as under: -

“102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for

wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

10. Upon careful perusal of FIR No.191/11 (*Annexure-A*) lodged by petitioner, complaint (*Annexure-B*) of second respondent and the status report of respondent-State, it prima facie appears that the version put forth by second respondent in its complaint (*Annexure-B*) is diametrically different from petitioner's version in FIR No.191/11 (*Annexure-A*). It is true that a separate FIR need not be register upon defence of accused but when a counter version is put forth by an accused, then cross-cases are often registered. The logic behind it can be gathered from the Apex Court's decision in *Shiv Shanker Singh (supra)* wherein it is categorically reiterated that filing of another FIR in respect of the same incident having a different version of the events is permissible. Rule of law postulates fair investigation. In the instant case, merely because of version of second respondent is subsequent to petitioner's version, does not bar registration of FIR on the version put forth by second respondent as it prima facie discloses a cognizable offence. The need for independent police investigation very much exists in view of the serious accusations of fraudulent misappropriation made by second respondent *qua* petitioner in complaint (*Annexure-B*).

11. Assertion of petitioner's counsel that complaint (*Annexure-B*) is based on concocted facts and is a counter-blast to petitioner's FIR No.191/11, which is pending investigation, remains unsubstantiated. The version of second respondent put forth in the complaint (*Annexure-B*) needs thorough and a detailed investigation which cannot be undertaken by second respondent. The tenor of the impugned order reveals the

reluctance of Investigating Officer in FIR No.191/11 to effectively investigate the version put forth in complaint (*Annexure-B*) of second respondent, which had persuaded trial court to direct registration of FIR on second respondent's complaint (*Annexure-B*). The contention of petitioner's counsel that impugned order has been passed in a mechanical and biased manner, is clearly unfounded. The accusations made by second respondent in complaint (*Annexure-B*) cannot be outrightly termed as bald allegations giving rise to a purely civil dispute and the serious accusations made by second respondent deserve to be independently investigated into. Infact, it is so ordered in view of the fact that there is no stay of investigation in FIR in question but no worthwhile investigation has been carried till now. Such a course is being adopted in light of the tardy progress of the investigation as reflected in the status report of respondent-State. What would be the impact of unsuccessful attempt by petitioner to withdraw the admissions made in civil proceedings by seeking to amend the pleadings is not required to be gone into at this stage.

12. The sum and substance of the submissions advanced by learned Senior Counsel for respondent No.2 can be summarized as under: -

The Metropolitan Magistrate has passed the order after considering the entire material available on record. Documents filed with the complaint demonstrate the fraud committed by petitioner. It is apparent that the order dated 27th February, 2008 passed by a coordinate Bench of this Court in CS (OS) No.260 of 2008 has been concealed by petitioner as the same has given a prima facie finding that Hira Realtors is a SPV of defendants in the said suit and not the plaintiff/petitioner.

It is clear from the contents of the FIR No.191 of 2011 that the same was got registered on the complaint of petitioner, which is pari materia with the post amended version which the accused sought to secure in CS (OS) No.260 of 2008 pending before a coordinate Bench of this Court. The amendment that was sought in the suit was disallowed by the Division Bench of this Court vide its order of 23rd March, 2010 in FAO (OS) No.93 of 2009, which order was not interfered by the Apex Court dismissing SLP (C) No.21707 of 2010 vide order of 10th September, 2010.

Petitioner herein alongwith others filed the aforesaid suit, wherein he alleged that the Company Hira Realtors Pvt. Ltd has been hijacked and the Court vide its order of 27th February, 2008 has held as under:-

It is undisputed that different chunks of land were purchased from the funds of defendants and these lands are standing in the name of plaintiff No.1- Company. In view of this, there is no prima facie case for issue of an injunction restraining defendants from bolding or dealing with the property purchased in the name of plaintiff No.1 which was created as a Special Purpose Vehicle. It is submitted by the plaintiffs' counsel that the plaintiffs had purchased land out of their own funds as well and the land was not purchased only from the funds of defendants. Facts show prima facie that plaintiff No.1 was created as Special Purpose Vehicle for purchasing land for the purpose of defendants and the money was provided by the defendants through banking channel. A separate bank account was also created for purchase of land. Other plaintiffs i.e. Plaintiffs No.2 to 6 had no reason to use the Plaintiff No.1 Company for purchasing property out of their own funds. If they have

purchased land, they have done so at their own risk. Any land purchased by Plaintiffs No.2 to 6 in the name of Company out of their own funds, will have to be established by them. However, Plaintiffs No.2 to 6 claim that Plaintiffs had purchased land worth more than ₹6 crores out of their own funds.....”

It was further observed that:-

“As far as removal from directorship of Plaintiff No.2 and 3 is concerned I consider this would need evidence. While the Plaintiff claim that forged documents were filed by the defendants with the ROC the case of the Defendants is that the company infact belonged to defendants and there was no necessity of forging documents. The Defendants had been claiming this company as part of their holding right from 2006 and this information was given to SEBI. Considering all these aspects, it is directed that the Defendants shall not do any further purchase of land using company. The defendants shall not change the present Directorship, shareholdings and shall maintain status quo as on today in respect of shareholding, no further transfer of shares shall be done by the defendants without leave of this Court.”

That the contentions of petitioner that the FIR No.191/11 and the complaint of respondent No.2 are pari materia same, is absolutely incorrect. In FIR No.191/11 petitioner had alleged that his company M/s. Hira Realtors Pvt. Ltd. had been hijacked by misusing his papers obtained blank. It is further alleged that various forged documents have been created to take over the company M/s. Hira Realtors Pvt. Ltd. whereas the allegations in the complaint/FIR No.397/12 are that Mr.Hira Prasad and his son Mr. Abhay Kumar have siphoned off the funds that were

entrusted to them for the purchase of land for the SPV and had failed to account for a sum of ₹26.92 crores approximately. It has been further alleged that petitioner had not disclosed the complete facts including pendency of civil suit between the parties wherein his amendment to the plaint was declined by the Division Bench of this Court and also by the Apex Court. However, petitioner still used the contentions sought to be raised by him in the amendment. As such, petitioner had played a fraud with the Court as well. What petitioner/accused could not achieve in the civil court, he is trying to achieve through the criminal proceedings. The order of 27th February, 2008 passed by Hon'ble Mr. Justice S.N. Dhingra, order of 23rd March, 2010 passed by the Division Bench of this Court and order of 10th September, 2010 passed by the Apex Court in SLP filed by Abhay Kumar Mishra, have been filed with the brief synopsis filed by respondent No.2.

Allegations made in the complaint constitute cognizable offence and FIR has already been registered and requires impartial investigation.

Furthermore, the petition also suffers from the infirmity as petitioner has not challenged the FIR that has been registered pursuant to the impugned order and before filing of the instant petition, which fact has not been disclosed to this Court by petitioner.

13. In the considered opinion of this Court, I find considerable substance in the aforesaid stand taken on behalf of respondent No.2, therefore, to unearth the magnitude of the fraud perpetuated in accounting towards payment of non-existent lands purportedly sold by fictitious farmers, an impartial police investigation is required in FIR No.397/12 registered in pursuance to the impugned order. Whether the

version put forth by second respondent in complaint (*Annexure-B*) on the basis of which FIR No.397/12 has been registered is based upon concocted facts, is an aspect which needs to be independently investigated into. No bias can be attributed to trial court nor can it be said that impugned order has been passed mechanically. Apex Court in *Rajiv Thapar v. Madan Lal Kapoor*, (2013) 3 SCC 330 has reiterated the parameters governing the exercise of inherent powers under Section 482 of Cr.P.C. and has cautioned that the truthfulness or otherwise of the allegations levelled, cannot be prejudged while exercising inherent powers. The pertinent observations made on this aspect by Apex Court in *Rajiv Thapar (supra)* are as under:-

"28. The High Court, in exercise of its jurisdiction under Section 482 CrPC, must make a just and rightful choice. This is not a stage of evaluating the truthfulness or otherwise of the allegations levelled by the prosecution/complainant against the accused. Likewise, it is not a stage for determining how weighty the defences raised on behalf of the accused are. Even if the accused is successful in showing some suspicion or doubt, in the allegations levelled by the prosecution/complainant, it would be impermissible to discharge the accused before trial. This is so because it would result in giving finality to the accusations levelled by the prosecution/complainant, without allowing the prosecution or the complainant to adduce evidence to substantiate the same. The converse is, however, not true, because even if trial is proceeded with, the accused is not subjected to any irreparable consequences. The accused would still be in a position to succeed by establishing his defences by producing evidence

in accordance with law. There is an endless list of judgments rendered by this Court declaring the legal position that in a case where the prosecution/complainant has levelled allegations bringing out all ingredients of the charge(s) levelled, and have placed material before the Court, prima facie evidencing the truthfulness of the allegations levelled, trial must be held."

14. Finding no grave or palpable error in the impugned order, which infact is a reasoned order which is sound on facts and law, I dismiss this petition while making it clear that any observation made in this judgment shall not tantamount to an expression on merits. Let the investigation of FIR No.397/12 be conducted objectively with expedition uninfluenced by any observation made in this judgment. In view of the lackadaisical attitude of Investigating Officer, let the investigation of this FIR case be supervised by the Head of Economic Offences Wing, Crime Branch, New Delhi and a final report regarding the fate of investigation be placed on record within three months from today for perusal.

15. This petition and the application are accordingly disposed of.

(SUNIL GAUR)
JUDGE

DECEMBER 06, 2013

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