

In the High Court for the States of Punjab and Haryana
at Chandigarh.

CRM-M-12913-2022 (O&M)

Date of Decision: 31.05.2022

RCC Infra Ventures Ltd. & others.

.....Petitioners

Versus

State of Haryana & others.

.....Respondents

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present: Mr. Preetinder Singh Ahluwalia, Advocate and
Mr. Vipul Joshi, Advocate for the petitioners.

Mr. Rajiv Sidhu, Deputy Advocate General, Haryana.

Mr. Chetan Mittal, Senior Advocate with
Mr. Vivek Singla and Mr. Mayank Aggarwal Advocates
for the complainant.

GURVINDER SINGH GILL, J.

1. The petitioners assail order dated 07.02.2022 (Annexure P-18) vide which learned JMIC, Gurugram, has ordered for registration of FIR against the petitioners, while exercising powers under Section 156(3) of Cr.P.C.
2. Though, the allegations as levelled in the complaint (Annexure P-15), annexed with application under Section 156(3) Cr.P.C. filed by complainant may not really be relevant for the purpose of adjudication on the legal issues raised before this Court but the same are being briefly stated hereinunder :

- (i) that Respondent No. 1/complainant M/s. DMI Finance Private Limited (hereinafter referred to as DMI), is a “NBFC” (Non-Banking Financial

Company) and is into business of providing loans and finances to companies and entities;

- (ii) that the accused/petitioners No. 3 to 6 are Directors and Promoters of petitioner No. 1 company i.e. M/s. RCC Infra Ventures Ltd.
- (iii) that on 06.06.2016, National Highways Authority of India (NHAI) entered into a contract with M/s Corsan Corviam Construction (hereinafter referred to as “Corsan”) for the purpose of ‘four-laning’ of a National Highway. Corsan further sub-contracted the work to an unincorporated joint venture between petitioner No. 1 and one RK Infracorp Pvt. Ltd (RKIPL);
- (iv) that the accused/petitioners No. 3 to 8 approached complainant DMI and made tall claims about their expertise and experience and represented that since they are undertaking various projects and have raised loans for undertaking such projects, therefore, to avoid any complications, they were proposing to the complainant that loan be provided to a LLP (Limited Liability Partnership) to be incorporated by the accused company with M/s RK Infracorp Pvt. Ltd.(RKIPL). Accordingly, in July 2018, LLP was incorporated and a loan of ₹100 crores was sanctioned, pursuant to loan agreement dated 09.08.2018;
- (v) that the accused had represented that initially only an amount of ₹ 31.75 crores would be required and that the balance will be required to be disbursed later after the project kickstarts. It is alleged that however, shortly after the said amount of ₹31.75 crores was disbursed in September 2018, the accused/petitioner No. 3 and 4 repeatedly started requesting for disbursement of more loan amount on one pretext or the other while representing that in case the said amount is not disbursed, the project would slow down or could even come to a halt and that the vendors are building up pressure for the same. It is alleged that the complainant in the interest of the project and to ensure that the same is not stalled and in which case the entire amount could

become irrecoverable, disbursed the entire agreed amount of ₹100 crores by 29.03.2019;

(vi) that the accused talked the complainant into disbursing another ₹20 crores under a Facility Agreement dated 28.6.2019, by citing similar reasons of apprehension of stalling of work;

(vii) however, there was little progress in work and by July 2019, the work came to a standstill;

(viii) that pursuant to several meetings and discussions between complainant and accused in local offices of complainant in Basai and Sector 9-A, Gurugram, a Re-Constitution Deed was executed, enabling DMI to change management of LLP; and

(ix) that on 7.11.2019, NHAI issued a Cure Notice to Corsan and LLP. Since complainant's interest was also involved, a MOU dated 5.1.2020 was executed. LLP was reconstituted by way of substitution of some partners. Upon re-constitution, it transpired that there was a liability towards vendors and salaries to the tune of about ₹52 crores, whereas an amount of ₹120 crores had already been advanced to accused. It is alleged that most of the amount had been misappropriated or siphoned off by accused. It was also found that infact the total bill that had been raised was for an amount of ₹18 crores only. It is alleged that it came to the notice of complainant that accused/petitioners no. 3 to 8 had prepared forged bills and payment receipts showing payment to vendors and had taken disbursement on said basis and misappropriated funds. It is alleged that accused have a unholy nexus with vendors and are intentionally not providing complete record and accounts and have rather been using vendors to create and constitute a mob so as to intimidate and disrupt work.

3. The above referred complaint (Annexure P-15) alongwith an application under Section 156(3) Cr.P.C., was filed by respondent no.2/complainant before learned CJM, Gurugram on 4.2.2022 as would be evident from the

‘Case Status Details’ (Annexure P-14). The application under Section 156(3) Cr.P.C. came to be accepted by learned JMIC, Gurugram, vide order dated 7.2.2022 (Annexure P-18), wherein a direction was issued to SHO concerned to lodge a FIR. It is the said order (Annexure P-18) which is being assailed before this Court.

4. The learned counsel representing the petitioners has assailed the impugned order mainly on the following grounds:

- (i) that it is a case where respondent No. 2/complainant has indulged in 'Forum Shopping' inasmuch as the FIR has been lodged pursuant to his 3rd attempt for getting the same lodged and the complainant had been filing applications/complaints under Section 156(3) Cr.P.C. repeatedly before different Courts;
- (ii) that the conduct of the complainant in proceeding with multiple applications at the same time before different Courts is a deprecable conduct and that the petition deserves to be accepted solely on this score itself;
- (iii) that there is no evidence whatsoever to show that Police Station Sector 9-A, Gurugram would have jurisdiction in the matter so as to justify registration of FIR in the said Police Station;
- (iv) that since the matter in dispute already stands referred to Arbitration, the present proceedings are in the nature of arm twisting and an abuse of process of law;
- (v) that provisions of Section 154(1) Cr.P.C. and Section 154(3) Cr.P.C. have not been complied with in letter and spirit and that Hon'ble Supreme Court has repeatedly held that compliance of said provisions is mandatory and that in the absence of such compliance, the impugned order cannot sustain.

5. The learned State counsel, assisted by learned Senior counsel for the complainant, has opposed the petition while submitting that there is no infirmity in the procedure adopted by the learned Magistrate while considering and accepting an application under Section 156 (3) Cr PC and that the order is perfectly legal. It has been submitted that the present case cannot be said to be a case of 'Forum Shopping' inasmuch as it was on account of mistaken belief that the applications came to be filed initially before a different Police Station. It has been submitted that the previous applications had been duly withdrawn before the subsequent application came to be filed or considered by the Magistrate concerned. It has also been submitted that pendency of Arbitration proceedings is no bar for continuation of criminal proceedings and that having regard to the nature and extent of colossal fraud, the accused do not deserve any relief from this Court.
6. I have considered rival submissions addressed before this Court. The submissions raised on behalf of the petitioner are being discussed individually hereinunder.
7. Submission no (i) :
 - (i) *that it is a case where respondent No. 2/complainant has indulged in 'Forum Shopping' inasmuch as the FIR has been lodged pursuant to his 3rd attempt for getting the same lodged and the complainant had been filing applications/complaints under Section 156(3) Cr.P.C. repeatedly before different Courts*

It is not in dispute that the impugned order dated 7.2.2022 (Annexure P-18) was passed on an application under Section 156(3) Cr.P.C., which was in

fact third such application filed on behalf of the complainant. Thus, in order to assess as to whether it can be said to be a case of 'Forum Shopping' or not, the circumstances under which the previous applications came to be filed and withdrawn need to be examined. The relevant dates and relevant particulars in respect of the said three applications are stated herein under:

FIRST COMPLAINT

22.12.2020: 1st complaint dated 22.12.2020 (Annexure P-2) under Section 156(3) Cr.P.C. filed by complainant before Area Magistrate, Gurugram, having jurisdiction over Police Station, DLF Phase I, Gurugram, seeking registration of FIR against petitioner and others for offences under Section 3 of HPIDFE Act 2013 and under Sections 406, 409, 420, 467, 468, 471, 477-A, 120-B of IPC.

05.01.2021: Upon request made by complainant, offence under Section 3 of HPIDFE Act 2013, was permitted to be dropped from complainant vide order dated 5.1.2021 (Annexure P-4).

08.01.2021: As per 'Action Taken Report' (ATR), filed by police, Police Station DLF Phase I, Gurugram, did not have jurisdiction in respect of the offences in question and that it was Police Station Sector 29, Gurugram which has jurisdiction.

Accordingly, the learned JMIC sent a reference to CJM for necessary action.

19.02.2021: The JMIC having jurisdiction over Police Station Sector 29, Gurugram, to whom the complaint had been transferred called for 'Action Taken Report' from Police Station DLF Sector 29, Gurugram for 9.3.2021.

25.03.2021: Complainant DMI moved application dated 25.03.2021 (Annexure A-3) on 25.03.2021 before JMIC seeking permission to withdraw the complaint i.e. complaint and application under Section 156(3) Cr.P.C..

01.02.2022: Matter was adjourned several times after 25.03.2021, sometimes on account of instructions issued due to outbreak of pandemic COVID-19. Ultimately, on 1.2.2022, when the matter was listed before LOK ADALAT, the complaint was dismissed as withdrawn with liberty to file afresh. (Annexure P-8)

SECOND COMPLAINT

01.04.2021: Second complaint filed by complainant in the Court of Sessions for offences under Section 3 of HPIDFE Act 2013 and under Sections 406, 409, 420, 467, 468, 471, 477-A, 120-B of IPC.

31.01.2022: After institution of complaint on 1.4.2021, the matter was adjourned for five times for appearance of accused and another about half a dozen times for arguments till 31.01.2022, when the complainant withdrew the complaint stating that there are some technical defects and that he needs to incorporate some additional facts.(Annexure P-13)

THIRD COMPLAINT

04.02.2022: Complainant filed third complaint for offences under Sections 406, 409, 420, 467, 468, 471, 477-A, 120-B IPC, before JMIC having jurisdiction over Police Station Sector 9-A, Gurugram. The learned JMIC, vide order dated 4.2.2022 adjourned the matter to 7.2.2022, while directing SHO to file Action taken report.(Annexure P-17)

07.02.2022: Though Action Taken Report had not been received, but the learned JMIC proceeded to order for registration of case vide impugned order 7.2.2022 (Annexure P-18)

8. The learned counsel for the petitioners, while referring to the above mentioned dates and sequence of events and in order to build up his argument that it is a case of 'Forum Shopping' has submitted as follows:

- (I) that the complainant filed complaint before Area Magistrate having jurisdiction over Police Station DLF, Phase-I, Gurugram in the first instance without there being anything to suggest as to how the said Magistrate would have jurisdiction to entertain the complaint and that apparently the same had been done with a hope to seek some favourable order;
- (II) that subsequently, when the aforesaid complaint stood transferred to Area Magistrate having jurisdiction over Police Station, Sector 29, Gurugram, pursuant to receipt of ATR, the complainant ultimately chose to withdraw the complaint;
- (III) that the complainant for some obvious reasons, filed the 2nd complaint before Court of Sessions but upon not being able to get any favourable order withdrew the said 2nd complaint from the Court of Sessions and thereafter chose to file the third complaint before another Magistrate;
- (IV) that the complainant has conveniently been adding and dropping offence under Section 3 of HPIDFE Act 2013, so as to conveniently choose the forum, as the moment offence under the HPIDFE Act 2013, an offence triable by a Designated Court only, is added, the complainant could approach the Court of Sessions,, which virtually amounts to 'Forum Shopping';
- (V) that when the 2nd complaint was filed on 1.4.2021, the 1st complaint was still pending and in fact both the criminal complaints remained pending for a good 10 months i.e. during the period 01.04.2021 upto 31.01.2022;
- (VI) that once the learned JMIC (exercising jurisdiction over Police Station DLF Phase-I) had referred the complaint to CJM for transfer to

an Area Magistrate having jurisdiction over Police Station DLF Sector 29 Gurugram, it remains unexplained as to why the complainant subsequently chose to file the 3rd complaint before Area Magistrate having jurisdiction over Police Station Sector 9-A, Gurugram and that the only possible explanation is that complainant was all into 'Forum Shopping', trying his best to get a favourable order and ultimately succeeded in getting one i.e. impugned order dated 7.2.2022 (Annexure P-18).

9. The learned counsel for petitioner, in support of his above noted contentions regarding 'Forum Shopping' places reliance upon a latest judgment of Hon'ble Supreme Court rendered in 2022(2) RCR (Criminal) 528 - Vijay Kumar Ghai and others vs State of West Bengal and others wherein it has been held as follows :-

- “7. Predominantly, the Indian Judiciary has time and again reiterated that forum shopping take several hues and shades but the concept of 'forum shopping' has not been rendered an exclusive definition in any Indian statute. Forum shopping as per Merriam Webster dictionary is:-

‘The practice of choosing the court in which to bring an action from among those courts that could properly exercise jurisdiction based on determination of which court is likely to provide the most favourable outcome.’

8. The Indian judiciary's observation and *obiter dicta* has aided in streamlining the concept of forum shopping in the Indian legal system. This Court has condemned the practice of forum shopping by litigants and termed it as an abuse of law and also deciphered different categories of forum shopping.
9. A two-Judge bench of this Court in Union of India & Ors. Vs. Cipla Ltd. & Anr., (2017) 5 SCC 262 has laid down factors which lead to the practice of forum shopping or choice of forum by the lis which are as follows:-

‘148. A classic example of forum shopping is when litigant approaches one Court for relief but does not get the desired relief and then approaches another Court for the same relief. This occurred in *Rajiv Bhatia Vs. Govt. of NCT of Delhi and Others*, (1999) 8 SCC 525. The respondent-mother of a young child had filed a petition for a writ of habeas corpus in the Rajasthan High Court and apparently did not get the required relief from that Court. She then filed a petition in the Delhi High Court also for a writ of habeas corpus and obtained the necessary relief. Notwithstanding this, this Court did not interfere with the order passed by the Delhi High Court for the reason that this Court ascertained the views of the child and found that she did not want to even talk to her adoptive parents and therefore the custody of the child granted by the Delhi High Court to the respondent- mother was not interfered with. The decision of this Court is on its own facts, even though it is a classic case of forum shopping.

149 to 154 : x x x

155. The decisions referred to clearly lay down the principle that the Court is required to adopt a functional test vis-a-vis the litigation and the litigant. What has to be seen is whether there is any functional similarity in the proceedings between one Court and another or whether there is some sort of subterfuge on the part of a litigant. It is this functional test that will determine whether a litigant is indulging in forum shopping or not.’

10. A perusal of *Vijay Kumar Ghai's* case (supra) shows that Hon'ble Supreme Court while referring to various judgments has elaborated as to what could constitute 'Forum Shopping'. At the same time, it has also referred to an earlier judgement rendered in *Union of India vs. Cipla (2017)5SCC 262* wherein it was held that some kind of 'functional test' has to be conducted before reaching at a conclusion as to whether a given case is a case of

'Functional Shopping' or not. It was highlighted that it should be seen as to whether any kind of deceit on part of such litigant to achieve his goals can be discerned. The relevant extracts from the said judgment i.e. Cipla's case (Supra) are reproduced herein under:

- “146. The learned Solicitor General submitted that Cipla was guilty of forum shopping inasmuch as it had filed petitions in the Bombay High Court, the Karnataka High Court and also an affidavit in the Delhi High Court as a member of the Bulk Drug Manufacturers Association and had eventually approached the Allahabad High Court for relief resulting in the impugned judgment and order dated 3rd March, 2004. It was submitted that since Cipla had approached several constitutional Courts for relief, the proceedings initiated in the Allahabad High Court clearly amount to forum shopping.
147. We are not at all in agreement with the learned Solicitor General. Forum shopping takes several hues and shades and Cipla's petitions do not fall under any category of forum shopping.
148. A classic example of forum shopping is when a litigant approaches one Court for relief but does not get the desired relief and then approaches another Court for the same relief. This occurred in *Rajiv Bhatia v. Govt. of NCT of Delhi and others.*, 1999(4) RCR (Civil) 149 : (1999) 8 SCC 525. The respondent-mother of a young child had filed a petition for a writ of habeas corpus in the Rajasthan High Court and apparently did not get the required relief from that Court. She then filed a petition in the Delhi High Court also for a writ of *habeas corpus* and obtained the necessary relief. Notwithstanding this, this Court did not interfere with the order passed by the Delhi High Court for the reason that this Court ascertained the views of the child and found that she did not want to even talk to her adoptive parents and therefore the custody of the child granted by the Delhi High Court to the respondent-mother was not interfered with. The decision of this Court is on its own facts, even though it is a classic case of forum shopping.
- 149 to 154 : x x x
155. The decisions referred to clearly lay down the principle that the **Court is required to adopt a functional test vis-a-vis the litigation and the**

litigant. What has to be seen is whether there any functional similarity in the proceedings between one Court and another or **whether there is some sort of subterfuge on the part of a litigant. It is this functional test that will determine whether a litigant is indulging in forum shopping or not.**”

(emphasis supplied)

11. Bearing in mind the ratio of above referred judgments, this Court proceeds to examine the contentions as regards 'Forum Shopping'. The 'functional test' would require scrutinising the sequence and circumstances in which the complaints came to be instituted, so as to determine as to whether there has been any kind of 'subterfuge' or deceit on part of the complainant.
12. The learned counsel for complainant/respondent no. 2 while replying to the 1st contention regarding jurisdiction, has not disputed the fact that the complaint dated 22.12.2020 (Annexure P-2) under Section 156(3) Cr.P.C. was indeed filed by complainant before Area Magistrate, Gurugram, having jurisdiction over Police Station, DLF Phase I, Gurugram. However, the reasons for the same have been explained by the learned counsel by referring to the following dates and facts:
 - 06.10.2020: Initially, it was petitioner no 3 Luv Jain, Director RCC Infraventure Ltd., who had submitted complaint no. 5181-Z dated 6.10.2020 to Assistant Commissioner of Police DLF, Gurugram against Managing Director, Directors of DMI and others alleging therein that it is DMI (complainant in present case), which had played fraud.
 - 09.10.2020: Assistant Commissioner of Police DLF, Gurugram, issued notice to DMI (complainant) and others to join inquiry on 16.10.2020 (Annexure A-1).

24.10.2020: Consequently, the complainant DMI, also submitted a complaint no.15275/CP/2020 to Commissioner of Police, Gurugram for registration of FIR against the petitioners and thereafter filed an application complaint under Section 156(3) Cr.P.C. before Area Magistrate having jurisdiction in matters pertaining to ACP, DLF, Gurugram.

13. The learned counsel for petitioners, while referring to para 3 of additional Affidavit dated 12.5.2022 filed on behalf of respondent no.2, has submitted that since the complainant had received notice from ACP, DLF, Gurugram, therefore, it was on the said premises that he also filed the complaint under Section 156(3) Cr.P.C. before the Area Magistrate having jurisdiction in matters pertaining to ACP, DLF, Gurugram.

14. Replying, to the 2nd contention raised on behalf of the petitioners, the learned counsel for respondent No. 2/complainant, while referring to para 5 of additional Affidavit dated 12.5.2022 filed on behalf of respondent no.2, has submitted that subsequently the complaint was withdrawn as it was found that some averments had been left to be pleaded. It has further been submitted that in any case the complaint was withdrawn before LOK ADALAT on 1.2.2022 (Annexure P-8) with permission to file afresh and as such the same cannot said to be a circumstance adverse to the complainant.

15. As regards the 3rd contention raised on behalf of the petitioners, respondent No. 2 in para 6 of additional Affidavit dated 12.05.2022 has clarified that it was on account of the fact that it is only the Court of Sessions at Gurugram which has jurisdiction to entertain proceedings for offence under Section 3 of HPIDME Act, 2013 that the complaint was

filed on 1.4.2021 before the Court of Sessions instead of the Court of JMIC. The learned counsel has further submitted that although a complaint/application filed under Section 156(3) Cr.P.C., for registration of FIR, is required to be dealt with urgently but the same remained pending for a good 10 months without any progress and therefore, as per advise of counsel, the same was withdrawn on 31.1.2022.

16. The learned counsel for respondent No. 2, in reply to the 4th contention as raised on behalf of of petitioners, has submitted that it is solely the prerogative of the complainant to choose as to for which offences he wishes to prosecute the accused and that in case he has an option of prosecuting accused for different offences which are triable by different forums, he is at liberty to choose any such offence/forum and by exercising such option, he cannot be said to be indulging in 'Forum Shopping'. It has further been submitted that in any case, the reasons for withdrawal of the complaints, have been duly explained in additional Affidavit dated 12.05.2022, filed on behalf of respondent No. 2, as has been referred to above.
17. In response to 5th contention made on behalf of the petitioners as noted above, the learned counsel for respondent No. 2 has admitted the fact that for a good 10 months i.e. during the period 01.04.2021 upto 31.01.2022, the first and second complaint remained pending together. He has however, submitted that infact before filing of the second complaint on 1.4.2021, an application for withdrawal of the first complainant had already been submitted on 25.03.2021, as would be evident from the stamp of the Court bearing date 25.3.2021 as affixed on the top of

application dated 25.03.2021 (Annexure A-3). The learned counsel has submitted that somehow the application remained pending for about ten months and it was in LOK ADALAT that the same was ultimately withdrawn on 1.2.2022. The learned counsel has, however, submitted that it was on account of inadvertent oversight that the factum of actual passing of order of withdrawal was not confirmed before filing fresh complaint on 1.4.2021, though an application dated 25.3.2021 for withdrawal of earlier complaint had been moved before filing of fresh complaint.

18. The learned counsel for respondent No. 2, in order to rebut 6th contention raised on behalf of the petitioner, while referring to para 9 of additional Affidavit dated 12.5.2022, has submitted that since the local office of the respondent no.2/complainant is situated in an area falling within the jurisdiction of Police Station , Sector 9-A, Gurugram and meetings in respect of disbursement of loan had been held in the said office and which is also stated so in Para 5 (J) of complaint (Annexure P-15), therefore, Police Station Sector 9-A, Gurugram would have jurisdiction.
19. Upon considering the rival submissions, as noted above, this Court finds that the complainant has fairly well explained the reasons for having instituted the first complaint in Police Station DLF Phase I, Gurugram and the second complaint before the Court of Sessions. It cannot be said that the complainant had intentionally filed the complaint before the said forums on account of bench hunting. However, the fact that the 1st and 2nd complaint remained pending together for about 10 months certainly cannot be appreciated though, it has been explained that an application for

withdrawal of the 1st complaint had been filed before instituting the 2nd complaint. The complainant ought to have waited for passing of an order on his application for withdrawal of the 1st complaint before proceeding to file the 2nd complaint.

20. As regards the question as to whether Court of Magistrate, where the 3rd complaint has been filed, does have territorial jurisdiction or not, this Court at this stage would *prima-facie* accept the assertion of respondent No. 2 to the effect that their local offices are situated in Basai and Sector 9-A, Gurugram, particularly when there is no specific averment in the petition to the effect that the office of petitioners is not situated in Sector 9-A Gurugram or that the same is situated somewhere else. The question as to whether the offence had taken place within jurisdiction of Police Station Sector 9-A Gurugram or not would depend much upon the fact as to whether the complainant does have an office, as alleged, falling within the jurisdiction of the said Police Station or not and as to whether any act, constituting the offences alleged, had been committed in the said office or not. The said question of fact would be a matter to be decided on basis of evidence and this Court, at this stage, does not deem it proper and necessary to delve into this issue, particularly when the petition can be disposed off without entering into said issue. In any case, as discussed above, the respondent no.2 having sufficiently explained the reasons for filing previous complaints before JMJC having jurisdiction over Police Station DLF Phase-1, Gurugram and before Designated Court, this Court does not find that the same were intentionally filed before the said forums in an attempt of 'Forum Shopping' .

21. Submission no (ii) :

(ii) that the conduct of the complainant in proceeding with multiple applications at the same time before different Courts is a deprecable conduct and that the petition deserves to be accepted solely on this score itself

It is not in dispute that when the 2nd complaint was filed on 1.4.2021, the 1st complaint was still pending and it was only on 1.2.2022 that the 1st complaint was dismissed as withdrawn. In other words, both the complaints remained pending together for 10 months. However, it is also borne out that that infact before filing of the second complaint on 1.4.2021, an application for withdrawal of the first complainant had already been submitted on 25.03.2021 as would be evident from the stamp of the Court bearing date 25.3.2021 as affixed on the top of application dated 25.03.2021 (Annexure A-3). It was later before LOK ADALAT that the same was ultimately withdrawn on 1.2.2022, with permission to file afresh. The learned counsel for respondent no.2 has attributed the said lapse to inadvertance and has submitted that there was no oblique motive for the same. While such conduct is not expected of a diligent litigant, but the same can not, in every case, be interpreted to be an intentional act or such so as to completely throw out the case of complainant at nascent stage. The funds allegedly siphoned off were meant for 'four-laning' of a National Highway in respect of which National Highways Authority of India (NHAI) had entered into a contract with M/s Corsan Corviam Construction. The present case is a case of fraud of more than ₹120 crores, and can not be brushed aside lightly on account of technical lapse as in the present case, when it can not be said that complainant had derived any benefit on account of such omission in not

waiting for a formal order to be passed on the application for withdrawal which infact had been filed before submitting second complaint.

22. Submission no (iii) :

(iii) that there is no evidence whatsoever to show that Police Station Sector 9-A, Gurugram would have jurisdiction in the matter so as to justify registration of FIR in the said police station

The said issue has already been dealt with in para 20 of this judgment and as such need not be discussed again.

23. Submission no (iv) :

(iv) that since the matter in dispute already stands referred to Arbitration, the present proceedings are in the nature of arm twisting and an abuse of process of law;

The fact that the dispute in hand is also pending before Arbitrator is admitted by respondent no. 2. In fact, it is a case where claim and counter-claim has been filed by both the parties wherein the matter is at the stage of recording evidence. However, the mere fact that arbitration proceeding are pending can not *ipso-facto* operate as a bar for initiating criminal proceedings in case the act of any party also constitutes some criminal offence. There is nothing on record at this stage to show that it is a case of arm twisting by complainant. The contention in this regard, as raised on behalf of the petitioners, cannot be accepted.

24. Submission no (v) :

(v) that provisions of Section 154(1) Cr.P.C. and Section 154(3) Cr.P.C. have not been complied with in letter and

spirit and that Hon'ble Supreme Court has repeatedly held that compliance of said provisions is mandatory and that in the absence of such compliance, the impugned order cannot sustain.

The learned counsel representing the petitioners has submitted that in the instant case there is non-compliance of mandatory provisions of Section 154(1) Cr.P.C. and Section 154(3) Cr.P.C. inasmuch as there is only a vague averment to the effect that the complainant had sent a copy of complaint through email dated 31.01.2022 to the police authorities for the purpose of registration of FIR and that there is no such averment that as to whether upon failure of the Officer Incharge of the Police Station concerned to register the FIR, any representation was made to Superintendent of Police/Commissioner of Police.

25. The learned counsel cites 2015(6) SCC 287 Priyanka Srivastava v. State of U.P. & Others and also a recent judgment of Hon'ble Supreme Court rendered in 2022 (2) RCR (Criminal) 187 - Babu Venkatesh vs State of Karnataka and another to contend that compliance of the provisions of Section 154 (1) Cr.P.C. and Section 154 (3) Cr.P.C. is mandatory and not an empty formality and that compliance is *sine-qua-non* for registration of FIR by invoking powers under Section 156(3) of Cr. PC.
26. In order to consider the aforesaid submission, it is apposite to bear in mind the provisions of Section 154 Cr.P.C. which are reproduced herein under:

"154. Information in cognizable cases.

- (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced

to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

- (2) A copy of the information as recorded under sub-Section (1) shall be given forthwith, free of cost, to the informant.
- (3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in Sub-Section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

27. Hon'ble the Supreme Court in Babu Venkatesh's case(supra), while reiterating the position of law as spelt out in Priyanka Srivastava's case (supra) regarding compliance of provisions of Section 154(1) Cr.P.C. and Section 154(3) Cr.P.C., held as follows :-

“27. This court has further held that, prior to the filing of a petition under Section 156(3) of the Cr.P.C., there have to be applications under Section 154(1) and 154 (3) of the Cr.P.C. This court emphasizes the necessity to file an affidavit so that the persons making the application should be conscious and not make false affidavit. With such a requirement, the persons would be deterred from causally invoking authority of the Magistrate, under Section 156(3) of the Cr.P.C. In as much as if the affidavit is found to be false, the person would be liable for prosecution in accordance with law.”

28. In the present case, the complainant has asserted in para 14 of the complaint dated 4.2.2022 (Annexure P-15) that a copy of complaint had been sent through email dated 31.01.2022 to the police authorities. Although, a copy of the complaint dated 31.1.2022, sent to SHO, Police

Station Sector 9A, Gurugram has been annexed as Annexure A-5 with the additional Affidavit dated 12.05.2022 of respondent no.2 but the learned counsel for respondent no.2 has today produced another copy of the same wherein, on the first page, there are particulars of the e-mail IDs to which the said complaint had been sent. The same is taken on record. A perusal of the same would show that while the complaint is addressed to SHO Police Station Sector 9A, Gurugram and has been sent to him through his email-ID shosec9aggm.pol-hry.gov.in , a copy of same has also been forwarded to e-mail ID cp.ggn@hry.nic.in, which according to counsel for Respondent no.2 is of Commissioner of Police, Gurugram.

29. Even if the aforesaid contention made on behalf of Respondent no.2 to the effect that a copy of complaint had also been sent to Commissioner of Police, Gurugram, on 31.01.2022 is accepted, the same cannot be said to be compliance of the mandatory provisions of Section 154(1) Cr.P.C. and Section 154(3) Cr.P.C. in letter and spirit. First of all, it needs to be noticed that while the complaint was submitted to SHO on 31.1.2022, the application under Section 156(3) Cr.P.C. along with complaint was filed in the Court on 4.2.2022 without affording any reasonable time to the SHO to verify the facts, given the fact that matter was arising out of a commercial transaction where both parties were raising claim and counter-claims and as per the ratio of Lalita Kumari vs. Govt. of U.P. and others (2014)2SCC 1, a preliminary inquiry could be made in matrimonial disputes/ family disputes, commercial offences, medical negligence cases, Corruption cases and cases where there is abnormal delay/laches in initiating criminal prosecution. Still further, the purpose of Section 154(3) Cr.P.C. is to afford a remedy to the complainant to approach a higher

officer in case the Incharge Police Station does not lodge the report but in the present case sending a copy of the complaint to Commissioner Police at this same very time when a complaint is submitted to the SHO concerned is hardly a compliance of Section 154(3) Cr.P.C. and rather is in the nature of an eyewash. In these circumstances, this Court has no hesitation in holding that in the present case there is absolute non-compliance of the mandatory provisions of Section 154(1) Cr.P.C. and Section 154(3) Cr.P.C.

30. Hon'ble Supreme Court in 2011 (14) SCC 770 - State of Punjab v. Davinder Pal Singh Bhullar and others held that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. It was held that in such a fact-situation, the legal maxim "*sublato fundamento cadit opus*" meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores. Measuring the fact-situation of present case in light of ratio of Davinder Pal Singh Bhullar and Babu Venkatesh's case(supra), this Court is of the opinion that learned Court of JMIC ought not to have accepted the application for registration of the FIR. Consequently, the petition merits acceptance and is hereby accepted. The impugned order dated 7.2.2022 (Annexure P-18) is as well as consequential proceedings including FIR No. 47 dated 9.2.2022 (Annexure P-21) registered thereupon are set aside.
31. Keeping in view the fact that the present petition is being accepted shortly after passing of impugned order and is being accepted on technical grounds of non-compliance of certain provisions of law and the matter

pertains to fraud of a colossal amount of more than ₹120 crores, it will not be in the interest of justice to show the door to complainant at this nascent stage. As such, the complainant would be at liberty to move afresh for getting the FIR lodged after compliance of mandatory provisions of Section 154 Cr.P.C. while also complying with dictates of Priyanka Srivastava's case (Supra). In case any such application is moved before Area Magistrate after compliance of requisite provisions, the Area Magistrate shall do the needful and consider the same in accordance with law.

31.5.2022

kamal

(Gurvinder Singh Gill)
Judge

Whether speaking /reasoned
Whether Reportable

Yes / No
Yes / No