$~60

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

\+ CRL.M.C. 2142/2024

PROGRESSIVE ENCLAVE CGHS LTD ..... Petitioner
Through: Ms. Manshu Sharma, Advocate

versus

GOVT OF NCT OF DELHI AND ORS ..... Respondents
Through: Mr. Hitesh Vali, APP for the State

CORAM:
HON'BLE MR. JUSTICE AMIT MAHAJAN

O R D E R

% **15.03.2024**

CRL.M.A. 8307/2024 *(exemption from filing legible/certified copies of annexures)*

1. Exemption allowed, subject to all just exceptions.

2. The application stands disposed of.

CRL.M.C. 2142/2024

3. The present petition is filed under Section 482 of the Code of Criminal Procedure, 1973 ('**CrPC**'), challenging the order dated 15.07.2023 (hereafter **'the impugned order'**), passed by the learned Additional Sessions Judge ('**ASJ**'), South-West District, Dwarka, New Delhi, in Criminal Revision No. 303/2022.

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

4.1. The complaint was filed by the petitioner under Section 200 of the CrPC against Respondent No.2 company, Respondent No.3 (erstwhile Managing Director of Respondent No.2 company) and the other respondents, who were the former office bearers of the petitioner society. It is stated that Respondent Nos. 4 to 6 occupied the posts of President, Secretary and Treasurer of the petitioner society from April, 1997 till November, 2002. Respondent Nos. 4 to 6 retained their posts after the elections on 01.12.2002.

4.2. It is alleged that Respondent No.2 company was engaged by Respondent Nos. 4 to 6, on behalf of the petitioner society, for construction of 135 dwelling unit / flats. In this regard, a contract was awarded to Respondent No. 2 in three phases. The first phase was for the construction of the 135 dwelling units for an amount of ₹7,29,75,331/-. The second phase was for internal electrification and similar work for an amount of ₹96,08,415/-. The third phase was for external development for an amount of ₹65,59,646/-. All the said contracts were to be completed between 6 and a half months.

4.3. It is alleged that Respondent Nos. 4 to 6 made excess payment to Respondent No.2 company against uncertified bills despite the work not getting finished in the stipulated time period. It is alleged that a huge amount to the tune of ₹2,22,60,904/- was paid in excess to Respondent No.2 and siphoned off by the respondents and misappropriated in connivance with each other. It is alleged that Respondent Nos. 2 to 6 procured bogus bills from the contractor and got the same verified from the site engineer by threatening him. It is submitted that the excess payments were made on the basis of dubious bills which were highly inflated. Despite the payment of excess amount, when Respondent No.2 was pressed to complete the work immediately, an additional ₹1.10 crore were demanded.

4.4. It is alleged that Respondent Nos. 4 to 6 committed criminal breach of trust and cheated the members of the petitioner society by misappropriating the money entrusted to them by making payments to Respondent No.2 company even though the legal contract was not discharged. It is also alleged that Respondent No.4 did not return some key documents after resigning from his post.

5. The learned ASJ, by the impugned order, dismissed the revision petition filed by the petitioner challenging the order dated 07.02.2022, passed by the learned Metropolitan Magistrate ('MM'), South-West District, Dwarka, New Delhi, in CT No. 4995572/2016.

6. The learned MM, by order dated 07.02.2022, had discharged the respondents for offences under Sections 406/420/120B of the Indian Penal Code, 1860.

7. The learned counsel for the petitioner submits that the learned ASJ had failed to appreciate that sufficient material was available on record to give rise to grave suspicion against the accused persons/ respondents.

8. She submits that the learned ASJ had gravely erred in ignoring the pre-summoning evidence of CW-04, namely, Mr. Rajesh Khanna, C.A., who had categorically testified that the books of accounts of the petitioner society for the year 2005 as well as the year 2004 clearly reflect that excess payments, that is, payment of ₹1,00,89,593/- and ₹10,29,95,257 respectively, was made to Respondent Nos. 2 and 3 by Respondent Nos. 4 to 6 without any substantial bills.

9. She submits that Respondent Nos. 4 to 6 were in absolute control of the funds of the petitioner society and were also signatories to the cheques and balance sheets/ audit reports.

10. She submits that the learned ASJ erroneously concluded that the present case was merely one of excess payment and ignored the case of the petitioner that the accused persons in active connivance with each other had conspired to cheat and misappropriate the funds of the petitioner society.

11. She submits that a *prima facie* case is made out against the respondents and they are not entitled to discharge merely because a civil remedy is also available.

12. She submits that grave injustice has been caused to the petitioner society because the respondents have been discharged at the initial stage itself.

13. She submits that the learned ASJ and the learned MM delved into the probative value of the material on record, which is not permissible in law.

14. I have heard the learned counsel for the petitioner and perused the record.

15. At the outset, it is relevant to note that it is settled law that the inherent power of this Court under Section 482 of the CrPC ought to be exercised sparingly and cautiously when the Sessions Court has already exercised revisional jurisdiction 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.

x-x-x

10. *Ordinarily, when revision has been barred by Section 397(3) of the Code, a person — accused/complainant — cannot be allowed to take recourse to the revision to the High Court under Section 397(1) or under inherent powers of the High Court under Section 482 of the Code since it may amount to circumvention of the provisions of Section 397(3) or Section 397(2) of the Code. It is seen that the High Court has suo motu power under Section 401 and continuous supervisory jurisdiction under Section 483 of the Code. So, when the High Court on examination of the record finds that there is grave miscarriage of justice or abuse of the process of the courts or the required statutory procedure has not been complied with or there is failure of justice or order passed or sentence imposed by the Magistrate requires correction, it is but the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensue. It is, therefore, to meet the ends of justice or to prevent abuse of the process that the High Court is preserved with inherent power and would be justified, under such circumstances, to exercise the inherent power and in an appropriate case even revisional power under Section 397(1) read with Section 401 of the Code. As stated earlier, it may be exercised sparingly so as to avoid needless multiplicity of procedure, unnecessary delay in trial and protraction of proceedings. The object of criminal trial is to render public justice, to punish the criminal and to see that the trial is concluded expeditiously before the memory of the witness fades out. The recent trend is to delay the trial and threaten the witness or to win over the witness by promise or inducement. These malpractices need to be curbed and public justice can be ensured only when trial is conducted expeditiously.*"

(emphasis supplied)

16. The Hon'ble Supreme Court expounded the law in regard

to Section 245(2) of the CrPC in the case of ***Ajoy Kumar Ghose vs. State of Jharkhand* : (2009) 14 SCC 115** and observed as under:

> "***24.*** *Now, there is a clear difference in Sections 245(1) and 245(2) of CrPC.* ***Under Section 245(1), the Magistrate has the advantage of the evidence led by the prosecution before him under Section 244 and he has to consider whether if the evidence remains unrebutted, the conviction of the accused would be warranted.*** *If there is no discernible incriminating material in the evidence, then the Magistrate proceeds to discharge the accused under Section 245(1) CrPC.*
>
> ***25. The situation under Section 245(2) CrPC is, however, different. There, under sub-section (2), the Magistrate has the power of discharging the accused at any previous stage of the case i.e. even before such evidence is led. However, for discharging an accused under Section 245(2) CrPC, the Magistrate has to come to a finding that the charge is groundless. There is no question of any consideration of evidence at that stage, because there is none.*** *The Magistrate can take this decision before the accused appears or is brought before the court or the evidence is led under Section 244 CrPC. The words appearing in Section 245(2) CrPC "at any previous stage of the case", clearly bring out this position.*
>
> *x-x-x x-x-x x-x-x*
>
> ***31.*** *The situation under Section 245(2) CrPC, however, is different, as has already been pointed out earlier. The Magistrate thereunder has the power to discharge the accused at any previous stage of the case. We have already shown earlier that that previous stage could be from Sections 200 to 204 CrPC and till the completion of the evidence of prosecution under Section 244 CrPC. Thus, the Magistrate can discharge the accused even when the accused appears, in pursuance of the summons or a warrant and even before the evidence is led under Section 244 CrPC, and makes an application for discharge."*

17. In the present case, the learned MM had discharged the respondents under Section 245(2) of the CrPC, before the

evidence was recorded. In such a case, what is to be seen is whether the learned MM, and subsequently the learned ASJ, rightly adjudged that the charge alleged against the respondents, is groundless.

18. The relevant portion of the impugned order is reproduced hereunder:

> "***13.*** *As held by Ld Trial Court that assuming that some excess payments were made to the respondents no. 1 & 2 the same by itself does not fasten criminal liability, much less prove involvement of respondents. In the MoU, it is mentioned that "there is variation is the payments and actual". This admission does not impute any criminal liability to the accused persons. There is no documentary proof to show that infact, respondents no. 3 to 5 were signatories to the cheques, as no evidence has been brought on record to this effect. Fact that the balance sheets were signed by respondents no. 3 to 5 does not either prove that they played an active role in siphoning off the money from the Society or criminally conspired to do the same.*
>
> ***14.*** *Facts of the case indicate that after entering into a contract, certain work was done by respondent no.1 and consequent payments were made. Respondent no.1 continued to work for the revisionist for a considerable duration. Parties entered into a MoU after disputes arose and are currently in arbitration. Respondent no.1 continued to work even after the new management committee came at the helm of affairs of the Society and even after coming to know that excess payments have been made respondent no.1. There is no evidence on record to indicate that respondents entered into contract with an intent to cheat revisionist. Thus, offence of cheating is not attracted so to frame charges against respondents.*
>
> ***15.*** *There is insufficient material on record to indicate that respondents misappropriated any amount. There is no documentary evidence is on record to prove misappropriation as held by Ld Trial Court production books of account are not solely sufficient to fasten liability.*"

19. From a bare perusal of the complaint and the material on record, it is seen that the primary allegations seem to be in regard

to excess payment made by Respondent Nos. 4 to 6 when they were in charge of the management of the petitioner society. Only vague allegations have been made in the complaint that the said payments were made with a malicious motive to cheat the petitioner society and misappropriate the funds. For the offence of cheating, an accused person must deceive the complainant fraudulently or dishonestly. However, the allegations in the present case seem to stem out of mere suspicion.

20. It is stated in the complaint that many of the bills tendered by Respondent No.2 were highly inflated and Respondent No.2 failed to finish the work on time. Nothing has been placed on record or contended to substantiate as to why it is apprehended that the bills were bogus or inflated. Nothing is contended to substantiate the allegation of misappropriation of funds either.

21. In the opinion of this Court, the learned MM and ASJ have rightly observed that the allegations levelled in the complaint concern alleged excess payments made to Respondent No.2 which do not constitute the offences of misappropriation and cheating.

22. The learned Trial Court has also rightly observed that the only documents adduced by the petitioner society to substantiate its allegations are the account books and the audit reports, which while relevant are alone not sufficient to fasten liability in terms of Section 34 of the Indian Evidence Act, 1872.

23. Considering the facts, this Court is of the opinion that the learned MM and the learned ASJ have evidently applied their judicial mind and considered the totality of the acts before discharging the respondents.

24. In view of the foregoing discussion, in the opinion of this Court, no special case has been made out by the petitioner to

warrant any interference with the impugned order .

25. The petition is dismissed in the aforesaid terms.

AMIT MAHAJAN, J

MARCH 15, 2024
"hkaur"