Atul and Another Vs. State of Maharashtra and Others

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Court : Mumbai Aurangabad

Decided On : Feb-13-2013

Judge : K.U. Chandiwal

Appeal No. : Criminal Writ Petition Nos.569 of 2009, 581, 600, 614, 615, 620, 621 & 622 of 2009

Appellant : Atul and Another

Respondent : State of Maharashtra and Others

Advocate for Def. : Mr. Brahme

Advocate for Pet/Ap. : Mr. Suryawanshi

Judgement :

This group of Criminal Writ Petitions involves common question in respect of C.R. No.129/2009 (R.C.C. No.90/2009) and C.R. No.109/2009 (R.C.C. No.83/2009), are heard together.

2. Rule made returnable forthwith. Heard finally.

3. Mr. Atul Deshmukh (borrower) had taken a loan of Rs.10,00,000/- from the Chalisgaon People's Cooperative Bank Ltd., Chalisgaon (For short, "the Bank") on 31-3-2001. There was another loan of Rs.41,02,720/- / Rs.42,00,000/- released in favour of Rajiv Hotels Private Ltd., by the said Bank.

4. One group of Criminal Writ Petitions, as stated earlier, is by said borrowers, guarantors and Directors. Another group of Criminal Writ Petitions is again by the same borrowers, guarantors and Directors, concerning second loan.

5. The borrower could not repay the loan amounts, Bank had taken proceedings under Section 101 of the Maharashtra Cooperative Societies Act, 1960 (For short, "MCS Act"), before the competent authority, and a recovery certificate to this effect was granted to the Bank. The petitioners assert, entire loan amount of then Rs.22,00,000/- is repaid to the Bank on 21-3-2009. Loan of Rs.41,02,720/- was availed on 28-7-2000. It was repaid on 14-11-2008, to the tune of Rs.87,00,000/-. The Bank has issued 'no dues' certificate, for both loans.

6. The complainant filed private complaints before learned Judicial Magistrate (First Class), Chalisgaon, on 13-4-2009 (C.R.No.129/2009) and 6-4-2009 (C.R.No.109/2009), wherein the learned Judicial Magistrate (F.C.) issued directions under Section 156(3) of the Code of Criminal Procedure, to the concerned Police. FIR was instituted in both the matters, for offences punishable under Sections 406, 409, 108, 109, 417, 420, 427, 465, 467, 468, 120-B, read with Section 34 of Indian Penal Code. After investigation, final report was filed.

7. The complainant has urged that the petitioners, as borrowers or Directors or guarantors, having clout to the management of the Bank, committed illegalities and by submitting incomplete set of documents, rather blank set of documents, availed the above referred two loans. It was also canvassed, the loan policy was of Rs.3,00,000/- but loan of Rs.10,00,000/- was released. The guarantors were disqualified as they had earlier liabilities. The borrower's father was then President of Municipal Council, Chalisgaon, and had influence over the affairs of the Bank.

8. Both the learned Counsel read statements of Mr. Gadekar, Madhukar Patil, Rajendra Pardeshi, Pravin Gunjal, Dipak Deshmukh, Smt. Sindhubai Deshmukh, Ravindra Nikam and Vilas Ravate. Mr. Brahme, learned Counsel for respondent no.3, submits, the loan was repaid after eight years by depositing Rs.26,30,381/-. The funds of the depositors were misappropriated, as the loan was procured by dishonest means and violating provisions of law. There was an entrustment to the Directors of the Bank and the borrowers created violation to the same. The

learned Counsel read extract of the complaint. He says, 'no dues' certificate is subsequently prepared. The hypothetication was illegally created. The affidavit of Mr. R.R. Patil, Assistant Registrar, Co-operative Societies, or statement of Mr. Gadekar, the Auditor, cannot be overlooked. The loan document dated 31-3-2001 for Rs.10,00,000/- in respect of hypothetication / mortgage of the property was blank. Learned Counsel submits, one time settlement benefit was wrongly extended as it was not in operation.

9. Mr. R.N. Dhorde, learned Senior Counsel appearing for the petitioners, submit that since there was a certificate under Section 101 of the MCS Act, it has effect of decree and has reached finality. It has not been questioned by the petitioners and in compliance thereto, since arrears were to be recovered as land revenue, respective borrowers have repaid the amount and consequently, there would not be any offence by the petitioners. He has criticized the modus operandi of the complainant by showing chart of complaints filed by complainant against Police authorities, Chief Officer of Municipality, Professors of various colleges. In one of the case, 33 Teachers and Education Officer were made accused and the complainant settled the matter subsequently with few of them. According to him, mala fides of the complainant being writ large, for extraneous consideration, he could not be allowed to play with system of the court as it will amount to court gesture and naturally predicament to the petitioners.

10. Learned Counsel for the complainant / respondent has placed reliance to the judgments Hon'ble Supreme Court in the matter of (i) Central Bureau of Investigation Vs. Ravi Shankar Srivastava, IAS and another [2006 AIR SCW 3990], explaining scope of Section 482 of the Code of Criminal Procedure, and mala fides, if any, of the informant, how much importance to be attached; (ii) State of Andhra Pradesh Vs. Bajjoori Kanthaiah and another [AIR 2009 SC 671], if material shows possibility of commission of offence, no interference; (iii) Hardeo Singh Vs. State of Bihar [2000 AIR (SCW) 2046], repayment of the loan in a matter of criminal conspiracy will not absolve the liability. In the said case, the Bank Manager provided over draft facility to the borrower beyond his powers. There was circumstance regarding acceptance of illegal gratification and consequently, Hon'ble Apex Court observed, it can be sufficient at the initial stage

to charge-sheet the Manager, repayment of loan would not absolve the Branch Manager.

11. In the matter of Rumi Dhar (Smt.) Vs. State of West Bengal and another [(2009) 6 Supreme Court Cases 364], Hon'ble Lordships have reiterated exercise of the inherent powers to quash criminal proceedings, in the situation, where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. On facts, in the said case, the material showed prima facie commission of offence under Section 120-B of IPC whereby joint property was conveyed and converted into an unauthorized colony, by selling to different purchasers.

12. In the matter of Shekhar s/o. Bhaskar Borhade and others Vs. The State of Maharashtra and others, in Criminal Application No.4488 of 2010, this Court has observed on 29th June 2011, that repayment of the loan by itself was not sufficient. In the said case, entire procedure was faulted. There was diversion of Bank funds, by-passing all rules and regulations. On the date of audit, there was staggering balance in the loan account and it was allowed to be piled. It was after the FIR, in the said case, some amount was deposited. This Court recorded, such approach showed mind of the said applicant to deal with the Co-operative Society as faith of the depositors in the Society was systematically squeezed and their hard earned money was duped.

13. Learned Counsel for the respondent / complainant relied to the order of this Court, in the matter of Kisanlal s/o. Dagdulal Rathi Vs. State of Maharashtra and others, in Criminal Writ Petition No.922 of 2008 and companion petitions, dated 5th October 2009. The said applicants were borrowers, Directors of the same Bank and sought quashment of FIR recorded against them. It is pertinent, in the said FIR, reference of present borrowers, Rajiv and Atul, is not reflected.

14. It is undisputed fact that owing to illegalities at the Bank, Liquidator was appointed. A Special Auditor carried out audit of the Bank for the period 1991-92 to 2005-06. He has noticed a choreographed system to siphon bank money by the Directors in league with borrowers, staff remaining hand in gloves. The loan documents were scanty, no charge created on the properties, fishy loans were released, it was made difficult to recover the dues from the borrower. The

depositors were defrauded owing to nefarious activities by the Directors, not showing required fidelity to the Bank.

15. It is a matter of record, before complaint dated 13-4-2009 or 6-4-2009, respective loans were repaid on 21-3-2009 and 14-11-2008 respectively. There should be an element at inception to dupe the Bank by dishonest mode.

16. Though the documents of creating lien was not disclosing details of the property, however, the 7/12 extract illustrate that Bank's charge was created. Therefore, shadow created by so called documents of loan dated 31-3-2001 has lost its significance as the Bank's security was safeguarded. The claim that there was no scheme of one time settlement is incorrect as Government had promulgated such scheme in the year 2008. However, it could not have been accelerated if the loans were obtained by cheating or to the wilful defaulters. The repayment made by the borrowers was with interest. Only penal interest and expenses were waived. This was in tune to due diligence of the right vested in the Board appointed by the Government. At that time, private Directors had no control on the Bank. There is no allegation that the hypotheticated property is sold away. The certificate dated 6-11-2009 ('Dakhala') shows that amount of loan is paid / cleared. One time settlement was as per the policy, there could not be any illegality. Since there was disbursement of loan and it has been repaid, there will not be an element of misappropriation. The petitioners, as borrowers, at no point of time have disputed about their liability as they had accepted the decree / certificate under Section 101 of MCS Act. Basically, when the financial facilities were availed, no inducement is reflected to deceive the Bank or dishonestly releasing the loan. The Bank has indeed not disputed the documents or the repayment. It has not even attributed mala fides to the borrowers. There was no element of misrepresentation.

17. In the matter of Inder Mohan Goswami and another Vs. State of Uttaranchal and others [2007 AIR (SCW) 6659], Hon'ble Lordships have explained ingredients qua breach of promise in paragraphs 41 and 43. It was observed, in Section 415 of IPC, there are two separate clauses of acts which the person deceived may be induced to do. In the first clause of acts, he may be induced fraudulently or

dishonestly to deliver property to any person. The second clause of act is doing or omit to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first clause, cases inducing must be fraudulent or dishonest. In the second clause, inducing must be intentional but need not be fraudulent or dishonest. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating, it is necessary to show that he had a fraudulent or dishonest intention at the time of making the promise. From his mere failure to subsequently keep a promise, one cannot presume that he all along had a culpable intention to break the promise from the beginning. Applying this parameter to the facts of present case, though there was delay on the part of the borrowers in repaying the bank dues, however, they did not challenge the same on any count anywhere, nor they placed forged documents of title. On the contrary, Bank's interest was secured by creating its lien over the property.

18. The resolution of the Bank dated 22-2-2000 is placed which shows that for hire purchase/ hypothetication, personal loan ceiling of Rs.10,00,000/- was enhanced to Rs.50,00,000/-. The loans in the present case were subsequent to such resolution. Though it was tried to be impressed that only on one page letter huge amount of Rs.10,00,000/- was advanced, however, it is not so, as set of loan papers illustrate that there was continuing security bond, letter of release and set off, hypothetication sanction letter, hypothetication of goods to secure demand cash credit, guarantor's information and acceptance of liability, charge of the Bank on Gut No.491/1/1 at Ranjangaon, Taluka : Chalisgaon.

19. In the affidavit of Shri R.R. Patil, in Criminal Writ Petition No.569 of 2009, on 21st August 2009, he has stated that the sanction limit was Rs.10,00,000/-, however, petitioners formed a conspiracy and taken huge amount. However, it is not supported from the documents. Even if the hypothetication agreement did not refer to goods nor schedule of goods is annexed, however, interest of the Bank, as stated earlier, was secured, it could not difuse, deflect or minimize the Bank's security. In the set of above facts, the prosecution initiated by the complainant more leans as a vendetta, to reck vengeance on personal scores actuated with other considerations and consequently, calls for interference.

20. Mr. Suryawanshi, learned Counsel for petitioners, at the end of submissions and even during one of such submissions, has indicated to release certain amount by way of donation. He has clarified that it should not be treated as a penalty or a fine, but out of his client's volition, such instructions are conveyed to the Court. Ultimately, Mr. Suryawanshi, on instructions inform, such donation in favour of the Bank from the borrower and the guarantor, Mr. Atul s/o. Anil @ Anilrao Deshmukh and Rajiv s/o. Anil @ Anilrao Deshmukh would be Rs.3,00,000/-, to be deposited directly with the Bank within two months.

21. Mr. Brahme, learned Counsel for respondent no.3 - original complainant says, it would not serve purpose of the complaint petition, the matter needs to be decided on merits. Mr. Chavan leaves the issue to the Court.

ORDER

(i) Criminal Writ Petitions allowed. Impugned proceedings against the petitioners quashed and set aside. Rule made absolute.

(ii) The borrower Atul s/o. Anil @ Anilrao Deshmukh and Rajiv s/o. Anil @ Anilrao Deshmukh jointly and / or severally to deposit an amount of Rs.3,00,000/- [Rupees three lacs] as donation with Chalisgaon People's Cooperative Bank Ltd., Chalisgaon, up to 13th April 2013.