

(2016) 07 CAL CK 0064

CALCUTTA HIGH COURT

Case No: C.R.R. No. 3076 of 2015.

Suman @ Abhijit Chowdhury and
Others - Petitioners @HASH The
State of West Bengal and
another - Opposite Parties

APPELLANT

Vs

RESPONDENT

Date of Decision: July 22, 2016

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 401, Section 482
- Penal Code, 1860 (IPC) - Section 406, Section 420

Citation: (2016) 4 CalCriLR 182

Hon'ble Judges: Ranjit Kumar Bag, J.

Bench: Single Bench

Advocate: Mr. Debasis Roy, Mrs. Anusua Sinha and Ms. Aindrila De, Advocates, for the Appellant; Mr. Sandipan Ganguly and Mr. Dipanjan Dutt, Advocates, for the Opposite Party; Mr. Manjit Singh and Mr. Anand Keshari, Advocates, for the State

Final Decision: Disposed Off

Judgement

Mr. Ranjit Kumar Bag, J. - The petitioners have preferred this revisional application under Section 482 of the Code of Criminal Procedure praying for quashing of the criminal proceeding of G.R. No.684 of 2006 arising out of Durgapur Police Station Case No.232 of 2006 dated July 25, 2006 under Sections 406/420 of the Indian Penal Code pending before the court of learned Judicial Magistrate, 2nd Court, Durgapur, Burdwan.

2. The backdrop of the present revisional application is as follows:-

Durgapur Police Station Case No.232 of 2006 dated July 25, 2006 under Section 420 of the Indian Penal Code was registered on the basis of the written complaint filed by the opposite party no.2 before the Superintendent of Police, Burdwan. It appears

from the said written complaint that the opposite party no.2 was attracted by the advertisement published in the Telegraph dated November 10, 2002 by one Dilip Kumar Roy Chowdhury of Acropolish Information Private Limited and the advertisement published in the Telegraph dated November 16, 2002 by M/s. Sarvanik Engineers Pvt. Ltd. wherein the name of M/s. Chowdhury Enterprises Pvt. Ltd. (hereinafter referred to as the petitioner company) was mentioned. The petitioner no.1 Abhijit Chowdhury is the Managing Director of the petitioner company. The only son of the opposite party no.2 was searching for a job having an M.B.A. degree and having proficiency in Japanese language. The petitioner no.1 Abhijit Chowdhury married one Japanese lady Reiko Khuroda Chowdhury who happens to be the petitioner no.2. The petitioner no.3 happens to be the brother in law of the petitioner no.1. Both the petitioner no.1 and the petitioner no.2 are Buddhist by religion and the opposite party no.2 is also Buddhist by religion. It is alleged that the petitioner no.1 and the petitioner no.2 developed intimacy and friendship with the opposite party no.2 as both of them stayed for a considerable period of time in Japan. It is alleged that the petitioner no.1 projected his business within Durgapur Industrial Area and offered lucrative job to the son of the opposite party no.2 in the petitioner company.

3. The petitioner no.1 took loan of Rs.12 lakh through four different bank drafts from the opposite party no.2 to meet the day to day expenditure of the business run by the petitioner no.1. The petitioner no.1 also took loan of Rs.3,15,000/- in cash on different occasions from the opposite party no.2 through his brother in law the petitioner no.3. It is alleged that the petitioner no.1 gave undertaking to the opposite party no.2 to return the entire amount of loan of Rs.15,15,000/- within a period of 3 months from the date of last payment on September 7, 2004. It is pertinent to point out that the demand drafts were given by the opposite party no.2 in favour of the petitioner company of which the petitioner no.1, 2 and 3 are the Directors. It is alleged that the opposite party no.2 persuaded his friends and relatives to give loan of Rs.3,90,000/- to the petitioner no.1 for running his business, but the petitioner no.1 did not return the said amount of money within the stipulated period of time. The petitioner no.1 issued cheques in favour of the friends and relatives of the opposite party no.2, but those cheques were dishonoured partly on the ground of insufficient fund and partly on the ground of giving instruction to the bank to stop the payment. The creditors of the petitioner no.1 ultimately gave notice to the petitioner no.1 for initiating criminal proceeding under Section 138 of the Negotiable Instrument Act and thereafter payment was made by the petitioner no.1 by way of amicable settlement of the dispute.

4. The petitioner no.1 did not return Rs.15,15,000/- to the opposite party no.2 long after lapse of the period of return. It is alleged that the petitioner no.1 was annoyed when the opposite party no.2 requested him to make repayment of the loan. It is further alleged that the petitioner no.2 and 3 being the wife and brother in law of the petitioner no.1 aided and abetted the petitioner no.1 in committing the crime. It

is also alleged that the petitioner no.1 also cheated some of the Japanese citizens who came to India and wanted to start business with the petitioner no.1 at Durgapur. The further allegation of the opposite party no.2 is that the petitioner no.1 deceived the opposite party no.2 and collected Rs.15,15,000/- from him on the pretext of taking loan for running his business and as such the petitioner no.1 and his wife and brother in law have committed the offence of cheating punishable under the law.

5. The police started the criminal case against the petitioner no.1, 2 and 3 for the offence punishable under Section 420 of the Indian Penal Code and took up the investigation. On completion of investigation, charge sheet was submitted against the petitioner no.1, 2, 3 and petitioner company for the offence punishable under Sections 406/420 of the Indian Penal Code. The petitioner no.1, 2 & 3 appeared before the court of learned Magistrate, but no notice was issued to the petitioner company immediately after submission of the charge sheet. It appears from the copy of orders annexed to the revisional application that on September 19, 2013 learned Magistrate issued summons to the petitioner company. It also appears from the copy of orders passed by learned Magistrate that on July 2, 2014 the petitioner company represented by the Managing Director Abhijit Chowdhury entered appearance before learned Magistrate. In the meantime, the petitioners no.1, 2 and 3 filed an application before the court of learned Magistrate praying for discharge under Section 239 of the Code of Criminal Procedure on June 29, 2011. However, on April 8, 2014 learned Magistrate rejected the application filed by the petitioners praying for discharge and posted the case for consideration of the charge against the petitioners including the petitioner company. The present petitioners have preferred this revision praying for quashing of the said criminal proceeding.

6. Mr. Debasis Roy, learned counsel appearing on behalf of the petitioners contends that the contents of the written complaint treated as FIR do not disclose any offence against the petitioner no.2 and 3. He further submits that the opposite party no.2 did not arraign the petitioner company as an accused in the written complaint treated as FIR. He has pointed out that the opposite party no.2 gave the money to the petitioner company for allotment of share and the share of the petitioner company was allotted to the opposite party no.2, but no formal application was filed by the opposite party no.2 for allotment of shares and as such the allotment of share of the petitioner company in favour of the opposite party no.2 was not considered as legal and valid under the law. Mr. Roy submits in his usual fairness that he is not pressing for quashing of the criminal proceeding against the petitioner no.1 and the petitioner company, but he is praying for quashing of the criminal proceeding against the petitioner no.2 and 3 against whom sufficient evidence could not be collected by the investigating agency to prosecute them for the offence punishable under Sections 406/420 of the Indian Penal Code.

7. Mr. Sandipan Ganguly, learned senior counsel appearing for the opposite party no.2, submits that there is inordinate delay on the part of the petitioners to pray for quashing of the criminal proceeding by invoking the inherent power of this court under Section 482 of the Code of Criminal Procedure and as such, the present revisional application is not maintainable in law. He has pointed out from the materials on record that the FIR was registered on July 25, 2006, charge sheet was submitted on August 30, 2007, copies of documents and statement of witnesses were supplied to the accused persons under Section 207 of the Code of Criminal Procedure on September 28, 2007 and the application filed by the petitioners praying for discharge was rejected by learned Magistrate on April 8, 2014. By referring to the order dated September 29, 2015 passed by learned single Judge of this Court in CRR 1055 of 2015, Mr. Ganguly argues that this court gave direction to learned Magistrate to expedite the hearing of G.R. No.684 of 2006 and to dispose of the same within a period of 9 months from the date of communication of the order. He further argues that the opposite party no.2 filed CRR 1055 of 2015 praying for expeditious disposal of G.R. 684 of 2006. He contends that the notice of the revisional application being CRR 1055 of 2015 was served on the present petitioners on July 14, 2015 and thereafter the petitioners have preferred this revision only to delay the hearing of the criminal case pending before the trial court.

8. By referring to the averments made in the written complaint treated as FIR and by referring to the statement of the opposite party no.2 recorded under Section 161 of the Code of Criminal Procedure, Mr. Ganguly has vehemently urged this court to consider that the specific allegations are levelled against the petitioner no.2 & 3 for aiding and abetting the petitioner no.1 in committing the offence of cheating. He has also referred to the abstract of minutes of the Board Meeting of the petitioner company held on October 24, 2004 (Annexure P-7 to the revisional application) and submitted that both the petitioner no.2 and 3 have participated in the said meeting where the share of the petitioner company was allotted to the opposite party no.2 in the absence of an application filed by him, even when the opposite party no.2 demanded for repayment of the loan of Rs.15,15,000/- paid by him to the petitioner company. Mr. Ganguly has relied on the decision of this High Court in "**Vandana Agarwal v. State of West Bengal**" reported in (2015) 3 C.CRLR (Cal) 872 in order to urge this court that the inordinate delay in moving this court for quashing of the criminal proceeding must be considered and this court may not invoke the inherent power to quash the criminal proceeding as prayed by the petitioners.

9. Mr. Anand Keshari, learned counsel for the opposite party State has pointed out from the statement of the opposite party no.2 how the petitioner no.2 and 3 are involved in persuading the opposite party no.2 to pay loan to the petitioner company which was not ultimately repaid by the petitioners in general and the petitioner no.1 in particular.

10. At the very outset, I would like to decide whether this Court can exercise the inherent power under Section 482 of the Code of Criminal Procedure in the facts and circumstances of the present case. The contention made on behalf of the opposite party no.2 is that this court should not exercise the inherent power under Section 482 of the Code of Criminal Procedure due to inordinate delay on the part of the petitioners to approach this court for quashing of the criminal proceeding. In "**Vandana Agarwal v. The State of West Bengal & Anr.**" reported in (2015) 3 C. Cr. LR (Cal) 872 learned single Judge of this court refused to invoke inherent power under Section 482 of the Code of Criminal Procedure for quashing the order of issuance of summons by learned Magistrate due to inordinate delay on the part of the petitioner to approach the High Court. In the said report, the petitioner/accused person appeared before the court of learned Magistrate in response to the summons issued by the learned Magistrate and obtained bail and took part in the hearing of the case before learned Magistrate who not only recorded the plea of the accused person, but also posted the case for recording of evidence of prosecution witnesses. The accused person challenged the order of issuance of summons by learned Magistrate and prayed for quashing of the criminal proceeding when learned Magistrate started recording evidence of prosecution witnesses. In the instant case, the opposite party no.2 filed the written complaint against the petitioner nos.1, 2 and 3 without impleading the petitioner company as the accused person in the said written complaint treated as FIR. On August 30, 2007 the charge sheet was submitted by the Investigating Officer disclosing M/s. Chowdhury Enterprises Pvt. Ltd. as the accused person along with the present petitioner nos.1, 2 and 3 for prosecution under Sections 406/420 of the Indian Penal Code. The petitioner company appeared before the court of learned Magistrate on July 2, 2014 in response to the summons issued by the court of learned Magistrate. Admittedly, learned Magistrate has not yet framed charge against the petitioners. So, the facts of the present case are clearly distinguishable from the facts of "**Vandana Agarwal v. The State of West Bengal & Anr.**" (supra) and as such, the ratio of the said report cannot be made applicable in the facts of the present case. I am unable to accept the contention made on behalf of the opposite party no.2 that this court should not invoke inherent power under Section 482 of the Code of Criminal Procedure for inordinate delay on the part of the petitioners to approach this court with prayer for quashing of the criminal proceeding.

11. The criteria laid down by the Supreme Court for quashing of the criminal proceeding in paragraph 102 of "**State of Haryana v. Bhajanlal**" reported in 1992 SCC (Cri) 426 are as follows:-

"102♦.(a) Whether the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(b) Whether the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognisable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(c) Whether the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(d) Whether the allegations in the FIR do not constitute a cognisable offence, but constitute only a non-cognisable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(e) Whether the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(f) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(g) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

12. By applying the above test laid down by the Supreme Court, I have to decide whether an offence is made out against the petitioners for continuation of the criminal proceeding or the criminal proceeding is liable to be quashed for non-disclosure of offence from the written complaint treated as FIR and from the materials collected by the investigating agency. The contents of written complaint treated as FIR disclose that the petitioner no.1, Managing Director of the petitioner company made friendship with the opposite party no.2 by disclosing his common religion with the opposite party no.2 and by disclosing his connection with Japan and thereby persuaded the opposite party no.2 to give him loan of Rs.12 lakh at the initial stage through four bank drafts and Rs.3,15,000/- at the subsequent stage in cash, which was collected through his brother in law, the petitioner No.3. It is alleged in the said written complaint that the petitioner No.1 had undertaken to make repayment of the entire amount of loan within a period of three months from the date of last payment on September 7, 2004. The further allegation made in the written complaint is that the opposite party no.2 persuaded the petitioner No.1 to provide loan from his friends and well-wishers which is not relevant for the purpose of this criminal case. It is also alleged in the said written complaint that the

petitioner No.1 cheated some of the Japanese Nationals after exploiting them for the purpose of his business. The only allegation made against the petitioner No.2 and the petitioner No.3 is that they aided and abetted individually and collectively for the common cause of all the petitioners. The manner of aiding and abetting the petitioner no.1 by his wife and brother in law in committing the offence of cheating are not spelt out in the written complaint treated as FIR. The abetment of a thing as defined in Section 107 of the Indian Penal Code is that a person can be said to be an abettor if he instigates the accused person to do something or engages himself with one or more accused person or persons in any conspiracy for the doing of anything or for omitting to do something in pursuance of that conspiracy or if the person intentionally aids in the doing of other thing by an act or illegal omission. In the instant case, the opposite party no.2 has not disclosed information in the written complaint from which the court can infer about aiding and abetting the petitioner No.1 by his wife and brother in law in procuring fund from the opposite party no.2 with dishonest intention of not making repayment of the said fund. It is relevant to point out that the investigating officer of the case has not levelled any charge against the wife and brother in law of the petitioner No.1 for the offence punishable under Section 109 of the Indian Penal Code or for the offence punishable under Section 120B of the Indian Penal Code. However, the contents of the written complaint treated as FIR disclose offence against the petitioner No.1 and the petitioner company for the offence punishable under Section 420 of the Indian Penal Code.

13. Now, I would like to consider the statement of witnesses and other documents collected by the Investigating Officer in course of investigation for prosecuting the petitioners for the offence punishable under Section 406/420 of the Indian Penal Code. It appears from the statement of the opposite party no.2 recorded under Section 161 of the Code of Criminal Procedure that the petitioner No.1 used to visit the house of the opposite party no.2 along with his Japanese wife - the petitioner no.2. On close scrutiny of the entire statement of the opposite party no.2, I find that the petitioner No.1 and his wife allured the opposite party no.2 and his wife for helping the petitioner No.1 by providing loan and in the month of July 2004, the petitioner No.1 and his wife visited the house of the opposite party no.2 and represented that they need Rs.15 lakh for making payment to the employees of the company. It is difficult to comprehend how the opposite party no.2 can be allured for providing unsecured loan, when the fund was deposited with the petitioner company through four bank drafts of Rs.12,00,000/-. The manner of alluring the opposite party no.2 by the wife of the petitioner No.1 has not been disclosed by the opposite party no.2 in his statement recorded under Section 161 of the Code of Criminal Procedure. Nor is there any allegation made by the opposite party no.2 against the petitioner no.3, the brother in law of the petitioner No.1. What transpires from the statement of the opposite party no.2 is that the petitioner no.2 was the carrier of the cash given by the opposite party no.2 to the petitioner No.1.

The stray statement made by the opposite party no.2 before the investigating officer disclosing the fact that the wife of the petitioner No.1 allured the opposite party no.2 and his wife for providing the loan is not sufficient to prosecute the wife of the petitioner No.1 for the offence punishable under Section 420 of the Indian Penal Code. Nor can I persuade myself to hold that the petitioner No.3 is liable to be prosecuted for the offence punishable under Section 420 of the Indian Penal Code only because he carried the cash from the opposite party no.2 to the petitioner No.1.

14. The next contention made on behalf of the opposite party no.2 is that the petitioner no.1, 2 and 3 held a Board Meeting of the company on October 24, 2004 for allotment of share of the petitioner company in favour of the opposite party no.2 even when they had full knowledge that the opposite party no.2 provided loan to the petitioner no.1 and the said loan was not repaid and the opposite party no.2 has not filed any application for allotment of share of the petitioner company. It is pertinent to point out that the minutes of the meeting of the Board (Annexure P-7 to the revisional application) was not referred to as a document to establish the charge against the petitioners and as such the said document cannot have any bearing upon the criminal liability of the petitioners in the instant case. Since the abstract of minutes of the meeting of the Board held on October 24, 2004 was annexed to the revisional application by the petitioners and since learned counsel for the opposite party no.2 has referred to these documents in course of his submission before this court, I would like to consider the said document in its proper perspective. It appears from the said abstract of the minutes of the Board Meeting held on October 24, 2004 that the petitioner No.1 has informed other members of the Board that the opposite party no.2 approached the petitioner company for purchase of 1 lakh 20 thousand equity shares and the payment has already been made through four demand drafts issued in favour of the company and as such, the share of the company may be allotted in favour of the opposite party no.2. It is crystal clear from the said minutes of Board Meeting that the petitioner No.1 being the Managing Director of the petitioner company was entrusted with the duty to allot the share of the company in favour of the opposite party no.2 after fulfilling all terms and conditions and the rules framed under the Companies Act, 1956. It is true that both the petitioner no.2 and 3 being the wife and brother in law of the petitioner No.1 and being the Directors of the petitioner company participated in the said Board Meeting wherein it was resolved that the equity share can be transferred in favour of the opposite party no.2 on fulfilment of all terms and conditions and rules in this regard. The issue whether the shares of the company have been allotted in favour of the opposite party no.2 are disputed in this case and the said dispute is liable to be resolved in the domain of facts after recording of evidence before the court of learned Magistrate. The petitioner no.2 and 3 cannot be liable to be prosecuted under section 406 or under Section 420 of the Indian Penal Code for participation in the Board Meeting of the petitioner company on October 24, 2004 where the prime

role was played by the petitioner No.1 being the Managing Director of the company, who proposed for transfer of shares in favour of the opposite party no.2 and the petitioner no.2 and 3 only endorsed the proposal of the petitioner No.1 subject to fulfilment of terms and conditions and rules applicable in transfer of shares of the company. Accordingly, I am unable to persuade myself to hold that criminal liability can be attributed to the petitioner no.2 and 3 for making resolution in the Board Meeting of the petitioner company on October 24, 2004 as contended by the learned counsel for the opposite party no.2.

15. The specific contention made on behalf of the opposite party no.2 is that the petitioners have moved this court for quashing of the criminal proceeding after receiving notice of CRR 1055 of 2015 wherein the opposite party no.2 prayed for expeditious disposal of criminal case being G.R. No.684 of 2006 pending before the court of learned Judicial Magistrate, 2nd Court, Durgapur. I have already observed that the opposite party no.2 did not arraign the petitioner company as an accused in the written complaint treated as FIR. I have also observed that there was delay on the part of the learned Magistrate to issue notice to the petitioner company even when the investigating officer submitted charge sheet against all the petitioners including the petitioner company in order to prosecute them for the offence punishable under Sections 406/420 of the Indian Penal Code. What transpires from the materials on record is that on July 2, 2014 the petitioner company appeared before the court of learned Magistrate being represented by the Managing Director, the petitioner No.1. Admittedly, the charge has not yet been framed by the learned Magistrate and as such, the expeditious disposal of the criminal case was not done by learned Magistrate. In the facts and circumstances as disclosed by me herein above, it is difficult to accept the contention made on behalf of the opposite party no.2 that the present petitioners have moved this court by filing this revision only to delay the criminal trial.

16. By applying the test laid down by the Supreme Court in "State of Haryana v. Bhajanlal" (supra), I can safely hold that no offence is made out against the petitioner No.2 and the petitioner No.3 for prosecuting them for the offence punishable under Sections 406/420 of the Indian Penal Code. However, there are sufficient materials collected by the investigating agency to prosecute the petitioner Abhijit Chowdhury and the petitioner company for the offence punishable under Section 420 of the Indian Penal Code. In view of my above findings, I would like to invoke my inherent power under Section 482 of the Code of Criminal Procedure to quash the criminal proceeding against the petitioner no.2 and 3.

17. As a result, the criminal proceeding of G.R. No.684 of 2006 pending before the court of learned Judicial Magistrate, 2nd Court, Durgapur, Burdwan is quashed so far as the petitioner No.2 and the petitioner No.3 are concerned. The criminal proceeding will continue against the petitioner Suman @ Abhijit Chowdhury and the petitioner M/s. Chowdhury Enterprises Pvt. Ltd. before the trial court in accordance

with law. The learned Judicial Magistrate, 2nd Court, Durgapur, is directed to expedite the hearing of G.R. No.684 of 2006 and to dispose of the said criminal case in accordance with law as early as possible preferably within a period of six months from the date of communication of the order.

18. The learned Judicial Magistrate is directed to consider that learned counsel for the petitioners has undertaken not to press for hearing of the application filed on behalf of the petitioner (M/s. Chowdhury Enterprises Pvt. Ltd.) praying for discharge from the charge of the criminal case.

19. The criminal revision is disposed of.

20. Let a copy of the order be sent down to the learned court below for favour of information and necessary action.

21. Urgent photostat certified copy of this order, if applied for, shall be given to the parties as expeditiously as possible.