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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CRL.M.C. 747/2022 & CRL.M.A.37173/2024**

BHAYANA BUILDERS PVT. LTD. .....Petitioner

Through: Mr. Saurabh Kirpal, Senior Advocate with Mr. Vikas Gogne, Mr. Satyam Chaturvedi, Ms. Adya Luthra and Ms. Tanvi Seth, Advocates.

versus

STATE OF NCT OF DELHI & ANR. .....Respondents

Through: Mr. Manoj Pant, APP for the State.
Mr. Ayush Puri and Mr. Kanav Madnani, Advocates for R-2.

CORAM:
HON'BLE MR. JUSTICE AMIT MAHAJAN

O R D E R

% **10.12.2024**

1. The present petition is filed challenging the judgment dated 17.08.2021 (hereafter '**impugned order**'), passed by the learned Additional Sessions Judge ('**ASJ**'), South District, Saket Courts, New Delhi, in Criminal Revision No. 60/2019. The petitioner is also seeking directions for registration of FIR against Respondent No.2.

2. By the impugned order, the learned ASJ dismissed the revision petition filed by the petitioner against order dated 12.11.2018, in CC No. 4058/2018, whereby the learned Chief Metropolitan Magistrate ('**CMM**') had dismissed the petitioner's application under Section 156(3) of the CrPC and posted the matter for pre-summoning evidence.

3. The brief facts of the case are as follows:

3.1. It is alleged that the Director of the petitioner– Nitin Bhayana and Respondent No.2 shared a cordial relation, due to which, Respondent No.2 approached the complainant for a personal loan of ₹5 crores on 18.01.2010. Respondent No.2 allegedly assured the complainant that the loaned amount will be returned within eight months. Based on the inducement, the complainant extended the loan of ₹5 crores to Respondent No.2. To secure the loan, Respondent No.2 pledged 29,90,000 of his shares in Rasik Software Pvt. Ltd.

3.2. The loaned amount was not paid within eight months. On the repeated requests of the complainant, Respondent No.2 repaid ₹2.5 crores by a cheque, however, he expressed his inability to repay the remaining amount. Subsequently, Respondent No.2 requested the complainant to return the share certificates so as to enable him to repay the outstanding balance. In return of the same, Respondent No.2 gave an undated cheque for a sum of ₹2.5 crores to the complainant as well.

3.3. When the complainant threatened to initiate legal action, Respondent No.2 offered to transfer the ownership of the property being 2nd and 3rd floor of E-89 Masjid Moth, GK-III along with proportionate right in the land underneath in favour of the complainant (hereafter '**subject property**'). The parties entered into an Agreement to Sell dated 28.04.2011 in relation to the same as well wherein the consideration was fixed at ₹2,50,10,000/-, out of which, ₹2.5 crores were to be adjusted with the balance payment. Respondent No.2 handed over certain documents in relation to the subject property as well. Respondent No.2 also executed a registered General Power of Attorney ('**GPA**') and Will dated 14.05.2011.

3.4. The parties also entered into a Memorandum of Understanding ('**MOU**') dated 28.04.2011 where they decided that the Agreement to Sell and GPA will only be invoked if Respondent No.2 failed to make the necessary payment before expiry of six months.

3.5. It is alleged that before the expiry of the said time, Respondent No.2 informed the complainant that the GPA had been cancelled by him. Contrary to the inducements, Respondent No.2 did not make the payments within six months either.

3.6. Thereafter, the complainant sent a demand draft of ₹10,000/- in terms of the agreement to sell and a final notice dated 10.01.2022 to Respondent No.2 to execute the sale deed in relation to the subject property. The complainant filed a suit seeking specific performance as well where it was found that the subject property had been sold by Respondent No.2 to someone else prior to executing the GPA, Sale Deed and Will.

3.7. It is alleged that the act of Respondent No.2 amounts to cheating as he entered into Agreement to Sell dated 28.04.2011 despite being aware that the subject property had already been sold way back by him to someone else.

3.8. When no action was taken on the complaint by the police officials, a complaint was filed by the petitioner under Section 156(3) of the CrPC for registration of FIR against Respondent No.2 for offences under Sections 420/409/467/468/471/120B/34 of the Indian Penal Code, 1860 ('**IPC**').

3.9. By order dated 12.11.2018, the learned CMM dismissed the said application by observing that all the documents were within possession of the complainant and no evidence was to be collected for which the assistance of police was required. It was further noted that the parties had entered into an MOU dated

21.06.2011, subsequent to MOU dated 28.04.2011, Agreement to sell, GPA and Will, wherein it was stated that the parties will settle their dispute through arbitration. It was noted that the said MOU mentions the loan amount as ₹2.5 crores. It was also noted that the complainant had preferred a petition before the Hon'ble High Court of Allahabad stating that the dispute between the parties is purely civil in nature. The relevant portion of the same is reproduced hereunder:

> *"16. Adverting to the facts of the instant case in the light of the case law, I am of the considered opinion that the parties entered into MOU dated 21.06.2011 in which it is categorically stated that dispute between the parties would be settled by Arbitration.* ***The said MOU finds mention of amount of Rs.2,50,00,000/- as loan. This MOU was entered subsequently to agreement to sell, GPA and Will dated 28.04.2011 and 04.05.2011. Since MOU dated 21.06.2011 was entered into subsequent to MOU dated 28.04.2011 hence, complaint extinguished all the rights available to the under MOU dated 28.04.2011.*** *Since the amount of 2,50,00,000/- is mentioned as loan hence, the GPA and Will etc do not transfer any rights in favour of the complainant. The complainant himself has preferred an application u/sec 482 Cr. P.C. before the Hon'ble High Court of Allahabad where it is specifically argued on behalf of the complainant that the "dispute between the parties is purely of civil in nature and the criminal prosecution of the applicant on the basis of the present is bad in the eyes of law". The applicant is not permitted to take contrary stands himself.*
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> *17. All the documents on the basis of which criminal machinery is proposed to be brought in motion are within the possession of the complainant. No other evidence is to be collected for which the assistance of police is specifically required. No custodial interrogation of the proposed accused is required. Accordingly, application u/sec 156 (3) of Cr.P.C. is hereby dismissed."*

3.10. The learned ASJ, by the impugned order, upheld the order dated 12.11.2018 and observed as under:

> *"In the present case, Ld. Trial Court dismissed the application u/s 156(3) Cr.P.C. of the Revisionist and listed the matter for recording of pre-summoning evidence. The perusal of the record shows that the requisite documents are all within the power and possession of the Revisionist. If any*

record is required to be summoned, it may be summoned through Ld. Trial Court during pre-summoning evidence. ***It is not the case of the Revisionist that the Respondent no. 2 has disputed any of the documents that he has relied upon.*** *The Court agrees with the observations of Ld. Trial Court that assistance of the police is not needed in this case for collection of any evidence.* ***There is also nothing to show that any document is required to be analysed by FSL or handwriting expert. Besides, u/s 202 Cr.P.C., Ld. Trial Court is also empowered to direct an investigation to be made by the police officer after the statements of the complainant and his witnesses have been recorded by the Court for the purpose of deciding whether or not there is sufficient ground for proceeding.*** *"*

(emphasis supplied)

4. The learned senior counsel for the petitioner submits that registration of FIR is mandatory under Section 154 of the CrPC if the information discloses commission of a cognizable offence, despite which, the learned Courts below have failed to direct registration of FIR in the present case. He places reliance on ***Lalita Kumari v. Govt. of U.P.*** **: (2014) 2 SCC 1**.

5. He submits that the only onus on the complainant is to disclose commission of a cognizable offence and it is not open to the Court or to the Police to go into the reliability of the material.

6. He submits that the petitioner is not in a position to get the entire evidence for prosecuting Respondent No.2 and the assistance of police is required as the case relates to forgery of documents. He further submits that the assistance of the police will be necessary to find the trail of money and to recover the same in accordance with law.

7. He submits that since Respondent No.2 has blatantly denied the execution of certain documents such as Agreement to Sell and MOU dated 28.04.2011, all of which are registered documents, therefore, expert opinion of an FSL expert or an independent expert will be required. The said documents will need to be verified by the investigating agency by issuing notice

to the relevant authorities to ascertain their authenticity.

8. He submits that the act of Respondent No.2 in endeavoring to sell the subject property, even though it had already been sold to a third party, itself amounts to cheating.

9. He submits that the petition filed before the Hon'ble Allahabad High Court relate to a separate cause of action.

10. The learned counsel for Respondent No.2 submits that the present petition is in the nature of a second revision which is not maintainable.

11. He further submits that the dispute between the parties is purely civil in nature. He submits that while the civil suit was preferred by the petitioner way back in the year 2012 and is pending adjudication, the complaint was filed before the police after 5.5 years. He further submits that the complaint under Section 200 read with Section 156(3) of the CrPC was filed after a further period of almost 13 months.

12. He submits that the complainant has now proceeded with the compliant under Section 200 of the CrPC since the dismissal of the application under Section 156(3) of the CrPC.

13. He submits that the conduct of the petitioner shows that the present proceedings are instituted to merely arm twist Respondent No.2.

14. He submits that the evidence of the petitioner before the Arbitral Tribunal is completely contrary to his case in the complaint as he has categorically admitted there that ₹2.5 crores were extended as a loan and not as consideration under any Agreement to Sell.

15. He submits that it was rightly found in the preliminary enquiry as well as the Action Taken Report that the information did not disclose commission of any cognizable offence.

16. I have heard the counsel and perused the record.

17. The first issue that falls for the consideration of this Court is whether the petitioner having already availed the remedy of revision should be allowed to take recourse to Section 482 of the CrPC as a substitute for initiating a second revisional challenge which is clearly barred under Section 397(3) of the CrPC which reads as follows:

> *"(3) If an application under this section has been made by any person either to the High court or to the Sessions Judge, no further application by the same person shall be entertained by the either of them."*

18. While it is settled law that a second revision cannot be filed in terms of the bar under Section 397 of the CrPC, the inherent power of this Court under Section 482 of the CrPC has a wide ambit and can be exercised in the interest of justice. However, the power under Section 482 of the CrPC is to be exercised cautiously and sparingly, especially when Sessions Judge has already exercised revisional power under Section 397 of the CrPC. The Hon'ble Apex Court, in the case of ***Krishnan v. Krishnaveni* : (1997) 4 SCC 241**, had observed as under:

> "***8.*** *The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice.* ***In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its juridical process or illegality of sentence or order.***"
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> (emphasis supplied)

19. It is argued that FIR ought to be registered when the allegations clearly disclose commission of a cognizable offence. Reliance has been placed on ***Lalita Kumari v. Govt. of U.P.*** (*supra*), where it was held that FIR ought to be registered when the allegations clearly disclose commission of a cognizable offence. The relevant portion of the judgment is set out below:

> "***119.*** *Therefore, in view of various counterclaims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible, etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR.*
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> ***120.1.*** *The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.*"

20. It is equally true that it is not mandatory for the Magistrate to direct registration of an FIR merely because allegations disclose the commission of a cognizable offence, unless investigation is required. The Magistrate, after application of mind, can also decide to take cognizance and proceed under Section 202 of the CrPC instead of issuing directions under Section 156(3) of the CrPC (Ref. ***Kailash Vijayvargiya v.***

***Rajlakshmi Chaudhuri* : 2023 SCC OnLine SC 569**).

21. Thus, once a complaint/application under Section 156(3) of the CrPC is filed, the Magistrate can exercise the option of applying his own judicial mind to the entire material on record and 'may' direct registration of FIR. However, at times, the Magistrate also calls for a report from the police as to why no action had been taken on an earlier complaint filed by the complainant with the police, and thereafter, once a report is filed by the police, the Magistrate applies his mind to the material before him i.e. the complaint as well as the Action Taken Report which constitutes a 'preliminary inquiry' conducted by the police. After this, the Magistrate may make up his mind to either order registration of FIR or otherwise.

22. The Action Taken Report filed by the police before the learned CMM reveals that on being confronted with the Agreement to Sell and MOU dated 28.04.2011, Respondent No.2 had denied that he executed the said documents. While he admitted to executing the GPA and Will, however, he stated that the same were executed under deception. He further informed that an MOU dated 21.06.2011 had been executed between the parties and the same made no mention of the previously executed Agreement to Sell, MOU dated 28.04.2011, GPA and Will. He informed that an arbitration was pending between the parties where Nitin Bhayana, in his evidence by way of affidavit, had accepted that the amount of ₹5 crores was extended as interest bearing loan and ₹2.5 crores had been repaid. He stated that Nitin Bhayana made no mention of the aforesaid documents in his evidence. It was found from the enquiry that the matter is of civil liability for repayment of loan and a civil suit and arbitral proceeding was underway in relation to the issue as well. It was

also found that by entering into MOU dated 21.06.2011, the petitioner had extinguished its rights under MOU dated 28.04.2011.

23. The main thrust of the petitioner in the present case for registration of FIR is on the argument that investigation is required to ascertain the veracity of the disputed documents. It is argued that the same requires examination by FSL and summoning of relevant authorities such as an official from the Registrar Office as well.

24. It is also pointed out that the learned ASJ has erroneously observed that Respondent No.2 has not disputed any of the documents relied upon and FSL examination is not required.

25. The learned CMM, in the order dated 12.11.2018, noted that the dispute is essentially civil in nature and the rights in MOU dated 28.04.2011 were extinguished by MOU dated 21.06.2011. It was further noted that it is not open to the petitioner to take contrary stands before different Courts. The learned ASJ, by the impugned order, upheld the order dated 12.11.2018.

26. It is true that one transaction can give rise to a civil as well as criminal action against the accused persons. The complainant is within its right to not only initiate civil proceedings to remedy the action but to also file a complaint if the action discloses commission of cognizable offence. However, it is equally true that a criminal colour at times is given to commercial transactions so as to put extra pressure on the other party.

27. In such circumstances, it is within the power of the Courts, after considering the facts and the basic material, to either direct police investigation by ordering registration of FIR or proceed with the complaint under Section 200 of the CrPC. Even if the

allegation of forgery is made which at first blush may require police investigation, it is still within the power of the Magistrate to not direct registration of FIR.

28. In the case of ***Ramdev Food Products (P) Ltd. v. State of Gujarat* : (2015) 6 SCC 439**, while dealing with allegations of forgery, it was held that it is not compulsory for the Magistrate to pass an order under Section 156(3) of the CrPC. The relevant portion of the judgment is reproduced hereunder:

> "***11.*** *On the other hand, contention on behalf of the alleged accused is that both the powers of the Magistrate : (i) directing investigation under Section 156(3); and (ii) direction under Section 202 to seek a report from police after investigation to enable the Magistrate to decide whether to proceed further and issue process are qualitatively different and are in different chapters of the Code. Thus, as per scheme of the Code, power of the police in pursuance of directions under the said two provisions is not the same. The Magistrate has discretion either to direct registration of a case under Section 156(3) or to conduct inquiry himself as the situation may warrant. This discretion is to be exercised by the Magistrate in his wisdom and having regard to the nature of material available. The direction under Section 156(3) to register a criminal case and to investigate is to be exercised where the Magistrate is satisfied that prima facie a cognizable offence has been committed. On the contrary, where he thinks it necessary to conduct further inquiry before deciding whether he should proceed further in the matter, the matter has to be dealt with under Section 202. Mere allegation of forgery is not enough to require the Magistrate to pass the order under Section 156(3).*
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> ***32.*** *We now come to the last question whether in the present case the Magistrate ought to have proceeded under Section 156(3) instead of Section 202. Our answer is in the negative. The Magistrate has given reasons, which have been upheld by the High Court. The case has been held to be primarily of civil nature. The accused is alleged to have forged partnership.* ***Whether such forgery actually took place, whether it caused any loss to the complainant and whether there is the requisite mens rea are the questions which are yet to be determined. The Magistrate has not found clear material to proceed against the accused. Even a case for summoning has not yet been found. <u>While a transaction giving rise to cause of action for a civil action may also involve a crime in which case resort to criminal proceedings may be justified, there is judicially</u>***

<u>acknowledged tendency in the commercial world to give colour of a criminal case to a purely commercial transaction.</u> This Court has cautioned against such abuse."

(emphasis supplied)

29. Although Respondent No.2 has maintained that the GPA and Will were executed under deception, however, he has not disputed that the execution of the said documents. Insofar as the question of establishing the veracity of the other documents are concerned, as also noted by the learned ASJ, it is open to the learned Trial Court to summon any relevant documents, if required, during pre-summoning evidence. It is also rightly observed by the learned ASJ that it is open to the learned Magistrate to resort to Section 202 of the CrPC to direct an investigation to determine whether there are sufficient grounds for proceeding. Under the said provision, the learned Magistrate can direct for seizure of any documents and FSL or opinion of an independent handwriting expert, if so required, after the complainant and the witnesses have been examined.

30. Any relevant witnesses can also be summoned during pre-summoning evidence for ascertaining the veracity of the disputed documents.

31. It is pointed out that the petitioner has taken multiple adjournments and has refrained from leading pre-summoning evidence. No reason has been given for approaching the Courts belatedly even though the factum of the subject property being sold by Respondent No.2 was in the knowledge of the petitioner since the years 2012-2013.

32. The learned CMM also noted that the petitioner has relied upon the MOU dated 21.06.2011 in his petition before the Hon'ble High Court of Allahabad. On the basis of the same, it was observed that the dispute is essentially civil in nature. While

it is argued that the remit of the dispute is different in the present case, however, it cannot be ignored that the petitioner has not disputed signing the said MOU, which is relied upon by Respondent No.2 to argue that the same supersedes all previous documents.

33. In view of the aforesaid discussion, considering that all the relevant documents are in the possession of the petitioner, this Court finds no infirmity in the findings of the Courts below that the assistance of the police is not specifically needed in the present case.

34. In the instant case, this court is of the opinion that no exceptional circumstances have been presented to warrant any interference with the impugned order. There is no indication of any miscarriage of justice or legal irregularity in the proceedings undertaken by the two lower courts.

35. The petition, is, therefore, dismissed.

AMIT MAHAJAN, J

DECEMBER 10, 2024