

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.09.2017

Pronounced on : 23.10.2017

CORAM:

THE HONOURABLE MR. JUSTICE M.S.RAMESH

Cr1.O.P.No.15122 of 2016

M/s.Belair Corporation Pvt. Ltd.,
(formerly Known as
M/s.Belair Enterprises Pvt. Ltd.,)
rep., by its Managing Director,
Old No.140-A, New No.94, Luz Church Road,
Mylapore,
Chennai-600 004. .. Petitioner

Vs.

1.State rep. by
The Inspector of Police,
CBCID Metro,
Alandur,
Chennai-600 016.

2.R.Vasu .. Respondent

Prayer: Criminal Original Petition filed under Section 482 Cr.P.C. praying to call for the records relating to the impugned final report filed by the first respondent in Metro Crime No.3 of 2013 in C.C.No.3546 of 2014 pending before the learned XI Metropolitan Magistrate, Saidapet and to quash the same.

For Petitioner : Mr.A.Thiyagarajan, Sr. Counsel
for Mr.P.N.Swaminathan

For Respondent-1: Mr.P.Govindarajan, APP

For Respondent-2:Mr.R.Shanmugasundaram, Sr. Counsel
for Mr.A.Gopinath

O R D E R

Heard Mr.A.Thiyagarajan, learned Senior counsel for the petitioner and Mr.P.Govindarajan, learned Additional Public

Prosecutor for the first respondent as well as Mr. Shanmugasundaram, learned Senior counsel for the second respondent.

2. The case of the prosecution is as follows:

a) The first accused along with the accused 2 and 3 had committed criminal breach of trust in respect of shares purchased on behalf of the defacto complainant and his wife Sarala Vasu from different companies. The shares were purchased by the petitioner in its capacity as a sub broker to one M/s. Kantilal Chaganlal Securities Private Limited, Mumbai between 12.10.2006 and January 2009 by acting as an agent to the defacto complainant and his wife. In the course of share trading business, the petitioner had used two forged letters dated 22.07.2008 alleged to have been signed by the wife of the defacto complainant and thereby, dishonestly induced them to transfer the amounts from the account of the defacto complainant's wife to the accounts of the second accused by using the forged letters given by the third accused. Thus, the petitioner and the other two accused had conspired to commit criminal breach of trust for the purpose of misappropriation of the shares and apart from criminal breach of trust, the petitioner and the other accused had also committed the offence of forgery, cheating and misappropriation.

b) The said charges were taken on the file of the learned XI Metropolitan Magistrate, Saidapet, Chennai in C.C.No.3546 of 2014 which is under challenge in the present Criminal Original Petition.

3. Mr. A. Thiyagarajan, learned Senior counsel appearing for the petitioner submitted that the transaction alleged in the charge sheet is purely civil in nature and therefore, the impugned criminal proceedings is unwarranted. The learned Senior counsel further submitted that since the defacto complainant's two earlier complaints were referred to as civil in nature and closed, the Director General of Police, CBCID was not possessed with powers to order reinvestigation and hence, the entire criminal proceedings is vitiated.

4. Mr. Shanmugasundaram, learned Senior counsel for the defacto complainant on the other hand submitted that the first accused had committed criminal breach of trust in respect of 21 shares worth about Rs.56 lakhs belonging to the defacto complainant and his wife, by a clandestine method of making use of two forged request letters dated 22.07.2008 and dishonestly used the same to undertake M/s. Kantilal Chaganlal Securities Private Limited, Mumbai to transfer funds from the accounts of the defacto complainant's wife to the account of the third accused and since the second accused was aware of the fact that these two request letters were forged documents, all the accused

have committed the offences of criminal breach of trust, misappropriation, forgery and cheating.

5.I have given careful consideration to the submissions made by the learned Senior counsels on either side and have perused the materials produced before me.

6.A few facts leading to the framing of charges against the petitioner are as follows:

On 07.04.2004 and 23.11.2004, the defacto complainant and his wife had availed loans of Rs.75 Lakhs and Rs.3 Crores respectively from the petitioner by executing irrevocable power of attorney in favour of the petitioner. The said loans are evidenced through the respective loan agreements, which is not in dispute. On 25.08.2008, the defacto complainant had acknowledged his liabilities by endorsing the statement of accounts rendered by the petitioner. On 16.07.2010, the petitioner had made a demand to the defacto complainant to settle further outstanding dues to the tune of Rs.2,26,09,835/-, to which, the defacto complainant had sent a reply dated 17.07.2010 denying the liability. Consequent to the denial, the petitioner had sent a reply notice dated 28.08.2010 pointing out the defacto complainant's admission of the transactions he had with the main broker and the receipt of accounts statement from the main broker and therefore, claimed the outstanding dues. In connection with this claim, the petitioner herein had filed a suit before this Court in CS.No.224 of 2012 claiming a sum of Rs.2,74,60,403/- together with interest on Rs.1,98,23,969/- at the rate of 12% p.a. The said suit which is dated 19.08.2011 was taken on file in the year 2012. After filing of the above said suit, the defacto complainant had filed a private complaint before the learned XI Metropolitan Magistrate, Saidapet, Chennai and based on the orders pronounced therein, the said complaint was taken on file in FIR No.438 of 2012 by the Central Crime Branch, Egmore, for the offences under Sections 406, 408, 480, 420 IPC. By a report dated 12.01.2013, the Assistant Commissioner of Police had closed the FIR No.438 of 2012 on the ground that the dispute was civil in nature. As against the closure report, the defacto complainant filed a protest petition before the learned XI Metropolitan Magistrate, Saidapet, Chennai praying for re-investigation. During the pendency of the protest petition, the Director General of Police, CBCID transferred the case in Cr.No.438 of 2012 for reinvestigation to the CBCID, Metro Wing and in view of the transfer, the protest petition came to be closed on 27.09.2013. Based on this, the second FIR in Cr.No.3 of 2013 was registered by the police for offences under Sections 406, 409, 418, 420 IPC against the petitioner herein. After investigation, a final report came to be filed on 28.06.2014 against the petitioner, which was taken on file by

the learned XI Metropolitan Magistrate, Saidapet, Chennai in CC.No.3546 of 2014 and which is impugned in the present Criminal Original Petition.

7. Some of the admitted facts of the case is that the defacto complainant and his wife had engaged in share trading by depositing shares as margin with the first accused and availed loan on the strength of such margin. It is not in dispute that when the loan agreement executed by the defacto complainant with the first accused, they had borrowed Rs.75 lakhs and Rs.3 Crores respectively. It is also not in dispute that the loan agreement and irrevocable power of attorney are executed by them to secure the loan of the first accused. The Demat account of the defacto complainant and his wife were maintained by M/s.Kantilal Chaganlal Securities Pvt. Ltd., Mumbai who is the principal broker and the petitioner herein was a sub broker. The defacto complainant and his wife were involved in share trading from the year 2004 to 2009 and their accounts maintained with the principal broker was closed in the year 2009.

8. The main dispute between the parties arose when the petitioner herein had sent a letter dated 16.07.2010 calling upon the defacto complainant to pay a sum of Rs.2,26,09,835/- which came to be denied by the defacto complainant stating that they had several transactions with the principal broker and that they had not received any details with regard to their transactions with the petitioner herein. The defacto complainant's averments that the petitioner herein did not share any details of the various debt and the notice without any statement to substantiate the details, was replied to by the petitioner herein on 28.08.2010 substantiating that the statements have been received by the defacto complainant from the principal broker and the petitioner was under no obligation to give them the statements. It is in this background that the petitioner herein had filed a suit for recovery of Rs.2,74,60,403/- together with interest Rs.1,98,23,969 at 12% p.a. in CS.No.224 of 2012 against the defacto complainant and his wife. Till the filing of the suit by the petitioner, no criminal complaint was preferred by the defacto complainant. It is after this suit that the defacto complainant had chosen to initiate criminal complaints against the petitioner.

9. The first criminal complaint dated 17.08.2012 in FR.No.438 of 2012 came to be closed by the Assistant Inspector of Police, Central Crime Branch on 12.01.2013 stating that the dispute was civil in nature in view of the loan agreement, power of attorney and in the strength of the statements recorded under Section 161 (3) Cr.P.C. When the defacto complainant had challenged the closure report by filing of protest petition, there were no allegations of bias pleaded against the Investigating Agency nor were any averments made with regard to forgery committed by the

petitioner. Furthermore, the defacto complainant had filed his written statement along with the counter claim in CS.No.224 of 2012 in the month of March 2016, wherein he had admitted of signing the acknowledgment of liability dated 25.08.2008 but denied the same to be confirmation of the debt. In the said counter claim petition, there were no allegations of forgery inspite of the fact that charges were framed against the petitioner herein based on his complaint.

10. On a perusal of the counter claim made by the defacto complainant in C.S.No.224 of 2012, it is seen that the defacto complainant had admitted of his dealings with the petitioner herein in his capacity of a sub broker of M/s.Kantilal Chaganlal Securities Pvt. Ltd., Mumbai and also admitted the execution of the power of attorney. What could be derived from the averments made in the counter claim is that the petitioner herein had committed breach of trust by transacting business with the defacto complainant without informing him about the negatived impact involved in the transfer notes whereby the defacto complainant's shares were transferred to third parties. On an overall reading of the counter claim made by the defacto complainant and the earlier protest petitions filed by the defacto complainant questioning the closure report, it can only be concluded that the plea of forgery has been made as an afterthought. Further, in order to ascertain as to whether the charges of criminal breach of trust and consequent offence of cheating has been made out in the said complaint as against the petitioner herein, it is not in dispute that the petitioner who was the share broker sub registered under M/s.Kantilal Chaganlal Securities Pvt. Ltd., Mumbai had trade dealings with the defacto complainant for the loan amount. Admittedly, the defacto complainant and his wife had also executed irrevocable power of attorney in favour of the petitioner by pledging their shares as margin for trading in shares.

11. The petitioner's claim on the outstanding amount of Rs.2,74,60,403/- together with interest is resisted in the counter claim by the defacto complainant. When the defacto complainant had not denied the fact that he had trade dealings with the petitioner herein, it cannot be said that the defacto complainant was not aware of the risk involved in speculation in share trading. Even according to the defacto complainant, as per his pleadings in the counter claim in the Civil Suit, the petitioner herein had indulged in high risk business transactions with their money and had addressed that he would manage the funds prudently and wisely investing in the stock market. The grievance of the defacto complainant is that the petitioner herein had mismanaged by imprudent handling of the funds and therefore, held that the petitioner liable. What is not in dispute is that the defacto complainant had permitted the petitioner to invest their monies in the stock market. The

issue as to whether the petitioner herein had mismanaged in such investment or not is a triable issue which is the subject matter of the suit in C.S.No.224 of 2012 on the counter claim made by the defacto complainant. As such, the charges framed against the petitioner with regard to criminal breach of trust and the consequent offences can be, by no stretch of imagination, implicate the petitioner for having committed a criminal offence of criminal breach of trust and cheating.

12.Moreover, the defacto complainant's first complaint in FIR No.438 of 2012 came to be closed since the dispute was civil in nature. The Assistant Inspector of Police, Central Crime Branch while closing the said complaint on 12.01.2013 had taken into account, the 161 (3) statement of the complainant as well as the basic documents of the loan agreement and deed of power of attorney executed between the petitioner and the defacto complainant and had come to the conclusion that the dispute was civil in nature. As against the closure report dated 12.01.2013, the defacto complainant had filed a protest petition on 14.03.2014, pending the protest petition, the DGP, CBCID, had transferred the investigation in Cr.No.438 of 2012 for reinvestigation to the CBCID, Metro Wing under Section 173(8) of Cr.P.C.

13.With regard to the transfer of the order for reinvestigation, as rightly pointed out by the learned Senior counsel for the petitioner, the power of further investigation is vested only with the same superior officer to whom the earlier report was filed. It is also seen that the leave of the Court was not obtained before carrying on reinvestigation. Moreover, the transfer of investigation agency is not contemplated under the Code. Such transfer can only be made by a higher Courts in order to meet the ends of justice. The Hon'ble Supreme Court in a judgment in Vinay Tyagi Vs. Irshad Ali @ Deepak and others reported in 2013 (5) SCC 762 had observed that no investigation agency is empowered to conduct the investigation afresh or in relation to the offence in which a report has already been filed under Section 173(2) of Cr.P.C. As per the observations of the Hon'ble Apex Court, once a report under Section 173(2) has been filed, it can only be cancelled or proceeded further and neither the police nor a special investigating agency has any right to cancel the report and that, after the report under Section 173(2) has been filed, it is only upon the orders of the higher courts that reinvestigation can be conducted, in which event, the High Court will have to pass specific order with regard to the investigation already conducted and the report be filed before the learned Magistrate. The relevant portion of the said order which is as follows:

"53.The court of competent jurisdiction is

duty bound to consider all reports, entire records and documents submitted therewith by the Investigating Agency as its report in terms of Section 173(2) of the Code. This Rule is subject to only the following exceptions;

a) Where a specific order has been passed by the learned Magistrate at the request of the prosecution limited to exclude any document or statement or any part thereof;

b) Where an order is passed by the higher courts in exercise of its extra- ordinary or inherent jurisdiction directing that any of the reports i.e. primary report, supplementary report or the report submitted on 'fresh investigation' or 're-investigation' or any part of it be excluded, struck off the court record and be treated as non est.

54.No investigating agency is empowered to conduct a 'fresh', 'de novo' or 're-investigation' in relation to the offence for which it has already filed a report in terms of Section 173(2) of the Code. It is only upon the orders of the higher courts empowered to pass such orders that aforesaid investigation can be conducted, in which event the higher courts will have to pass a specific order with regard to the fate of the investigation already conducted and the report so filed before the court of the learned magistrate."

14.From the aforesaid observations, it can only be concluded that the transfer of the case in Cr.No.438 of 2012 for reinvestigation to the CBCID, Metro Wing by the Director General of Police is not in consonance with the settled proposition and hence, subsequent registration of the charges is bad in law.

15.It will not be out of place to mention that when the transfer of investigation was brought to the notice of the learned XI Metropolitan Magistrate, Saidapet, Chennai, the learned Magistrate ought to have held that since police report was closed after investigation, such de novo investigation was not permissible. The consequent registration of the second FIR in Cr.No.3 of 2013 is again opposed to a decision of the Hon'ble Supreme Court in Anju Chaudhary V. State of Uttar Pradesh and others reported in 2013 (6) SCC 384. The relevant portion of the judgment is as follows:

"14. On the plain construction of the language and scheme of Sections 154, 156 and 190 of the Code, it cannot be construed or suggested that there can be more than one FIR about an occurrence. However, the opening words of Section 154 suggest that every information relating to commission of a cognizable offence shall be reduced to writing by the officer in-charge of a Police Station. This implies that there has to be the first information report about an incident which constitutes a cognizable offence. The purpose of registering an FIR is to set the machinery of criminal investigation into motion, which culminates with filing of the police report in terms of Section 173(2) of the Code. It will, thus, be appropriate to follow the settled principle that there cannot be two FIRs registered for the same offence. However, where the incident is separate; offences are similar or different, or even where the subsequent crime is of such magnitude that it does not fall within the ambit and scope of the FIR recorded first, then a second FIR could be registered. The most important aspect is to examine the inbuilt safeguards provided by the legislature in the very language of Section 154 of the Code. These safeguards can be safely deduced from the principle akin to double jeopardy, rule of fair investigation and further to prevent abuse of power by the investigating authority of the police. Therefore, second FIR for the same incident cannot be registered. Of course, the Investigating Agency has no determinative right. It is only a right to investigate in accordance with the provisions of the Code. The filing of report upon completion of investigation, either for cancellation or alleging commission of an offence, is a matter which once filed before the court of competent jurisdiction attains a kind of finality as far as police is concerned, may be in a given case, subject to the right of further investigation but wherever the investigation has been completed and a person is found to be prima facie guilty of committing an offence or otherwise, reexamination by the investigating agency on its own should not be permitted merely by registering another FIR with regard to the same offence. If such protection is not given to a suspect, then possibility of abuse of investigating powers by the Police

cannot be ruled out. It is with this intention in mind that such interpretation should be given to Section 154 of the Code, as it would not only further the object of law but even that of just and fair investigation. More so, in the backdrop of the settled canons of criminal jurisprudence, re-investigation or de novo investigation is beyond the competence of not only the investigating agency but even that of the learned Magistrate. The courts have taken this view primarily for the reason that it would be opposed to the scheme of the Code and more particularly Section 167(2) of the Code. [Ref. Rita Nag v. State of West Bengal [(2009) 9 SCC 129] and Vinay Tyagi v. Irshad Ali @ Deepak & Ors. (SLP (Crl) No.9185-9186 of 2009 of the same date).

Thus, the registration of second FIR in respect of the same offence is not permissible in view of the aforesaid proposition.

16.In the light of my above said observations and legal proposition laid down by the Hon'ble Supreme Court of India, it can only be concluded that the reinvestigation ordered by the Director General of Police, CBCID is not in conformity with law and the consequent framing of charges based on reinvestigation is liable to be struck off. Even otherwise, the averments made in the complaint leading to culmination of charges are triable issues of the petitioner's claim as well as the defacto complainant's counter claim in C.S.No.224 of 2012 and the averments are purely civil in nature, I am of the view that no criminal offence has been made out in the impugned charges.

17.In the result, the Criminal Original Petition stands allowed. Consequently, the proceedings in C.C.No.3546 of 2014 on the file of the learned XI Metropolitan Magistrate, Saidapet, Chennai which is now being transferred to the file of the learned Metropolitan Magistrate, CCB and CBCID Cases, Egmore at Allikulam in C.C.No.3018 of 2017 is hereby quashed.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

DP

To

1. The XI Metropolitan Magistrate,
Saidapet, Chennai.
 2. do thro the Chief Metropolitan Magistrate,
Egmore, Chennai.
 3. The Metropolitan Magistrate,
CCB & CBCID cases,
Egmore at Allikulam.
 4. The Inspector of Police,
CBCID Metro,
Alandur,
Chennai-600 016.
 5. The Public Prosecutor,
High Court, Madras.
- + 1 cc to Mr.A.Gopinath, Advocate,SR.74616
- + 2 cc to M/s.P.N.Swaminathan, Advocate,SR.74639

order made in
Crl.O.P.No.15122 of 2016

SKV(CO)
NR 27/10/2017



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