



2. The crux of the allegation in the private complaint is that the accused, who are father and son, have induced the de facto complainant for investing the amount in Real Estate as a result of which the partnership came into existence on 19.11.2010. The first accused was authorized to act on behalf of the firm called "NHD Homes". They informed the de facto complainant that they have been funding Adhursh and Aashish Surana and they are reliable people. Accordingly, a Power of Attorney was executed in favour of the accused to deal with the property in various survey numbers and also executed Power of Attorney in favour of M/s.Amarprakash Developers Private Limited. However, taking advantage of the Power of Attorney, despite the agreement that the funds collected would come to the firm, the first accused realized the funds for his personal use with the help of A2, who was the Director of Amarprakash Developers Private Limited. Hence, it is alleged that various acts committed by the accused would constitute offences under Sections 120(B), 406, 420 r/w 34 of IPC

3. The present petition has been filed by the accused to quash the proceedings mainly on the ground that it is only a dispute among the partners in respect of which an arbitration proceeding has also been initiated earlier to decide the right of the first accused to continue as a managing partner and an award has also been passed in his favour. It is submitted by the learned counsel for petitioners that there are no materials available on record to proceed for the offences under Sections 406 and 420 IPC. During arguments, it is also pointed out that learned Magistrate has took cognizance of the offences without following the procedure which are mandatory in nature and just received the affidavit and took cognizance, which is impermissible.

4. The learned counsel appearing for the respondent brought to the notice of the Court the various documents and the conduct of the parties in misusing the funds in order to deceive the de facto complainant and submitted that merely because there was an arbitration proceeding that will not absolve the penal action against these persons for committing criminal offences and usurping the funds of the firm and opposed to quash the proceedings.

5. Before going into the merits of the case and whether the offences as alleged in the complaint have been made out or not, this Court is of the view that the issue as to whether the cognizance taken by the Magistrate was proper or not has to be addressed first. Therefore, this Court is not entering upon the merits relating to the dispute, but address the main legal issue first.



6. The private complaint was filed alleging certain allegations against the accused for committing aforesaid offences. It is relevant to note that private complaint is made in writing only with a view to take action under the code against some persons who have committed an offence. The learned Magistrate before taking cognizance has to conduct an Inquiry, after satisfying the relevant materials and applying his mind has to take cognizance. Section 2(g) of the Cr.P.C deals with inquiry. The word "Inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court. Sub-section (i) of Section 2 defines the term "Judicial proceeding". Judicial Proceeding includes any proceeding in the course of which evidence is or may be legally taken on oath. Section 200 of the Code deals with taking cognizance by the learned Magistrate. The language employed in Section 200 of the Code makes it very clear that the Magistrate taking cognizance of an offence on the basis of the complaint shall examine the complainant and witnesses present, if any, on oath and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate. The only exception provided under Section 200 Cr.P.C is not to examine the complainant if the complaint is made by a public servant acting or purporting to act in discharging of duty or a Court which made the complaint or Magistrate makes over the case for inquiry, or trial to another Magistrate under Section 192 Cr.P.C.

7. Only under the above two exceptions to take cognizance of an offence on the complaint, the complainant and the witnesses present, if any, shall be examined on oath by the learned Magistrate whereas, in this case the learned Magistrate has not followed the mandatory provisions contained in Section 200 of the Code to take cognizance of the offences. It is relevant to note that Section 200 of the Code makes it mandatory to examine the complainant on oath. After such examination, the same shall be reduced in writing and the same shall be signed by the complainant and the witnesses. Only after completing the above formalities as required under law, the learned Magistrate can go through the materials placed before him for the purpose of applying his mind to find out whether the offences are made out or any materials are there to proceed further, whereas in this case the learned Magistrate has not examined either the complainant or any other witnesses on oath as required under Section 200 of the Code. On the contrary he has just relied upon the proof affidavit.

8. It is relevant to note that the proof affidavit is not defined as an evidence in the Evidence Act, 1872. Only wherever the proof affidavit is considered as an evidence by a special



statute like Negotiable Instrument Act, 1881, the proof affidavit can be taken as an evidence. Section 145 of the Negotiable Instrument Act, 1881, which was introduced later makes the proof affidavit as an evidence. Section 145 of the Negotiable Instrument Act, 1881 makes it very clear that the evidence on affidavit is permissible only under the proceedings initiated under Negotiable Instrument Act for the offence under Section 138 of the Negotiable Instruments Act. Therefore, other than that, the Code does not permit the proof affidavit as an evidence to take cognizance of the offences. Similar to Negotiable Instrument Act, there is an amendment in the CPC to treat the chief proof affidavit as an evidence. Therefore, to make the proof affidavit as an evidence, there must be a special provision under the Statute. Without making the proof affidavit as an evidence under the Statute, such proof affidavit cannot be treated as an evidence, whereas, Section 200 of the Code makes it very clear that the complainant shall be examined on oath. Therefore, mere proof affidavit, which is reproduction of the complaint, is not at all sufficient for the Court to apply its mind. That was the intention of the legislation which made the examination of the complainant on oath mandatory.

9. To find out whether any sworn statement has been recorded in this regard, this Court also called for the report from the trial Court. The report is also received which indicates that no statements from the complainant or witnesses examined or recorded on oath before taking cognizance whereas, only on the basis of the proof affidavit the cognizance has been taken.

10. In such view of the matter, this Court is of the view that the procedure adopted by the learned Magistrate in taking cognizance without examining the complainant upon oath or any other witnesses produced by the complainant taking cognizance is not according to law.

11. Accordingly, the cognizance taken by the learned Magistrate alone is set aside and the matter is remitted back to the learned Magistrate to follow the procedure under Section 200 of Cr.P.C. and decide the issue on its own merits. The complainant or the witnesses, if any, are to be examined on oath. It is also relevant to note that no new materials shall be presented other than the materials already produced in respect of the original complaint.

12. For the aforesaid reasons, the cognizance taken in C.C.No.8721 of 2017 by the learned XIVth Metropolitan Magistrate, Egmore, Chennai, is unsustainable and accordingly, the same is set aside. The matter is remitted to the learned Magistrate, who shall issue notice to the de facto complainant



for the purpose of his examination upon oath and thereafter, the learned Magistrate shall take a decision on merits.

13. With the above observations, this Criminal Original Petition is disposed of. Consequently, the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS-IX)

//True Copy//

Sub Assistant Registrar

gpa/gba

To

1. The XIVth Metropolitan Magistrate,
Egmore, Chennai.
2. -do- through The Chief Metropolitan Magistrate,
Egmore, Chennai.
3. The Public Prosecutor,
Madras High Court, Chennai.

+1cc to M/s.N.S.Tanvi, Advocate, S.R.No.7075

Crl.O.P.No.27018 of 2017 &
Crl.M.P.Nos.15503 & 15504 of 2017

BR(CO)
RLP(14/03/2022)