

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

Criminal Petition No.10170 of 2017

Between:

Khaja Obedullah

... Petitioners/Accused

AND

The State of Andhra Pradesh

Rep. by its Public Prosecutor,

High Court of Judicature at Hyderabad,

For the State of Telangana and

the State of Andhra Pradesh

and another.

... Respondents

DATE OF JUDGMENT PRONOUNCED: **06.09.2018**

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers
may be allowed to see the judgment? Yes / No
2. Whether the copies of judgment may be
marked to Law Reporters / Journals? Yes / No
3. Whether Their Lordship wish to
see the fair copy of the Judgment? Yes / No

U. DURGA PRASAD RAO, J

*** THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**

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... Respondents

! Counsel for Petitioner

: Sri C.Kumar

^ Counsel for Respondent No.1

: Public Prosecutor (Telangana)

^ Counsel for Respondent No.2

: Sri Gulam Mustafa Rabbani

< Gist:

> Head Note:

? Cases referred:

1) (2004) 12 SCC 83

2) (2013) 15 SCC 222

3) AIR 1963 SC 107

4) MANU/TN/0271/1989

5) 1964 (7) SCR 745 = AIR 1965 SC 166

6) AIR 1992 SC 248

THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

Criminal Petition No.10170 of 2017

ORDER:

In this petition filed under Section 482 Cr.P.C, the petitioner/accused seeks to quash the proceedings in C.C.No.413 of 2017 on the file of III Special Magistrate, Miyapur.

2a) Brief facts of the case are that complainant and accused are relatives to each other; while so, on 05.09.2014 the father of the accused went to the house of complainant and in the meantime, three unknown persons entered the house of complainant representing that they were Income Tax Officers (IT officers) and wanted to search house and father of the accused acted as a mediator and promised that he would settle the matter; believing his false representation the complainant and her husband paid a total amount of Rs.18,00,000/- on different dates to settle the income tax claim.

b) It is the further case of complainant that father of the accused and imposters got issued a forged letter dated 06.11.2014 said to have been issued by the Assistant Commissioner of Income Tax stating that total tax amount along with 2% penalty has been remitted to the IT Department and there were no dues to the Department and file relating to IT dues has been closed. Thereafter, when the complainant and her husband through their Chartered Accountant came to know that it was a fake letter and father of the accused and three imposters cheated them, immediately the husband of complainant went to Gachibowli PS and lodged complaint. Basing on the said complaint,

the police registered a case in Cr.No.423 of 2015 under Sections 419, 420 and 471 IPC.

c) Thereafter, the accused approached the complainant and her husband to settle the matter on behalf of his father. Considering their relationship, the complainant and her husband agreed to settle the issue; accused promised to pay the entire amount and accordingly, he issued three cheques dated 23.01.2017 for a sum of Rs.6,00,000/-, 6,35,000/- and Rs.6,00,000/- drawn on HSBC, Somajiguda, Hyderabad in favour of complainant. When the said cheques were presented with her banker i.e. DCP Bank, Madhapur on 23.01.2017, they were dishonoured due to '*insufficient funds*' vide cheque return memo dated 24.01.2017. Following due process the complainant filed complaint against accused for the offence under Section 138 of Negotiable Instruments Act, 1881 (for short "NI Act") which was taken cognizance by Magistrate and numbered as C.C.No.413 of 2017.

Hence, the instant petition for quashment.

3) Heard arguments of Sri C.Kumar, learned counsel for petitioner/accused and Sri Gulam Mustafa Rabbani, learned counsel for 2nd respondent/complainant.

4a) Learned counsel for petitioner would argue that even if the prosecution case is accepted to be true, still the criminal proceedings under Section 138 of NI Act are not maintainable for two reasons. Firstly, as per complainant the father of the accused allegedly collected amounts from the complainant and her husband on the pretext of giving bribe to three persons who visited their

house to conduct search in the guise of IT officers and complainant and her husband paid Rs.18 lakhs in installments to the father of accused to bribe the imposters to close the tax claim against them. Thus, even according to the complainant, the amounts were paid for an illegal purpose i.e. to bribe the impersonators. Since the consideration and object are illegal, no liability can be fastened on the father of the accused for return of the amount and therefore the Court cannot entertain the claim against the father of the accused or muchless against the accused even assuming he stood as surety to repay the amount on behalf of his father. In this regard, he relied upon the following judgments.

1. *P.G.Pankajakshi Amma vs. Mathai Mathew (dead) through LRs.*¹

2. *Central Bureau of Investigation vs. Ashok Kumar Aggarwal*²

b) Secondly, learned counsel while admitting the accused issued three cheques on behalf of his father, would argue that the accused cannot be prosecuted under Section 138 of NI Act, as no legally enforceable debt was due from the accused and cheques were issued only as a consideration for dropping the criminal prosecution launched by the complainant's husband against his father and some others. Learned counsel strenuously argued that any agreement entered into by the parties to withdraw criminal prosecution involving non-compoundable offence is void *ab initio* as being opposed to public policy and hit by Section 23 of Indian Contract Act, 1872 and therefore, such an agreement is unenforceable in a Court of law. Therefore, against the re-bounced cheques, which were issued to smother the criminal

¹ (2004) 12 SCC 83

² (2013) 15 SCC 222

prosecution, the complainant cannot maintain C.C.No.413 of 2017. In this regard, he relied upon the decision of the Apex Court in *V.Narasimha Raju vs. V.Gurumurthy Raju*³. He thus prayed to quash the proceedings.

5a) In oppugnation, learned counsel for 2nd respondent/complainant would argue that the grounds raised by the accused to seek quashment are untenable. In expatiation, he would argue that the complainant and her husband paid the amounts to the father of accused not as a bribe to persuade the IT officers to close the case, but they paid the said amount to settle their income tax dues and to stop the imminent search of their house. Therefore, the amounts given by them were for a legal purpose and since the father of the accused cheated them in connivance with the imposters, the complainant and her husband are legally entitled to recover the said amount by filing a civil suit and they are also entitled to launch criminal prosecution against them which recourse they have already taken in Cr.No.423 of 2015. Hence, the argument that since the amount was paid for an illegal purpose the same cannot be recovered is preposterous.

b) Nextly, learned counsel argued that the complainant and her husband agreed to withdraw the prosecution against the father of accused solely on the ground that he was their close relative but not for monetary consideration. The accused however took up the responsibility on him as a surety for his father and returned the amount by way of three cheques which were bounced back. Therefore, for the said transaction, the motive or consideration is predominantly the relationship between the parties but not money. The

³ AIR 1963 SC 107

complainant never bargained with the accused to withdraw prosecution solely on monetary consideration. If that were the case, for the grave offence committed by his father towards complainant and her husband, they should have demanded much higher amount than being satisfied with their own amount. Therefore, in the entire episode there is no profit or undue consideration for the complainant and her husband since their own amount was returned to them by way of cheques by the accused and in turn he got the higher benefit of bailing out his father from the criminal prosecution. The complainant and her husband agreed for this course mainly considering the intimate relationship between the parties. Hence, the transaction is not hit by Section 23 of Indian Contract Act.

6) The point for consideration is:

“Whether there are merits in this petition to allow?”

7) **POINT:** The first argument of the petitioner is that the amounts were paid by the complainant and her husband to bribe the IT officers and since the object for which the amount was paid was illegal, those amounts cannot be recovered through a Court of law.

8) In *G.Pnakajakshi Amma* and *Ashok kumar Aggarwal* cases (1 and 2 supra) cited by the petitioner, the Apex Court reiterated the principle **ex dolo malo non oritur actio** i.e. “no Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act”. Hence, the question is, whether the complainant and her husband paid the amount to the father of the accused for an illegal purpose i.e. to bribe the imposters treating them as IT

officers or whether they paid the amount for a genuine purpose to settle their income tax dues and to avoid imminent house search. If their motive is to bribe the duped officials, certainly the Court will not lend its helping hand to the complainant for recovery of such amounts since the object of such payment is an illegal one as laid in the aforesaid principle. In this regard, a perusal of the FIR No.423 of 2015 lodged by Shavakath Hyder Qureshi, the husband of complainant would show that they paid the amounts from time to time to the father of accused for clearance of income tax dues but not as bribe to the officials. He never stated that he paid the amounts as bribe. On the other hand, his allegation in the FIR is that on 05.09.2014 when himself and Khaja Kalimulla—father of accused while taking lunch, three persons proclaiming themselves as IT officers entered their house and told that there were income tax dues and they wanted to search the house and asked to give the keys. On that, Kalimulla took them aside and talked with them and came to the Hyder Qureshi and informed that as per office records, he fell due of Rs.12 lakhs towards income tax. On that Qureshi informed that he was not having more than Rs.5 lakhs. Again Kalimulla took those persons aside and pretended to have talked with them and came to Qureshi and told him to pay Rs.5 lakhs and pay the remaining amount in two days. Accordingly, the complainant and her husband—Qureshi paid Rs.5 lakhs on that day and remaining amount of Rs.7 lakhs after 2 days to Kalimulla to discharge the tax claim. Thereafter, again on 22.07.2015 the imposters telephoned to him and told that still income tax was pending. Then, he informed the said fact to Kalimulla, who in turn pretended to have talked with IT officers and told Qureshi to pay Rs.6 lakhs towards

balance of income tax due and Rs.24,000/- towards fine to close the case. Believing his words, they paid the amount and the total amount paid was more than Rs.18 lakhs. They ultimately realized that Kalimulla and three others cheated them in the guise of IT officers.

9) Thus, a close scrutiny of the allegations in the FIR does not term to conclude that the amounts were paid by the complainant and her husband to Kalimulla to bribe the IT officers. If really they wanted to get rid of income tax cases by paying bribe, they would have paid lumpsum at once but not in installments and that too along with fine of Rs.24,000/-. Hence, the amounts were paid by them for genuine purpose for clearing the income tax dues. Hence, the transaction cannot be said to be an illegal one. If Kalimulla and others cheated them, that is a different aspect. So, the first argument does not hold water and the cited decisions will be of no avail to the petitioner.

10) The second argument of the petitioner is relating to doctrine of stifling of criminal prosecution which is held to be against public policy by the Apex Court.

11) As per Section 23 of Contract Act, the consideration or object of an agreement can be termed as unlawful, if the Court regards is as immoral or opposed to public policy. On the matrix of public policy, the doctrine of stifling of criminal prosecution was originated.

- 12) Referring to this doctrine, the High Court of Madras in ***Maria Packiam vs. Valliammal and another***⁴ extracted T.S. Venkatesa Iyer's law of Contracts, Vol. 2 Fourth Edition, wherein at Page 145, the author observed as follows:

"An agreement for stifling a prosecution is illegal, inasmuch as it impedes the administration of justice. "You shall not make a trade of felony." "You cannot make a profit out of a crime". These are the principles of law. Where a person has committed an offence, the law must take its course and if he be guilty, he must receive sentence; and so, if a person, in consideration of receiving money, promises to shield an offender, or not to prosecute him such an agreement is illegal".

The Apex Court also expostulated this doctrine.

- 13) In ***V.Narasimha Raju***'s case (3 supra) the Apex Court observed thus:

*"**Para-8:** Section 23 provides that every agreement of which the object or consideration is unlawful is void, and it lays down that the consideration of an agreement is lawful unless, inter alia, it is opposed to public policy. Agreement made by parties for stifling prosecution are not enforced by courts on the ground that the consideration for such agreements is opposed to public policy. If a person sets the machinery of the Criminal Law into action on the allegation that the opponent has committed a non-compoundable offence and by the use of this coercive criminal process he compels the opponent to enter into an agreement, that agreement would be treated as invalid for the reason that its consideration is opposed to public policy."*

- 14) In ***Poulo and others vs. Catholic Union Bank Ltd. and others***⁵ the Apex Court has delineated the above doctrine and also its exceptions.

*"**Para-6.** Before dealing with the merits of the controversy between the parties it is necessary to state briefly the true legal position in regard to the agreements which are held to be unenforceable on the*

⁴ MANU/TN/0271/1989

⁵ 1964 (7) SCR 745 = AIR 1965 SC 166

ground that the consideration for which they are made is opposed to public policy. It is well-settled that agreements which are made for stifling prosecution are opposed to public policy and as such, they cannot be enforced. The basis for this position is that the consideration which supports such agreements is itself opposed to public policy. In India, this doctrine is not applicable to compoundable offences, nor to offences which are compoundable with the leave of the court where the agreement in respect of such offences is entered into by the parties with the leave of the court. With regard to non--compoundable offences, however, the position is clear that no court of law can allow a private party to take the administration of law in its own hands and settle the question as to whether a particular offence has been committed or not, for itself. It is obvious that if Such a course is allowed to be adopted and agreements made between the parties based solely on the consideration of stifling criminal prosecutions are sustained, the basic purpose of criminal law would be defeated; such agreements may enable the guilty persons to escape punishment and in some others they may conceivably impose an unconscionable burden on an innocent party under the coercive process of a threat of the criminal prosecution. In substance, where an agreement of this kind is made it really means that the complainant chooses to decide the fate of the complaint which he has filed in a criminal court and that is clearly opposed to public policy.

Para-7 *In dealing with such agreements, it is, however, necessary to bear in mind the distinction between the “motive” which may operate in the mind of the complainant and the accused and which may indirectly responsible for the agreement and the “consideration” for such an agreement. It is only when the agreement is supported by the prohibited consideration that it falls within the mischief of the principle that agreements which intend to stifle criminal prosecutions are invalid....”*

15) In *Union Carbide Corporation and others. vs. Union of India*⁶ also the Apex Court happened to deal with the exceptions to this doctrine. The Apex Court has observed that with regard to non-compoundable offence, no Court of law can allow a private party (Emphasis supplied) to take the administration of law in its own hands and settle the question as to whether a particular offence has been committed or not for itself. It further observed that since in the case on hand the Union of India was the *dominus litus* which consented to quash the proceedings, the doctrine has no application. In the very same judgment the Apex Court dealt with another exception to the doctrine which is thus:

***“Para-61.** More importantly, the distinction between the "motive" for entering into agreement and the "consideration" for the agreement must be kept clearly distinguished. Where dropping of the criminal proceedings is a motive for entering into the agreement- and not its consideration-the doctrine of stifling of prosecution is not attracted. Where there is also a pre-existing civil liability, the dropping of criminal proceedings need not necessarily be a consideration for the agreement to satisfy that liability. In Hamaraih Sahu and Ors. v. Jogi Sahu and Ors. MANU/BH/0042/1921 : AIR 1922 Pat 502, this distinction is pointed out:*

The distinction between the motive for coming to an agreement and the actual consideration for the agreement must be kept carefully in view and this care must be particularly exercised in a case where there is a civil liability already existing, which is discharged or remitted by the Agreement.

x x x xx

***Para-62.** On a consideration of the matter, we hold that the doctrine of stifling of prosecution is not attracted in the present case. In reaching this conclusion we do not put out of consideration that it is*

⁶ AIR 1992 SC 248

inconceivable that Union of India would, under the threat of a prosecution, coerce UCC to pay 470 million US dollars or any part thereof as consideration for stifling of the prosecution. In the context of the Union of India the plea lacks as much in reality as in a sense of proportion.”

16) The above precedential jurimetrics can be summed up thus:

- 1) Agreements which are made for stifling prosecution are opposed to public policy under Section 23 of Contract Act and as such, they cannot be enforced.
- 2) The doctrine is not applicable to compoundable offences and not to the offences compoundable with the leave of the Court where the agreement was entered into by the parties with the leave of the Court.
- 3) In respect of non-compoundable offences, no Court of law can allow a private party to take the administration of law in its own hands and settle the question as to whether a particular offence has been committed or not for itself.
- 4) The exception to the doctrine is that if the dropping of criminal prosecution in respect of a non-compoundable offence is the motive for entering into compromise agreement but the same has not been made as a consideration, the doctrine has no application.
- 5) If there is a pre-existing civil liability, in those cases dropping of criminal prosecution need not necessarily be a consideration but it may be a motive for entering into agreement.

17) In the light of above principles, the case on hand has to be tested.

Cr.No.423 of 2015 was registered on the complaint given by Shavakath Hyder

Qureshi against Kalimulla and three others for the offences under Sections 419, 420, 471 IPC. The offences under Sections 419 and 420 IPC are compoundable with the permission of the Court under Section 320(2) Cr.P.C., whereas the offence under Section 471 is non-compoundable.

18) Be that it may, the contention of petitioner is that the cheques were issued by him for the consideration of dropping of prosecution by the complainant which amounts to stifling of prosecution and hence the agreement between the parties is opposed to public policy and therefore, C.C.No.413 of 2017 is liable to be quashed.

19) On the other hand, the contention of complainant is that she agreed to drop the proceedings not for sole purpose of receiving money in the form of cheques, but predominantly due to intimate relationship between the parties and therefore the motive for the agreement between the parties is dropping the proceedings but not the consideration.

20) Needless to emphasize that if the criminal prosecution was intended to be dropped for consideration of money, then certainly the transaction would be hit by Section 23 of Contract Act. However, on the other hand, if the complainant wanted to drop the proceedings to preserve the relationship between the parties and later the accused, taking upon himself the responsibility of paying the money which his father has illegally obtained from the complainant and her husband and issued cheques, such transaction will not be hit by the doctrine of stifling of prosecution. Therefore, what is

true nature of the transaction between the parties can be better appreciated only after a full-fledged trial takes place.

21) In that view, this Criminal Petition is dismissed giving liberty to the petitioner/accused to take a plea basing on doctrine of stifling of prosecution before the trial Court, in which case the trial Court considering the evidence on record shall pass the judgment on merits.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

Date: 06.09.2018
Murthy



U. DURGA PRASAD RAO, J