

Arvind Kotecha Vs. Mahesh Kumar and Others

Arvind Kotecha Vs. Mahesh Kumar and Others

SooperKanoon Citation : sooperkanoon.com/335764

Court : Mumbai

Decided On : Sep-05-1991

Reported in : 1992(1)BomCR439; (1992)94BOMLR836;
[1994]79CompCas338(Bom); 1992CriLJ124

Judge : M.F. Saldanha, J.

Acts : [Companies Act, 1956](#) - Sections 630; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 482; [Indian Penal Code \(IPC\), 1860](#) - Sections 120-B and 409

Appeal No. : Criminal Writ Petition No. 92 of 1990

Appellant : Arvind Kotecha

Respondent : Mahesh Kumar and Others

Advocate for Def. : S.S. Shinde and ;B.R. Patil, Adv.

Advocate for Pet/Ap. : K.M. Desai, Adv.

Judgement :

M.F. Saldanha, J.

1. The jurisdiction of the High Court to quash a criminal proceeding at a pre-trial stage is often exercised and the principles governing the situation in which such power would be justifiably used are embodied in a number of judgments of the

Supreme Court, this court and several other High Courts. On this occasion, it may be necessary to classify a class of cases in which the exercise of power under section 482 of the Code of Criminal Procedure, 1973, ought to be refrained from.

2. A few relevant facts giving rise to this petition are as follows :

A criminal complaint bearing No. 256/S of 1989 came to be filed before the learned Metropolitan Magistrate, 23rd Court, Esplanade, Bombay, by one Mahesh Kumar Mathur for and on behalf of M/s. Binod Mills Co. Ltd., Ujjain. The complaint alleged the commission of offences under section 120B, 409 read with section 120B of the Indian Penal Code, 1860, and under section 630 of the [Companies Act, 1956](#). It was primarily alleged in that complaint that accused No. 1, Baburam Lila, who is a director of the Binod Mills Co. Ltd., is alleged to have surrendered to the second accused, who is styled as the landlord of the building, flat No. 10 on the third floor of 'Ram Mahal' Building, situated at Churchgate in South Bombay. The Company was the tenant of this flat and it appears that the flat was being used as a Company guest home. There is no dispute about the fact that the Company was paying the rent in respect of this flat to the second accused till about June, 1984. It appears that the company addressed a letter dated January 24, 1985, to the second accused pointing out that they have not received the monthly rent bills for the period July, 1984, to December, 1984. According to averments in paragraph 12 of the complaint, accused No. 2 sent a reply that 'the aforesaid flat was surrendered to accused No. 2 by accused No. 1 and that possession of the aforesaid flat was given by accused No. 2 to one Smt. Saraswati Damani, who is now occupying the said flat'. It appears that the Company thereafter proceeded to the Magistrate's Court at Ujjain, that a complaint was filed, which was sent for enquiry and report, and that the police submitted a report to the effect that the dispute was of a civil nature and that the property is situated outside the local jurisdiction, upon which the Magistrate at Ujjain dismissed the criminal complaint. We are not much concerned about that proceeding even though some point was made by Mr. K. M. Desai, learned counsel appearing on behalf of the petitioner, that the Ujjain court had dismissed the complaint on the merits. A perusal of the certified copy of the order would indicate that the case was not heard on the merits and that it was dismissed predominantly because the

complainant remained absent, but in any event it was not a verdict given after the evidence came to be recorded and consequently, to my mind, the filing of a subsequent complaint before the Bombay court would not present any legal bar. The learned Magistrate has issued process against both the accused shown in the complaint for offences under section 120B, 409 read with section 120B of the Indian Penal Code and section 630 of the Companies Act. It is against this order that the present petitioner has moved this court for quashing of the proceeding. He essentially contends that he is one of the directors of Kotecha Investment Corporation P. Ltd., who are the landlords in respect of the flat in question. He states that so far as the disputes between the company and its director are concerned basically he is a total foreigner to that matter and that when the flat was surrendered to him he had taken a letter in writing from the director of the Company and to this extent it is wrong to allege that he has committed any offence whatsoever. He has further submitted that there is no dispute about the fact that original accused No. 1 is a director of the Company, and if he has accepted the surrender of the flat from a director of the Company, who was also a power of attorney holder, his action cannot be faulted and least of all can he be hauled up before a criminal court even if it is established that accused No. 1 has acted without the authority or that accused No. 1 has committed the alleged offences. He, therefore, submits that the process issued against him would constitute an abuse of the judicial process of a criminal court and that this is a fit case in which proceedings be quashed as against him.

3. Mr. K. M. Desai, learned counsel appearing on behalf of the petitioner, has taken me in detail through the averments in the complaint and annexures thereto which apparently was all the material that was placed before the learned Magistrate, Mr. Desai has submitted that no case whatsoever has been made out against the present petitioner either under Section 409 of the Indian Penal Code or under Section 630 of the Companies Act. I shall deal with the first aspect of the matter presently, but it needs to be emphasised that the order of the learned Magistrate issuing process is rather vague in so far as it is not very clear as to whether or not he has issued process under the provisions of section 630 of the Companies Act against the present petitioner. A plain reading of the provisions of this section will indicate that it is the elementary requirement of law that the person

against whom action is contemplated must be an employee or a person connected with the company as prescribed by that Section and that there can be no application of Section 630 of the Companies Act to other categories of person. To this extent, the submission advanced by Mr. K. M. Desai is valid and will have to be upheld and the process against the present petitioner, if at all it has been issued under Section 630 of the Companies Act, will have to be quashed.

4. As regards the charge under section 409 of the Indian Penal Code, the submission of Mr. Desai is to the effect that even if accused No. 1 is categorised as an agent of the Company and it is argued that he had dominion over the Company's property, namely, the flat in question, by no stretch of imagination can the present petitioner be categorised as an agent of the Company. He further submits that if this be the position, there can be no question of alleging abetment or conspiracy in respect of the commission of an offence of criminal breach of trust against the present petitioner. In response to this submission Mr. Shinde, learned counsel appearing on behalf of the original complainant, has contended that the charge against the present petitioner is confined to his having acted the first accused could not have under any circumstances, either in his capacity as director or as power of attorney holder of the Company, virtually disposed of a valuable asset of the company without following the procedure prescribed by law. He submits that if in the commission of this Act the prosecution is in a position to demonstrate that the present petitioner has been a knowing participant or an abettor that it would be permissible for the criminal court to exercise the jurisdiction in respect of such a charge against the present petitioner. It is necessary for me to mention that the trial has yet to commence and that the accused who are before the criminal court cannot be deprived of their full and complete right of defending themselves, both on points of fact and on points of law, and to this extent they ought not to be prejudiced by the observations that may be made in this proceeding. To this extent, therefore, the observations and findings in this judgment shall be circumscribed by two distinct conditions, the first of them being that the learned trial Magistrate shall not in any way rely upon or be influenced by the contents of this judgment in the course of the proceedings pending before him, and the second being that these observations are for purposes of justifying the reasons for the decision of this court in the present petition.

5. There has been considerable debate with regard to the power of attorney which, admittedly, the company appears to have issued to its director who is original accused No. 1 Mr. Desai, advanced an argument that apart from the letter given to the landlord by the first accused that the present petitioner was justified in having accepted the surrender of the flat from him because of the additional factor, namely, the existence of that power of attorney. Among other things, Mr. Desai submitted that admittedly a civil suit has been filed in the High Court which was subsequently transferred to the court of competent jurisdiction, namely, the Court of Small Causes which encompasses the total gamut of the complaint in relation to the surrender of the flat in question and to which suit even the present occupant of the flat, Mrs. Damani is made a party. Mr. Desai submits that the civil proceedings will effectively take care of the entire dispute because that court will go into the validity or otherwise of the surrender and, furthermore, that as far as the complainant mills are concerned the civil court will grant adequate reliefs to them if they are entitled thereto. He submits that the filing of the criminal complaint, according to him, is tainted with mala fides because the criminal court cannot pass any orders in respect of the disputed flat nor for that matter can it examine the allegations made at the Bar that a considerable amount of money had passed in relation to this transaction. He, therefore, concludes that if neither of these two reliefs can be granted by the criminal court he is justified in arguing that the sole purpose of filing that proceeding is in order to exert pressure or, to use his own phrase, to indulge in virtual arm-twisting. The submissions advanced by Mr. Desai are not very relevant, to my mind, with regard to the issue that is before me in so far as admittedly the criminal court cannot grant the reliefs in question and admittedly the criminal court is not concerned with the stray allegations regarding the large amount of money having passed. The narrow ambit of the dispute before the criminal court is to find as to whether a criminal offence has been made out or not. What I am required to examine is even a narrower issue as to whether a prima facie case exists on the material placed before the criminal court.

6. The complaint itself very specifically states that it was accused No. 2 who accepted the surrender of the flat. Undisputedly, the flat in question had been in the possession and occupation of the Company for several years. This is a limited Company, the flat consists of one of its valuable assets and if the company were

to decide for any reason to surrender the flat in question, there is a procedure prescribed for this process. In the present case, we find that a mere letter has been issued by the first accused which letter does not so much as even state that the company has decided through a resolution of the board that it does not desire to retain the flat any longer. There is no reference in this letter nor is there any reference even in the reply sent on behalf of accused No. 2 to the power of attorney.

7. Even assuming that the power of attorney was one of the documents that was relied upon at the time of the surrender, it is quite elementary that the document did not authorise accused No. 1 to do any such Act on behalf of the Company. If he purports to do an Act of which the legality is seriously disputed under the umbrella of such a document, then that document cannot be used as a justification. On the bare averments made out in the complaint there is a clearcut admission about the second accused that the flat was surrendered to him. Under these circumstances, the learned Magistrate was justified in issuing process also against the present petitioner on the basis of the material placed before him because it was contended that the present petitioner had acted in conspiracy with the first accused. It needs to be clarified here that it is certainly open to the present petitioner to establish his innocence before the forum of the trial court, and to this extent the observations made above are confined to the present proceedings alone.

8. Mr. Desai has placed strong reliance on the judgment of the Supreme Court in the case of *Madhavrao v. Sambhajirao*, : 1988 CriLJ853 . The Supreme Court had in that case considered a decision relating to a criminal proceeding instituted in relation to a dispute concerning the 'Shrikrishna Madhava Trust'. On the facts of that case, the Supreme Court observed that there would be certain situations where it would predominantly be a civil wrong and may or may not amount to a criminal offence. The facts of the present proceedings are entirely different from that case and are consequently distinguishable. Furthermore, in paragraph (7) of that judgment, the Supreme Court has laid down the salutary principle that where the chances of an ultimate conviction are bleak, no useful purpose is likely to be served by allowing a criminal prosecution to continue. It was, therefore, Mr.

Desai's submission that regardless of some averments in the complaint or some stray references in the correspondence he can demonstrate that the proceedings before the learned Magistrate could never conclude in the conviction of the present petitioner or for that matter if such a conviction appeared to be a remote possibility that interference by this court would be justified. Undoubtedly, it is difficult to predict the outcome of a prosecution, but an evaluation of the material and the possible evidence, which the prosecution can produce, would certainly give a fair indication of the likely outcome. In the present case the all important question that yet remains to be established before the trial court is as to what was the mens rea, if any, on the part of the present petitioner in the commission of the alleged offence where a nexus in law can be said to have been established and where he can be said to have acted in that manner as would justify his conviction on a conspiracy charge. Prima facie, this court cannot come to the conclusion on the basis of the documents and averments in the complaint that a conviction of the present petitioner is either bleak or remote. Under these circumstances, without adducing any elaborate reasons for the above conclusion, it will have to be held that interference at this stage in the present proceeding is uncalled for.

9. It is necessary for me to observe that the present complaint has been filed on behalf of a public limited company which is supposed to be now categorised as a sick unit. The complaint further states that the Government of Madhya Pradesh is now in the picture and that effectively this is a complaint lodged on behalf of a public authority. A solemn statement was made in the course of the arguments on behalf of the complainant that the flat in question is a very valuable asset and, therefore, an allegation was made that a lot of money has passed in this transaction. I need to mention that there are no allegations to this effect in the complaint and, therefore, I refuse to take cognizance of such wild statements. What, however, needs to be taken note of is the fact that it would be too much to expect this court to believe that the surrender of the flat was as innocent a transaction as has been made out to be. An investigation by the criminal court into the circumstances of this surrender is, therefore, to my mind, very essential and is also in the public interest. To this extent, I will categorise this case as being one of those categories of cases where the public interest requires that the forum before which the complaint is presented needs in the public interest to embark upon an

enquiry of the suspicious circumstances in which an important transaction has taken place and that such an enquiry should not be stifled by having resort to the provisions of section 48A of the Code of Criminal Procedure. Perhaps this is an angle which has not hitherto come up in many cases, but since it has come up in the present instance, these observations are necessary.

10. In this view of the matter, no interference is justified at this stage. The criminal writ petition accordingly fails and is dismissed. The rule to stand discharged and the interim orders to stand vacated.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com