

THE HON'BLE SRI JUSTICE M.S.K.JAISWAL

CRIMINAL REVISION CASE No.1090 of 2007

ORDER:

The criminal revision case is filed questioning the correctness of the order dated 05.06.2007 in CrI.M.P.No.1170/2007 in CC No.94/2005 on the file of the II Additional Chief Metropolitan Magistrate, Visakhapatnam, by and under which, the Court below allowed the petition in part filed under section 239 Cr.P.C, discharging the non-petitioners/A4 to A6 and dismissing the petition in so far as the petitioners/A1 to A3 are concerned.

2. Heard the learned counsel appearing for the petitioners/A1 to A3 and the learned Additional Public Prosecutor, representing the State.

3. The case of the prosecution is that on a private complaint, filed by the 2nd respondent/*de facto* complainant, being referred to police by the concerned Magistrate, the Station House Officer, Gopalapatnam P.S. registered a case in Cr.No.21/2004 against the petitioners/A1 to A3 and the non-petitioners/A4 to A6 under sections 120B, 406, 420 r/w.34 IPC and after investigation filed charge sheet, which has been numbered as CC.No.94/2005 on the file of the II Additional Chief Metropolitan Magistrate, Visakhapatnam. The allegations in so far as the petitioners/A1 to A3 are concerned are that A3, who was the Managing Director of A1 and A2 Companies, approached the 2nd respondent/*de facto* complainant on 04.10.1998 at Gopalapatnam, requesting him to arrange an amount of Rs.2 or 3 lakhs as loan agreeing to repay the same with interest @24% p.a. or in the alternative, made him believe that he shall take the 2nd respondent/*de facto* complainant as preferential share holder of A1 company. The 2nd respondent/*de facto* complainant believing the words of A3, paid Rs.1,35,000/- by way of demand draft in favour of A1

Company. On 25.10.1998 when the 2nd respondent/*de facto* complainant enquired A3 about his preferential share, A3 asked him to pay the remaining balance. On 05.01.1999 the 2nd respondent/*de facto* complainant went to Chennai to pay the balance, there A4 introduced herself as wife of A3 and she stated that A4 directed her to receive the amount from the 2nd respondent/*de facto* complainant, and believing her words, the 2nd respondent/*de facto* complainant paid the balance amount of Rs.1,50,000/-, but A3 could not keep up his promise to take the 2nd respondent/*de facto* complainant as preferential share holder and thereby cheated him.

3. All the accused persons filed a petition under section 239 Cr.P.C seeking discharge from the offences alleged against them, contending that the allegations made in the charge sheet do not attract the provisions of Code of Criminal Procedure and it is purely a case of civil nature, that there is delay in making the complaint, and that the police have not investigated the case and simply registered the crime and filed charge sheet.

4. The Court below partly allowed the petition filed by the accused, discharging A4 to A6 and dismissing the petition in so far as A1 to A3 while observing that there is *prima facie* evidence against A1 to A3.

5. Aggrieved by the said order, the petitioners/A1 to A3 filed the present revision contending that the Court below failed to consider the crucial fact that the payment made by the 2nd respondent/*de facto* complainant was in 1998 and that the complaint itself was filed in 2004, after 6 years, that the complainant is silent with regard to details of demand draft and receipt of money allegedly given to A4 at Chennai in the absence of A3, and that there is no basis in the contents of the charge sheet to implicate the petitioners/A1 to A3

6. The learned counsel appearing for the petitioners/A1 to A3 submits that no *prima facie* case is made out against the petitioners/A1

to A3 for the alleged offence, and the Court below ought to have discharged the petitioners/A1 to A3 also while discharging the other accused A4 to A6. The learned counsel further submits that there is no proof of payments made by the 2nd respondent/*de facto* complainant and the ingredients of Section 420 IPC do not attract. The learned counsel further submits that there is no iota of evidence against the petitioners/A1 to A3 to continue the criminal proceedings against them and hence the petitioners/A1 to A3 are entitled to be discharged.

7. The learned Additional Public Prosecutor, representing the State, submits that there is *prima facie* case against the petitioners/A1 to A3 to proceed. He further submits that the investigation and documentary evidence produced clearly discloses the key role played by the petitioner/A3 in receiving amounts from the 2nd respondent/*de facto* complainant by inducing him that he would give preferential shares in A1 and A2 Companies.

8. The point for consideration is as to whether the petitioners/A1 to A3 are entitled to be discharged under Section 239 Cr.P.C.

9. The contention of the learned Counsel appearing for the petitioners/A.1 to A.3 is that the learned Chief Metropolitan Magistrate having discharged the non-petitioners/A.4 to A.6 has dismissed the said request insofar as it is in respect of the petitioners/A.1 to A.3 and it is observed that there is material sufficient to frame charges against the petitioners/A.1 to A.3 for the offence punishable under Section 420 I.P.C. Learned Counsel submits that a bare reading of the contents of the complaint do not make out the ingredients of Section 420 I.P.C., and therefore, even they are liable to be discharge of the said offence.

10. On the other hand, learned Counsel appearing for the *de facto* complainant and also the learned Public Prosecutor submit that the order of the learned Magistrate cannot be said to be, in any way, irregular or illegal warranting interference by the revisional Court under the provisions of Sections 397 and 401 Cr.P.C. They further submit that at the stage of framing charge or discharging the accused, what is

all that is required to be seen is as to whether there is *prima facie* material to proceed against them.

11. Learned Counsel appearing for the petitioners in support of his submissions relied upon the following authorities of the Supreme Court:-

12. In **BINOD KUMAR v. STATE OF BIHAR**^[1] it is laid down as under in pars 14 and 19:-

“At this stage, we are only concerned with the question whether the averments in the complaint taken at their face value make out the ingredients of criminal offence or not. Let us now examine whether the allegations made in the complaint when taken on their face value, are true and constitute the offence as defined under Section 406 I.P.C.

Even if all the allegations in the complaint taken at the face value are true, in our view, the basic essential ingredients of dishonest misappropriation and cheating are missing. Criminal proceedings are not a shortcut for other remedies. Since no case of criminal breach of trust or dishonest intention of inducement is made out and the essential ingredients of Sections 405/420 I.P.C. are missing, the prosecution of the appellants under Sections 406/120-B of I.P.C., is liable to be quashed.”

13. In **INDIAN OIL CORPN. V. NEPC INDIA LTD**^[2] the Supreme Court observed as under in para 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 breakdown 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 through criminal prosecution should

be deprecated and discouraged. In *G.SAGAR SURI v. STATE OF U.P. (2000) 2 SCC 636*, this Court observed in para 8:-

“It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a shortcut 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 the 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. In **SUNIL BHARTI MITTAL v CBI**^[3], the Supreme Court held as under in pars 48, 51, 52 and 53:-

“*Since qua non* for taking cognizance of the offence is the application of mind by the Magistrate and his satisfaction that the allegations, if proved, would constitute an offence. It is, therefore, imperative that on a complaint or on a police report, the Magistrate is bound to consider the question as to whether the same discloses commission of an offence and is required to form such an opinion in this respect. When he does so and decides to issue process, he shall be said to have taken cognizance. At the stage of taking cognizance, the only consideration before the Court remains to consider judiciously whether the material on which the prosecution proposes to prosecute the accused brings out a *prima facie* case or not.

On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This Section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e., the complaint, examination of the complainant and his

witnesses, if present, or report of inquiry, if any), thinks that there is a *prima facie* case for proceeding in respect of an offence, he shall issue process against the accused.

A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into Court merely because a complaint has been filed. If a *prima facie* case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is likely to result in a conviction.

However, the words “sufficient ground for proceeding” appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is *prima facie* case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reasons given turn out to be *ex facie* incorrect.”

15. In **CBI v ASHOK KUMAR AGGARWAL**^[4], the Supreme Court held as under in para 40:-

“So far as the entertainment of the case at the behest of the respondent by the High Court is concerned, we may state that he may not have a legal right to raise any grievance, particularly in view of the law laid down by this Court in *RANADHIR BASU v STATE OF W.B. (2000) 3 SCC 161*. However, the revisional powers under Section 397 read with Section 401 Cr.P.C., can be exercised by the Court *suo motu*, particularly to examine the correctness, legality or propriety of any finding, sentence or order and as to the regularity of any proceeding of the inferior Court. These two Sections in Cr.P.C. do not create any right in the favour of the litigant but only empower/enable the High Court to see that justice is done in accordance with recognised principles of criminal jurisprudence. The grounds of interference may be, where the facts admitted or approved, do not

disclose any offence or the Court may interfere where the facts do not disclose any offence or where the material effects of the party are not considered or where judicial discretion is exercised arbitrarily or perversely.”

16. Learned Counsel appearing for the *de facto* complainant relied upon various authorities which laid down the well settled legal proposition of law that at the stage of framing of the charge, the Court cannot go into the probative value of the evidence that is likely to be produced by the prosecution and what is all that is required to be seen is as to whether the material placed before the Court is sufficient to raise a strong suspicion against the persons liable to be charged. In

STATE OF BIHAR v. RAMESH SINGH^[5] the Supreme Court held as under:-

“Reading Sections 227 and 228 together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and Judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Sections 227 or 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. If the evidence which the prosecutor proposes

to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Sections 227 or 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227.”

17. In **SUPDT.AND REMEMBRANCER OF LEGAL AFFAIRS, WEST BENGAL v. ANIL KUMAR BHUNJA AND OTHERS**^[6] (AIR 1980 S.C., 52 (1), a three Judge Bench of the Supreme Court observed as under:-

“At the stage of framing charges, the prosecution evidence does not commence. The Magistrate has therefore, to consider the question as to framing of charge on a general consideration of the materials placed before him by the investigating Police Officer. The standard test, proof and Judgment which is to be applied finally before finding the accused guilty or otherwise is not exactly to be applied at the stage of Sections 227 or 228. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged, may justify the framing of charges against the accused in respect of the cm of that offence.”

18. In **SHORAJ SINGH AHLAWAT AND ORS. V. STATE OF U.P. AND ANR**^[7] the Supreme Court held that on the basis of the material on record what is all that is required to be seen by the Magistrate is as to whether there is ground to presume that accused has committed the offence and even strong suspicion about existence of facts constituting offence is sufficient to refuse the request of the

accused to discharge them. In **SANGHI BROS. (INDORE) (P) LTD. v.**

SANJAY CHOUDHARY^[8] the Supreme Court held as under in paras 11 and 14:-

“Sections 227, 239 and 245 deal with discharge from criminal charge. In *STATE OF KARNATAKA v. L.MUNISWAMY* (1977) 2 SCC 699 it was noted that at the stage of framing the charge the Court has to apply its mind to the question whether or not there is any ground for *presuming* the commission of offence by the accused. The Court has to see while considering the question of framing the charge as to whether the material brought on record could reasonably connect the accused with the trial. Nothing more is required to be inquired into.

The present case is not one where the High Court ought to have interfered with the order of framing the charge. As rightly submitted by learned Counsel for the appellant, even if there is a strong suspicion about the commission of offence and the involvement of the accused, it is sufficient for the Court to frame a charge. At that stage, there is no necessity of formulating the opinion about the prospect of conviction. That being so, the impugned order of the High Court cannot be sustained and is set aside. The appeal is allowed.”

19. Bearing in mind the above principles with which there is no quarrel, what is required to be seen is as to whether the facts and circumstances of the case in hand are such which warrant interference by the order of the learned Magistrate under which he refused to discharge the petitioners/A.1 to A.3, but at the same time acceding to the request of the non-petitioners/A.4 to A.6 and discharging them.

20. The petitioners/A.1 and A.2 are the companies of which A.3 is the Managing Director. The specific allegation of the *de facto* complainant is that in between the *de facto* complainant and A.3, there was a transaction and A.3 requested the *de facto* complainant to give about two or three lakhs rupees for being invested in the companies on the promise that A.3 will return the said amount together with interest thereon at 24% per annum, alternatively, A.3 is said to have promised

the *de facto* complainant that he will be taken as a shareholder in the companies of which he was the Managing Director. It is alleged that even though four years lapsed, neither the money was returned, interest paid nor shares issued and therefore A.3 has cheated the *de facto* complainant and hence he is liable for criminal prosecution. The complainant paid a sum of Rs.1.35 lakhs to A.3 by way of Demand Drafts on 04-08-1998. Nearly **one and a half month thereafter i.e., on 25-10-1998**, A.3 is said to have asked the *de facto* complainant for the balance amount. Nearly two and a half months thereafter i.e., on 05-01-1999, the complainant paid a sum of Rs.1.50 lakhs to A.4 at the instance of A.3. Thereafter, several times demand is said to have been made for payment of the interest, the principal or the shares, which were not given and ultimately, in March, 2004, it is alleged that A.3 declined his liability for either of the above.

21. What is manifest from the above is that the transaction in between the *de facto* complainant and A.3 was purely a commercial transaction wherein A.3 took nearly a sum of Rs.2.85 lakhs promising to repay the same with interest thereon at 24% p.a. Alternative promise was that he will be taken as a shareholder. If A.3 has not fulfilled his part of the agreement, the remedy for the *de facto* complainant lies in a forum other than alleging that the petitioner/A.3 has committed the offence of cheating punishable under Section 420 I.P.C. If a Managing Director of a company takes money for investing in the company and he commits breach of the promise to return the said amount, it cannot be said to be attracting the ingredients of cheating. If the amount invested in a company, which ultimately runs into trouble, the persons who invested amounts in the company cannot take recourse to the remedy provided under the criminal justice system. The record shows that the petitioner/A.3 gave evidence in another connected C.C.No.1393 of 2001 in a Court at Madras, in which A.3 admitted that Koneru Karunakar Rao (the 2nd witness in the present complaint) and another invested Rs.95 lakhs till November,

December, 1998 in A.1 company. From the statement of A.3 recorded under Section 161 Cr.P.C., it is evident that the petitioner/A.3 admits that certain people may be including the *de facto* complainant and other supporting witness have invested certain amounts in A.1 company. The allegation is that there was criminal intention on the part of the petitioner/A.3 in taking investments from the people including the complainant for investing in a company, of which he was a Managing Director. If the Managing Director fails to fulfil his promise of returning the amount or allotting certain shares, it cannot be said that the petitioner/A.3 had any intention of cheating at the inception of the transaction.

22. It is also borne out from the record that when payments were made by end of the year 1998, the complaint came to be filed only in March, 2004. The explanation of the complainant that he kept quiet all along since A.3 kept on promising that he will fulfil the promise made by him cannot be *prima facie* accepted and no satisfactory explanation is forthcoming for this inordinate delay in launching private complaint by the *de facto* complainant which was referred by the jurisdictional Magistrate to the police for investigation.

23. It is a well settled proposition of law that where the allegations made in the complaint or the statement of the witnesses recorded in support of the same, taken at their face value, do not make out any case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused, further proceedings in a criminal trial cannot be allowed to proceed against the accused.

24. Upon carefully perusing the material on record, I have no hesitation in holding that the material that is placed on record do not *prima facie* make out any case so as to frame the charges against the accused for the offence punishable under Section 420 I.P.C. The learned Magistrate has erred in dismissing the request of the petitioners/A.1 to A.3 to discharge them while at the same time

allowing the same insofar as A.4 to A.6 is concerned.

25. Accordingly, the Criminal Revision Case is allowed, the impugned order of the Court below dated 05.06.2007 passed in CrI.P.No.1170/2007 in CC.No.94/2005 in so far as petitioners/A1 to A3 are concerned is set aside, and the petitioners/A1 to A3 stand discharged of the charges levelled against them. The bail bonds executed by the petitioners/A1 to A3, if any, shall stand cancelled.

Pending miscellaneous applications, if any, shall stand closed in consequence.

M.S.K.JAISWAL,J

Date: .12.2015

Dsr/Smr

[\[1\]](#) (2014) 10 SCC 663

[\[2\]](#) (2000) 6 SCC 736

[\[3\]](#) (2015) 4 SCC 609

[\[4\]](#) (2013) 5 SCC 222

[\[5\]](#) AIR 1977 SC 2018(1)

[\[6\]](#) AIR 1980 SC 52 (1)

[\[7\]](#) AIR 2013 SC 52

[\[8\]](#) (2008) 10 SCC 681