

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.15075 OF 2016

ORDER:

This petition is filed under Section 482 of Criminal Procedure Code (for short "Cr.P.C.") to quash the proceedings in C.C.No.215 of 2016 pending on the file of Judicial 1st Class Magistrate, Rajam, Srikakulam Distriect, for the offences punishable under Section 420 of I.P.C..

The defacto complainant/third respondent herein filed a private complaint and the Court took cognizance of the same and issued summons to the accused by order dated 01.09.2016 for the offences punishable under Sections 417, 420, 406 & 409 I.P.C. The case of the third respondent is that the petitioner is carrying on iron dust business and for business purpose the complainant and the accused jointly opened a current account No. 913020034967422 in Axis Bank, Rajam Branch in the name of Majji Gowri Minerals, Rajam to operate the account on either or survivor basis. The petitioner was dealing with the business transactions actively on behalf of the firm from 01.04.2014 to 31.08.2014. Further, Independent Mineral Resources Private Limited, Jubilee Hills, Hyderabad and Kineta Global Limited are the exporters of iron dust and main customers of the petitioner firm. They placed orders to the company for supply of iron dust and the complainant and the accused supplied iron dust as ordered regularly.

Further, the petitioner independently withdrew amount from the joint account for purpose of business from 01.04.2014 to 31.08.2014, but did not account for the amount withdrawn from the joint account during the said period. The total amount that the petitioner withdrew from the account of the firm is Rs.1,58,26, 960/-

Believing that the petitioner would return the amount, the complainant kept quiet. But after financial year 2014-2015, an assessment was made and noticed that the petitioner misappropriated an amount of Rs.1,58,26,960/- and therefore, filed a complaint before the Magistrate for committing fraud.

After recording sworn statement of the complainant/third respondent, the Court took cognizance for the offences punishable under Sections 417, 420, 406 & 409 IPC and issued process. The present petition is filed challenging the order passed by the Court taking cognizance, to quash the proceedings in C.C.No.215 of 2016, on the ground that the allegations made in the complaint would not constitute offences punishable under Sections 417, 420, 406 & 409 IPC and that failure to account for the amount would not give rise to any criminal offence and it would not fall within the definition of Section 415 of IPC. Therefore, taking cognizance against the petitioner for the offences punishable under Sections 417, 420, 406 & 409 IPC is illegal and without jurisdiction.

The second ground is that the Judicial 1st Class Magistrate did not afford any opportunity of hearing to the petitioner by issuing summons to the petitioner before taking cognizance, but, straightaway issued summons which is contrary to Section 202 of

Cr.P.C.

The third ground is that partnership deed is binding on both the parties and the disputes, if any, between the parties have to be resolved by arbitration. In view of the specific condition for resolving of disputes by the arbitrator, matter was referred to the arbitrator and by letter dated 07.10.2016 and it is contended that, when the dispute is ceased by the arbitrator, the proceedings cannot be continued against the petitioner.

During hearing, Sri G. Tuhin Kumar, learned counsel for the petitioner contended that very taking cognizance of the offence is against the principles laid down in various judgments and in the present case, there is sufficient ground to take cognizance by issuing summons by exercising power under Section 204 IPC is illegal and proceedings are liable to be quashed. It is further contended that the allegations made in the complaint would not constitute offence punishable under Sections 417, 420, 406 & 409 IPC.

Learned counsel for the petitioners placed reliance on the judgment of the Apex Court in **S.W. Palanitkar v. State of Bihar¹**, **Rashmi Jain v. State of Uttar Pradesh²**, **Pooja Ravinder Devidasani v. State of Maharashtra³** and **Priyanka Srivastava v. State of Uttar Pradesh⁴**. On the strength of the legal principles laid down in the above judgments, learned counsel for the petitioner contended that the proceedings are liable to be quashed.

¹ (2002) 1 Supreme Court Cases 241

² (2014) 13 Supreme Court Cases 553

³ (2014) 16 Supreme Court Cases 1

⁴ (2015) 6 Supreme Court Cases 387

Per contra, learned counsel for the second respondent Sri T. Nageswara Rao drawn the attention of this Court to the judgment of the Apex Court in **Priyanka Srivastava**⁴ case and **State of Tamil Nadu, represented by Inspector of Police CCIW/CID Dharmapuri Unit v. K. Ramesh**⁵ and contended that when there are sufficient allegations in the charge sheet to constitute offences punishable under Sections 417, 420, 406 & 409 IPC this Court cannot exercise its inherent power under Section 482 Cr.P.C.

The first and foremost contention raised by the learned counsel for the petitioner is that, failure to file an affidavit along with the complaint to take cognizance in a private complaint is an illegality committed by the Trial Court and drawn attention of this Court to **Priyanka Srivastava**⁴ case, where the Apex Court while dealing with the power of the Court under Section 156(3) Cr.P.c, the Court concluded that an affidavit verifying the allegations made in the complaint is to be filed. But here, the matter was not referred to the police by exercising power under Section 156(3) of Cr.P.C for investigation, but, the Court itself took cognizance for the offences punishable under Sections 417, 420, 406 & 409 IPC. Consequently, the principle laid down in the above judgment regarding filing of an affidavit and verifying the allegations in the complaint is not applicable to the present facts of the case and on the strength of the said judgment, this Court cannot quash the proceedings.

It is contended that summoning of accused is a serious matter and unless the Magistrate applies his mind to the present

⁵ (2015) 15 Supreme Court Cases 673

facts of the case and law applicable thereto, issuing summons is an illegality and that the dispute is predominantly civil in nature, the law cannot put into motion as a matter of course and the duty of the Magistrate is to verify the entire complaint and apply his mind to the facts of the case before taking cognizance. But here, the Magistrate allegedly failed to apply his mind and took cognizance for various offences allegedly committed by the petitioner. It is seen from the order passed by this Court dated 01.09.2016 that the Magistrate perused the record and sworn statement of the witnesses and the material on record and consequently concluded that there is a *prima facie* case against the accused for the offences punishable under Sections 417, 420, 406 & 409 IPC.

Passing of such an order by perusing the material and finding *prima facie* case is not sufficient and the order must disclose what weighed the Court to come to such a conclusion. In the absence of such situation, the very taking of cognizance itself is erroneous. The order passed by the Magistrate is not in consonance with the law declared by the Apex Court in **Pooja Ravinder Devidasani³ & Priyanka Srivastava⁴** cases, since the order does not reflect careful scrutiny of evidence brought on record and eliciting the officers to find out truth of the allegations or otherwise and examination of material to find out whether *prima facie* the accused committed any offence.

When the order passed by the Magistrate taking cognizance is without referring the evidence, which weighed the Court to take cognizance of various offences recording satisfaction, giving guidance to High Court in bad to law though complaint was filed

only for the offences punishable under Section 420 IPC, the very taking of cognizance by order 01.09.2016 for the offences punishable under Sections 417, 420, 406 & 409 IPC is illegal. Therefore, the order passed by the Magistrate is hereby set-aside, while declining to quash the proceedings in C.C.No.215 of 2016 and remanded the matter to the Judicial 1st Class Magistrate, Rajam, directing the concerned Magistrate to follow the guidelines issued by the Apex Court in **Pooja Ravinder Devidasani**³ case and pass appropriate orders afresh, considering the material on record disclosing what weighed in the mind of the Magistrate to take cognizance for various offences, within a period of fifteen days from the date of receipt of the order.

The other grounds raised before this Court need not be examined, in view of the foregoing discussion and therefore, the other grounds are not decided on merits.

With the above observations, the criminal petition is disposed of. No costs.

Consequently, miscellaneous petitions, if any, pending in this Petition shall stand closed.

JUSTICE M. SATYANARAYANA MURTHY

Dated 04.01.2017

SP