

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 18.11.2019

+ **CRL.A. 1049/2019 and CRL. M.A. Nos. 35936/2019,
37170/2019, 37171/2019, 37172/2019, 37248/2019
& 37249/2019**

ASHISH BHALLA

..... Appellant

versus

STATE & ANR.

..... Respondent

Advocates who appeared in this case:

For the Petitioner	: Mr Sudhir Nandrajog, Senior Advocate : with Mr Shaunak Kashyap, Advocate.
For the Respondent	: Mr Sanjay Lao, ASC with Mr Karanjeet : Sharma, Advocate with DCP Versha : Sharma, ACP K. Ramesh, SI Harpal : Madan and SI Deepak. : Mr Sanjay Abbot, Mr Ankit Agarwal and : Mr Abhimanyu Yadav, Advocates for R-2 : (Spirewood). : Mr Vivek Sibal and Mr Vikrant Pachnanda, : Advocates for complainant. : Mr Satya Prakash Yadav, Advocate for : Vishwendra.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal under Section 341 of the Code of Criminal Procedure, 1973 (CrPC), impugning the order dated 28.08.2019 (hereafter 'the impugned order') passed by the Ld. ASJ, South East District, Saket, whereby the Court had allowed an application under Section 340 of the CrPC and had directed that a

complaint in writing be made against the appellant in the Court of Ld. CMM, South-East District, Saket Courts, New Delhi. The impugned order is premised on the court's *prima facie* view, that the appellant's statement of "neither being a part of the investors group nor the promoters group" appears to be wrong.

2. The Court had formed the said *prima facie* view on perusal of the summary of the appellant's profile (along with the summary of the profile of thirteen other jury members) in a book/pamphlet published by Future Institute (a company allegedly owned by the appellant) and the reply/affidavit of EOW, Delhi Police filed in the matter of BA No. 1004/2019 before this Court.

3. The appellant has challenged the order dated 28.08.2019 on the grounds that the Trial Court had erred in placing reliance on a book (pertaining to architecture published by a research organization), since the same was not a statement made by the appellant on oath or any statement that had any bearing on the alleged offence. The appellant has further contended that the reliance placed on interim police reports is misplaced, as the same does not present any incontrovertible evidence and initiation of proceedings on the basis of the same is erroneous. The appellant also states that the impugned order was passed without issuing a notice to the appellant, which is violation of the principles of natural justice.

4. The facts that have given rise to the said controversy are briefly narrated below:-

4.1 The appellant states that he was associated with A.N. Buildwell Private Limited (hereafter 'ANB') – a company engaged in developing real estate in India – in professional and consulting capacity. In 2013, the appellant states that he discovered large scale siphoning by the promoters of ANB and he chose to disassociate himself with the said company. On 24.03.2014, the appellant filed a Suit being CS(OS) 857/2014, to expose the corrupt activities of ANB management and its shareholders.

4.2 Thereafter, various FIRs were filed against ANB by various complainants, investors who had alleged that ANB had launched two projects, commercial and residential, namely 'Spire Edge' and 'Spire Woods' for residential and commercial units, with lucrative offers, assured returns and buy back schemes. The projects were slated to be completed in 2011/2013. Despite having received several hundreds of crores of rupees from various customers, the projects were not completed. On further action being taken, it was discovered that the land on which the said project was to be constructed, was already mortgaged with the banks and there was no prior approval of HSIIDC. The said relevant facts were concealed from the investors and inasmuch FIRs were filed alleging criminal breach of trust, misappropriation of money, etc.

4.3 On 04.03.2016, FIR No. 114/16 under Sections 420/406/409/34/120 of the Indian Penal Code, 1860 (IPC) were registered at P.S. Sarita Vihar in connection with the project Spire Woods on the basis of the complaint made by Shikha Sadh. On

05.03.2016, FIR No. 116/16, under Sections 406/420/34 of the IPC was registered at P.S. Sarita Vihar on the basis of the complaint made by Renuka Kalkarni. On 23.05.2016, FIR No. 0064/2016 was registered with EOW under Sections 406/409/420/120B of the IPC in respect of the project Spire Edge on the basis of the complaint made by Shalini Sethi.

4.4 Apprehending arrest, the appellant approached the Court and was granted interim protection from arrest with reference to the abovementioned FIRs till 09.10.2017, by the ASJ, Saket District Courts vide order dated 27.09.2017. Thereafter, the appellant approached the Sessions Court for an anticipatory bail, which was rejected by an order dated 11.10.2017. The appellant filed an application seeking anticipatory bail before this Court, which was dismissed as withdrawn on 05.02.2018.

4.5 Thereafter, the appellant filed a bail application before the Learned MM under Section 437 of the CrPC. On 10.02.2018, the Trial Court had taken up the bail matter of the appellant. In the said proceedings, it was stated by the counsel of the appellant that the appellant was not a shareholder or a promoter of the accused company. He was never a fulltime director of the company and was only an alternative director from 30.01.2008 to 30.03.2009 and he had disassociated himself from the company (ANB). It was contended that the same was reflected in the audited balance sheet of the company for the year 2013-14, which was finalised about three years prior to the registration of the FIRs. The counsel for the appellant had further

submitted that the construction of both the projects were continuing till the year 2014, that is, one year after the appellant had disassociated himself. On consideration of the abovementioned submissions, the Trial Court had granted bail to the appellant.

4.6 Respondent no.1 challenged the said order dated 10.02.2018 by filing an application under Section 439(2) of Cr.P.C. Respondent no. 2 also filed an application under Section 439(2) Cr.P.C before this court, which was withdrawn. Thereafter, respondent no. 2 filed an application under Section 439(2) Cr.P.C before the Learned ASJ, being BA No. 1936/18 captioned *Vishvendra Singh vs State and Anr*, seeking cancellation of the bail granted to the appellant by the order dated 10.02.2018.

4.7 The Learned ASJ cancelled the bail granted on 10.02.2018 vide an order dated 16.04.2019. It is stated that the appellant has challenged the said order and the said proceedings are pending before this court.

4.8 Thereafter, respondent no. 2 filed an application under Section 340 of the CrPC, being Miscellaneous Application No. 91/19 captioned *Vishvendra Singh vs State and Another*. Respondent no. 2 alleged that the appellant had filed false affidavits in proceedings relating to FIR No. 114/2016, 64/2016, 116/2016 investigated by the EOW affirming that he had never exercised control over the affairs of ANB and was neither a part of the promoter group nor the investor group.

4.9 The Ld ASJ passed an order dated 28.08.2019, which is impugned in this petition.

Reasons and Conclusion

5. At the outset, it will be relevant to refer to the impugned order dated 28.08.2019 directing that a complaint be made against the appellant for making a false statement in the Court. The learned ASJ was of the *prima facie* view that the appellant had committed the offence under Section 195 (1)(b)(i) of the Cr.P.C inasmuch as he made a false statement. This was premised on the *prima facie* view that the statement made by the appellant, that he was not a part of the 'Promoters Group' and 'Investor Group', was wrong. Concededly, the impugned order was passed in view of the statements made by the appellant in a reply to the application under Section 439(2) of the Cr.P.C.

6. It is, thus, essential to examine the said relevant statement made in the said reply. These averments are contained in paragraph 21 of the said reply. It is, thus, relevant to examine the said averment and the context in which it was made. It is the appellant's case that he was not a promoter of ANB. As noticed above, ANB was an operational company, *inter alia*, engaged in developing real estate projects. ANB is a company incorporated under the Companies Act, 1956.

7. Paragraph 20, 21 and 22 of the said reply are relevant and are reproduced below:-

“20. The Respondent has never had any ownership role in ANB and was not a shareholder or owner of ANB, directly or indirectly. He has never been a full time Director and any ownership or control attributed to him is contrary to admitted company documents and a mala fide attempt by the Promoters to set him up as a scapegoat.

21. It is pertinent to note that in the application factual position is incorrectly stated and there is an attempt to attribute to the Respondent an ownership role that he never had. To understand the role of the Respondent it is important to bear in mind that he was never part of either the Promoter Group or Investor Group that held 100 per cent of ANB between them. The Investor Group being a Singapore based Fund lacked on-ground control and required an entity to monitor the Project to ensure that their investment was safe and the Promoters were managing ANB efficiently. Consequently, the aforementioned ANB SNA dated 13.12.2007 envisages a third entity being the "Asset Manager" which is referred to in clause 8 as: "*The Investor shall have the right to appoint an asset manager whose rights **shall be limited to monitoring the Project** Including inspecting the books and records of the Company*".

22. This was part of various 'checks and balances' put in place to enable the Investor group to effectively monitor the Promoter group. The Asset Manager was an entity incorporated in India. The accused was an employee of this Asset Manager. {*See Balance Sheet of ANB for 2013-14 ownership or control attributed to him is contrary to admitted reflecting the same*}. As part of his duties as an employee of the Asset manager, accused was asked to perform various functions to safeguard the interests of the investor Group, this included acting as Alternate Director from 30.01.2008 – 30.03.2009 and as authorized signatory for cheques but this was under a dual signatory mechanism. No cheque could clear

without the Signature of a Promoter and merely Mr. Bhalla's signature could not be used to withdraw any money. Moreover, EOW has not found a single instance of siphoning wherein the accused has signed the cheque and there in not a single rupee traced to his personal account.”

8. It is clear from the above that it is the appellant's stand that he is not a shareholder of ANB. It is in this context that the appellant had stated that he is not a part of the 'Promoter Group' or 'Investor Group' that held 100% shares of ANB between them. The reference to not belonging to a 'Promoter Group' or an 'Investor Group' is in the context of the groups of shareholders that held shares in ANB.

9. As noticed above, ANB is a private company. It is the appellant's statement that he is not a shareholder of that company. Although, it is alleged that the appellant was effectively controlling ANB and in that sense it was responsible for its affairs, the said allegations are a subject matter of investigation and at this stage, no final view has been taken. The scope of examination in the present appeal is limited to examining whether the statement made by the appellant, that he was not a part of the 'Promoter Group' or 'Investor Group' that held 100% shares of ANB between them, is patently false. There is no material which has been brought to the notice of this Court to establish that the appellant had subscribed to or was allotted any shares in ANB.

10. The learned Trial Court had referred to the description of the appellant in the publication captioned '201 Act'. The said publication

contains a list of jury members, which includes the appellant. A brief description of jury members had been published. The appellant has been described as a “*Co-founder and Managing Director of a Millennium Spire, an India focused real estate and infrastructure investment fund*”. Respondent no.2 had earnestly contended that the appellant cannot now distance himself from his description since the appellant/his wife was also the publisher of the said publication.

11. It is not necessary to examine whether the appellant has any stake in the entity that had published the said publication. Assuming that the appellant had held himself to be a Co-founder and Managing Director of Millennium Spire, it does not necessarily lead to the conclusion that he was a part of the ‘Promoter Group’ or the ‘Investor Group’. The appellant has readily conceded that his description in the said publication is not correct. The appellant may have embellished his credentials but that does not amount to perjury. More importantly, it does not establish that the statement in his reply to the application under Section 439 of the Cr.P.C. is false. The question whether the appellant is ascribed or was allotted any share in ANB is a matter of fact and it is not relevant to consider his representation to his designation for considering the same.

12. Concededly, there appears to be no dispute that the share capital of ANB is subscribed/held by its two groups of shareholders, namely the Promoter and the Investor. The Promoters of ANB include Mr Sunil Gandhi and other company entities controlled by him and his family. It does not appear that there is any allegation that the appellant

is a part of that group. The controversy arises in the context of the shares held by Millennium Spire Limited (which is a limited liability company incorporated under the Laws of Singapore). This company is also referred to as a fund, apparently, for the reason that it had collected funds by subscription to its shares from investors to participate in real estate projects. The funds so collected by Millennium Spire Limited were apparently invested with ANB.

13. Respondent no.2 had relied heavily upon the Memorandum of Information issued by Millennium Spire Limited. A copy of the same was placed on record. A plain reading of the said Memorandum indicates that it was issued in the context of an offer made by Millennium Spire Limited for subscription to its participating shares. Millennium Spire Limited had offered its participating shares to various investors for subscription by various investors, at an offer price of US\$ 1 for each participating share. The shares so offered were non-voting shares but entitled its holder to participation in profits and dividends as well as capital assets of liquidation. It was indicated that the funds raised by such subscription would be invested in infrastructure and real estate development projects in India. Such funds would be managed by an event manager, pursuant to a management agreement in conjunction with the investment advisor and the investment committee.

14. The information brochure memorandum also indicated the utilization of the funds so raised by subscription of the participating shares. The relevant extract in this regard is set out below:-

“Millennium Spire Limited, was incorporated in Singapore on 14 February 2006 as a public limited company for the purpose of investing in real estate and infrastructure development projects in India through subsidiaries and investee companies. The objective is to enhance the value of the Company's holdings by procuring, developing in full or in part properties identified for investment, capitalising on price trends and demand and supply metrics, or a combination thereof.

Funds raised from this offer will be used, to invest in infrastructure and real estate development projects in India. These investments shall be managed by the Fund Manager pursuant to a management agreement in conjunction with the investment Advisor and the investment Committee.”

15. The information brochure indicated that the Funds Manager was the company – Millennium Spire Estate Management Pvt. Limited or such other person as may be appointed as Fund Manager. The said company – Millennium Spire India Management Private Limited – would also be the investment advisor. The appellant was also a part of the investment committee along with his brother Abhijeet Bhalla, Michael Huttman and Joseph Strubel. The Information Memorandum also disclosed the constitution of the Board of Directors of the Millennium Spire Limited as Michael B. Collins, James Keyes, M. Rajaram and Deborah Sebire. Although, it was contended by learned counsel for respondent no.2 that the said information brochure indicates that the appellant is a promoter of ANB, the same is not persuasive. The information memorandum indicates to the contrary. It indicates that Millennium Spire Limited is a separate company run by

and is controlled by a Board of Directors. The voting rights are limited. The Millennium Spire has collected funds by issuing participating shares to various investors and the funds so collected are to be managed by an estate management company, namely, Millennium Spire India Management Private Limited. There is nothing in the Memorandum Information which indicates that Millennium Spire India Management Private Limited has any equity participation in Millennium Spire or in any of the entities, in which funds collected by Millennium Spire are to be invested.

16. Having stated the above, at this stage, it is not necessary for this Court to examine the role of the appellant in Millennium Spire Limited. Suffice it to state that no material has been brought to the notice of this Court which would indicate that the appellant is a shareholder of ANB. Thus, the appellant's statement that he is not a part of the 'Investor Group' or 'Promoter Group', is clearly in the context of groups that hold shares in ANB. Since there is no material that he was either subscribed or allotted any shares in ANB, the assumption that his statement that he was not a part of the Promoter Group or Investor Group is patently false, cannot be drawn at this stage.

17. Respondent no.2 elaborated submissions to contend that Millennium Spire Private Limited is also controlled entirely by the appellant and his family. He had contended that 45% shareholding of Millennium Spire Private Limited was held by Reed Asia Management PTE Ltd (RAM). It is stated that the appellant held 32.2% shares in the

said company (RAM) and so did the appellant's brother. This contention is also unsubstantial. The fact that the appellant has a minority shareholding in Millennium Spire Private Limited Company does not, in any manner, establish the appellant to be a shareholder of ANB.

18. The learned counsel for respondent no.2 also contended that even the role of the appellant in Millennium Spire Private Limited and as a part of the Investment Committee would establish that the appellant exercised some degree of control over the affairs of ANB. The extent of influence or control exercised by the appellant over affairs of ANB is a contentious issue. It is expected that the investigating agencies shall investigate this aspect, while as a part of their investigations, to ascertain whether the appellant has committed any offence as alleged in connection with any affairs of ANB. However, at this stage, the initiation of proceedings under Section 340 Cr.P.C. is unwarranted.

19. Reading of the impugned order also indicates that apart from relying on the publication '201 Act', the Trial Court had also relied upon the reply filed by EOW Delhi in a matter (B.No.1004/2019) before this Court. Apparently, EOW has reported the role of the appellant with respect to managing affairs of ANB. This Court is of the view that at this stage, relying upon status report/replies filed by investigating agencies to initiate proceedings under Section 340 Cr.P.C. may not be apposite. This is because the allegations made by the investigating agencies would remain to be tested in the trial.

20. The Supreme Court in a recent decision in ***Aarish Asgar Qureshi v. Fareed Ahmed Qureshi and Ors.***: ***Crl. Appeal No. 387/2019, decided on 26.02.2019***, had referred to the earlier decisions in ***Chajoo Ram v. Radhey Shyam***: (1971) 1 SCC 774; ***Chandrapal Singh and Ors. V. Maharaj Singh and Anr.***: (1982) 1 SCC 466; ***R.S. Sujatha v. State of Karnataka and Ors.***: (2011) 5 SCC 689 and had authoritatively observed as under:-

“10. It is clear therefore from a reading of these judgments that there should be something deliberate – a statement should be made deliberately and consciously which is found to be false as a result of comparing it with unimpeachable evidence, documentary or otherwise. In the facts of the present case, it is clear that the statement made in the anticipatory bail application cannot be tested against unimpeachable evidence as evidence has not yet been led. Moreover, the report dated 12.11.2011 being a report, which is in the nature of a preliminary investigation report by the investigating officer filed only two days after the F.I.R. is lodged, can in no circumstances be regarded as unimpeachable evidence contrary to the statements that have been made in the anticipatory bail application....”

21. In view of the above, the impugned order cannot be sustained. There was no material before the Trial Court to affirm the view that the appellant’s statement, that he was not a part of the ‘Promoters Group’ and ‘Investor Group’, was patently false. In view of the above, the appeal is liable to be allowed.

22. Respondent no.2 has filed an application under Section 340 of the Cr.P.C. (Crl. M.A. 37170/2019) in the above captioned appeal. It is alleged that certain statements made by the appellant in the present appeal are false.

23. It is contended that the appellant's statement, that Future Institute is a non-private organization registered under Section 8 of the Companies Act, 2013 and the appellant is not the owner of Future Institute, is false. This allegation is premised on (a) the appellant is a director of Future Institute; and (b) 99.99% equity of Future Institute is held by Viridian Foundation, which in turn is held by Viridian Holdings Private Limited. It is stated that the appellant holds 99% of Viridian Holdings Private Limited. Assuming that the appellant holds shares of the holding company, the same does not necessarily make him an owner.

24. It is further asserted by respondent no.2 that the appellant's statement that he has never held any shares in ANB, is false. This Court finds no material to accept the said statement as incorrect. In view of the above, the appeal is allowed. The order dated 28.08.2019 is set aside. The application Crl. M.A. 37170/2019 is dismissed.

25. All other pending applications are also disposed of.

VIBHU BAKHRU, J

NOVEMBER 18, 2019

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