

Neutral Citation No. - 2024:AHC:155804

HIGH COURT OF JUDICATURE AT ALLAHABAD

A.F.R

Judgement Reserved on 09.09.2024

Judgement Delivered on 24.09.2024

Court No. - 79

Case :- APPLICATION under Section 482 No. - 27298 of 2019

Applicant :- Jitendra Kumar Keshwani

Opposite Party :- State Of U.P. And Anr

Counsel for Applicant :- Deepak Kumar Kulshrestha, Hitesh Pachori

Counsel for Opposite Party :- G.A., Manish Trivedi

Hon'ble Anish Kumar Gupta, J.

1. Heard Sri Hitesh Pachori, learned counsel for the applicant, Sri Manish Trivedi, learned counsel for the opposite party no.2 and learned Sri Rajeev Kumar Singh, A.G.A. for the State.

2. The instant application under Section 482 Cr.P.C. has been filed seeking quashing of charge-sheet dated 06.09.2018 and cognizance order dated 12.04.2019 as well as the entire criminal proceedings in Case No. 21416 of 2019 (State of U.P. Vs. Jitendra Kumar Keshwani), arising out of Case Crime No. 160 of 2018, under Sections 420, 409 of the India Penal Code (hereinafter referred to as, 'I.P.C. '), Police Station- Hariparvat, District- Agra, pending in the court of Chief Judicial Magistrate, Agra.

3. The brief facts of the instant case are that the opposite party no.2 has lodged an F.I.R. being Case Crime No. 160 of 2018 under Section 420 and 406 I.P.C. alleging therein that the applicant herein

is the Director/proprietor of M/s LDK Share and Securities Pvt. Ltd., who was the licensed share broker. In the F.I.R. it has been alleged that the opposite party no. 2 and his younger brother Ram Kumar Sharma were having Demat Accounts with the Stock Holding Corporation of the applicant, where the equity shares of different companies were deposited by the opposite party no. 2 and his brother. The opposite party no. 2 and his brother used to trade in share equity shares through the applicant, who was the licensed share broker. It is alleged that the applicant herein had contacted the opposite party no. 2 and his brother and asked them to invest and trade in shares through the applicant, whereby he will provide various facilities. On such assurance, the opposite party no. 2 and his brother had invested in equity shares and also subsequently sold the aforesaid shares. When the money of shares sold was asked by the opposite party no.2 from the applicant, he assured that the payment shall be made after sometime. Therefore, the aforesaid amount of shares sold by the opposite party no. 2 was an amount kept in the entrustment of the applicant herein and despite repeated demands made by the opposite party no. 2 the applicant has failed to make the payment of shares amounting Rs. 9,69,450/-. When the said payment was not made by the applicant herein, a legal notice dated 30.11.2017 was given to the applicant. Despite the said notice the applicant had not paid the amount, therefore, it is alleged that the applicant has committed the breach of trust and misappropriation of the amount of the opposite party no.2.

4. It has been further prayed in the F.I.R. that after registering the F.I.R. and initiating the legal proceedings against the applicant, the amount of the opposite party no. 2 be recovered. The matter was investigated by the police and the charge sheet dated 06.09.2018 was filed, on which cognizance was taken by the Chief Judicial Magistrate concerned on 12.04.2019, against which the instant application has been filed by the applicant herein.

5. Learned counsel for the applicant relying upon the judgement of the Apex Court dated 06.02.2024 passed in Criminal Appeal arising out of *SLP (Crl.) No. 13485 of 2023 (Lalit Chaturvedi & Others vs. State of U.P. and Another)*, submits that from the allegations made in the F.I.R. no offence whatsoever under Sections 420 and 409 I.P.C. can be said to have been made out against the applicant herein.

6. Learned counsel for the applicant further submits that the applicant is a broker appointed under the provisions of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '*the SEBI Act*') and opposite party no.2 herein, is an investor and the dispute between the parties with regard to investment made by opposite party no.2 in the shares, which were ultimately sold by opposite party no.2 and the amount of the same has been misappropriated by the broker. He submits that the aforesaid offence is covered under Section 15-F of SEBI Act. Therefore, he relies upon the Section 26 of SEBI Act.

7. Learned counsel for the applicant submits that no criminal prosecution can be initiated on the F.I.R. lodged by any person for the offence under the SEBI Act. The criminal prosecution can be initiated only on the complaint filed by the court under the SEBI Act. Therefore, he submits that the instant F.I.R. lodged by the opposite party no.2 is not sustainable in law. Therefore, he seeks quashing of the entire proceedings of the instant case initiated under the provisions of this Act.

8. *Per contra*, learned counsel for the opposite party no.2 has relied upon Section 26B of the SEBI Act and has tried to contend that the criminal prosecution in the special courts are permissible, therefore, he further submits that in the instant F.I.R., no offence under the SEBI Act has been alleged by the applicant. Rather, the prosecution has been lodged for the offences under Section 409 and 420 of I.P.C., therefore, the prosecution of the applicant herein for the offences

under I.P.C. is permissible on the basis of the F.I.R. Therefore, learned counsel for opposite party no.2 submits that no interference is called for. Learned counsel further submits that if in any case, the Court comes to a conclusion that the F.I.R. lodged by opposite party no.2 against the applicant is not sustainable and barred under Section 26 of the SEBI Act, then he may be permitted to file an appropriate complaint before the SEBI, on which the delay in filing such complaint due to pendency of the instant application may be exempted.

9. Learned A.G.A. also supports the submissions made by learned counsel for the opposite party no.2.

10. Having heard the rival submissions made by learned counsels for the parties, this Court has carefully gone through the record of the case. Before proceeding further it would be relevant to note provisions of Sections 405, 420 and 409 I.P.C., which reads as under:

Sections 405, 409 and 420 I.P.C.

"405. Criminal breach of trust.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

409. Criminal breach of trust by public servant, or by banker, merchant or agent.—Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

420. Cheating and dishonestly inducing delivery of property.—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

11. From the plain reading of provisions of Section 420 I.P.C. it is apparent that if any person cheats and thereby dishonestly induces any person to deliver any property or to make alter or destroy the whole or any part of the valuable security or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punishable under Section 420 I.P.C.

12. In the instant case there is no element of cheating or dishonest inducement on the part of the applicant herein. The applicant herein was a share broker and the opposite party no. 2 being fully conversant with the consequences of investment in shares, as having his eyes wide open and being aware of risk of such investment had made the investment through applicant. There is some accounting dispute between the parties, for which the instant F.I.R. has been lodged praying therein the recovery of the amount, which is not permissible by criminal action as has been held by the Apex Court in **Lalit Chaturvedi (Supra)** in the following terms:

"Having gone through the complaint, which was registered as an FIR and the assertions made therein, it is quite clear that respondent no. 2/complainant – Sanjay Garg's grievance is regarding failure of the appellants to pay the outstanding amount, in spite of the respondent no. 2/complainant – Sanjay Garg's repeated demands. The respondent no. 2/complainant – Sanjay Garg states that the supplies were made between the period 01.12.2015 and 06.08.2017. The appellants had made the payments from time to time of Rs. 3,76,40,553/- leaving a balance of Rs. 1,92,91,358/-.

*We will assume that the assertions made in the complaint are correct, but even then, a **criminal offence under Section 420 read with Section 415 of the IPC is not established in the absence of deception by making false and misleading representation, dishonest concealment or any other act or omission, or inducement of the complainant to deliver any property at the time of the contract(s) being entered.** The ingredients to allege the offence are neither stated nor can be inferred from the averments. **A prayer is made to the police for recovery of money from the appellants. The police is to investigate the allegations which discloses a criminal act. Police does not have the power and authority to recover money or act as a civil court for recovery of money.***

*The chargesheet also refers to Section 406 of the IPC, but without pointing out how the ingredients of said section are satisfied. No details and particulars are mentioned. There are decisions which hold that **the same act or transaction cannot result in an offence of cheating and criminal breach of trust simultaneously. For the offence of cheating, dishonest intention must exist at the inception of the transaction, whereas, in case of***

criminal breach of trust there must exist a relationship between the parties whereby one party entrusts another with the property as per law, albeit dishonest intention comes later. In this case entrustment is missing, in fact it is not even alleged. It is a case of sale of goods. The chargesheet does refer to Section 506 of the IPC relying upon the averments in the complaint. However, no details and particulars are given, when and on which date and place the threats were given. Without the said details and particulars, it is apparent to us, that these allegations of threats etc. have been made only with an intent to activate police machinery for recovery of money."

(Emphasis Supplied)

13. In *Mohammed Ibrahim and Others vs. State of Bihar and Another* : (2009) 8 SCC 751, the Apex Court has held as under:

"18. Let us now examine whether the ingredients of an offence of cheating are made out. The essential ingredients of the offence of "cheating" are as follows:

(i) deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission;

(ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property.

19. To constitute an offence under Section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived

(i) to deliver any property to any person, or

(ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security)."

(Emphasis Supplied)

14. Thus, a person cannot be held responsible for the offence under Section 409 I.P.C. as well as Section 420 I.P.C. on the basis on the same allegations as both the offences are contradictory and operate in different fields altogether. In the case of cheating, dishonest intention must be present from the inception of the transaction, which is categorically missing in the instant case. Thus, no offence under Section 420 I.P.C. is made out. For the offence of criminal breach of trust the pre-condition is valid entrustment and subsequently its misappropriation. In the instant case, the opposite party no.2 was dealing in shares through the applicant and subsequently there is some accounting dispute between the parties in such dealing and no

determined sum is entrusted. Share Market has its own risks. Therefore, it cannot be said that there was any entrustment of the property by opposite party no.2 with the applicant. Thus, no offence under Section 409 I.P.C. can be said to have been made out against the applicant.

15. Thus, from the aforesaid judgement it is crystal clear that a person cannot claim to have entrusted any property to someone and at the same time he can also not say that he has been cheated by dishonest inducement to deliver the property. It can either be the entrustment or the cheating, however, it cannot be both.

16. From the plain reading of the F.I.R., the tenor and prayer of the F.I.R. is to get the recovery of money, which has been specifically deprecated by the Apex Court in the aforesaid judgement of **Lalit Chaturvedi (Supra)**, therefore, the F.I.R. lodged by the opposite party no.2 to initiate the criminal proceeding for recovery of money is not sustainable and is self contradictory. At the most, from the allegations as made in the F.I.R., there can be an offence under Section 15-F of the SEBI Act, which reads as under:

"15F. Penalty for default in case of stock brokers----- If any person, who is registered as a stock broker under this Act,---

(a) fails to issue contract notes in the form and manner specified by the stock exchange of which such broker is a member, he shall be liable to [a penalty which shall not be less than one lakh rupees but which may extend to [one crore rupees]] for which the contract note was required to be issued by that broker;

(b) fails to deliver any security or fails to make payment of the amount due to the investor in the manner within the period specified in the regulations, he shall be liable to [a penalty [which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which [such failure continues] subject to a maximum of one crore rupees];

(c) charges an amount of brokerage which is in excess of the brokerage specified in the regulations, he shall be liable to [a penalty [which shall not be less than one lakh rupees but which may extend to five times the amount of brokerage] charged in excess of the specified brokerage, whichever is higher."

17. For the aforesaid offences under Section 15F of the SEBI Act, Section 26 of the SEBI Act prohibits registration of the F.I.R. for

which only complainant can be filed under Section 26 of this Act, by the Board.

18. Section 26 of the SEBI Act reads as under:

Section 26 : Cognizance of offences by courts.

"26. (1) No court shall take cognizance of any offence punishable under this Act or any rules or regulations made thereunder, save on a complaint made by the Board. []

(2) No court inferior to that of [a Court of Session] shall try any offence punishable under this Act."

19. The SEBI Act is an Special Act, which shall prevail over the general act, such as I.P.C. or Cr.P.C. It is settled position of law that once a special Act holds the field, the provisions of general law would not apply and only the prosecution can be lodged in accordance with the provisions of such special law and the provisions of Section 26 of the SEBI Act, specifically. Reliance placed on section 26B of the SEBI Act by learned counsel for the opposite party no. 2 is misconceived. It is the applicable only for the purpose of filing of the complaint before the special courts and not for criminal prosecution under the provisions of I.P.C.

20. In view thereof, the instant application is **allowed** and the entire proceedings of cognizance order dated 12.04.2019 as well as the entire criminal proceedings along with the charge-sheet dated 06.09.2018, in Case No. 21416 of 2019 (State of U.P. Vs. Jitendra Kumar Keshwani), arising out of Case Crime No. 160 of 2018, under Section 420, 409 of I.P.C., Police Station- Hariparvat, District- Agra, pending in the court of Chief Judicial Magistrate, Agra, are hereby **quashed**.

21. However, it is open for the opposite party no. 2 to approach the Authorities under the SEBI Act for the redressal of his grievance, if any, in accordance with law with the provisions of SEBI Act. If any such application is made to the SEBI by the opposite party no.2, the

same shall be considered without any objection with the regard to the limitation.

Order Date :- 24th September, 2024

Shubham Arya

(Anish Kumar Gupta, J.)