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REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. OF 2023
(Arising out of SLP (Criminal) No. 3686 of 2021)

PRAKASH AGGARWAL ...APPELLANT(S)

VERSUS

GANESH BENZOPLAST LIMITED
AND ANOTHER ...RESPONDENT(S)

WITH

CRIMINAL APPEAL NO. OF 2023
(Arising out of SLP (Criminal) No. 4094 of 2021)

CRIMINAL APPEAL NOS. OF 2023
(Arising out of SLP (Criminal) Nos. 3707-3708 of 2021)

J U D G M E N T

B.R. GAVAI, J.

1. Leave granted.

2. The present appeals challenge the judgment and order dated 26th April 2021, passed by the High Court of Judicature at Bombay, thereby dismissing Criminal Writ Petition Nos. 348, 349 and 357 of 2020 filed by the

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appellants herein seeking quashing of the order dated 22nd March 2017 passed by the Metropolitan Magistrate, Railway Mobile Court, Andheri, Mumbai (hereinafter referred to as the "trial court"), thereby issuing summons to them. The High Court allowed Criminal Writ Petition Nos. 127, 128, 129 and 130 of 2020 filed by the complainant/respondent No.1 herein, thereby, upholding the order dated 22nd March 2017.

3. The facts, in brief, giving rise to the present appeals are as under:

3.1. Ganesh Benzoplast Ltd., the original complainant and respondent No. 1 herein, availed two Inter Corporate Deposit (hereinafter referred to as "ICD") facilities, dated 14th February 2000 and 7th March 2000, from Morgan Securities and Credits Pvt. Ltd – accused No. 1. The said ICD were for Rs. 50,00,000/-, each to be repaid by 15th May 2000 and 5th June 2000. As per the ICD, security cover of 200% of the ICD amount was to be maintained. Accordingly, the complainant/respondent No.1 executed a Letter of Pledge (for short, "LoP") in favour of accused No.1 Company, pledging

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15,00,000 of its equity shares as security, with each share valued at Rs. 16/-, thereby amounting to Rs. 2,40,00,000/-.

3.2. Prakash Aggarwal, Meera Goyal and Suresh Chand Goyal, appellants herein, who were Directors of accused No. 1 Company, were responsible for the management of its day to day affairs. They were arraigned as accused Nos. 2 to 4 in the original complaint.

3.3. On 3rd May 2000, accused No.1 Company issued a notice to the complainant/respondent No.1 asking it to pledge additional shares as the value of the pledged shares had decreased to Rs. 1,24,50,000/- on account of depression in the financial market, thereby, resulting in a shortfall of Rs. 75,50,000/- from the agreed security cover i.e. 200% of the ICD amount.

3.4. Due to financial hardship, the complainant/respondent No.1 was not in a position to repay the ICD amount on 5th June 2000, i.e. the due date, and therefore, it informed accused No.1 Company that it could sell the pledged shares to realize the due amount, and remit the excess amount to the complainant/respondent No.1. Thereafter, accused No.1

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Company assured the complainant/respondent No.1 that, as and when the shares were sold, the balance amount, if any, would be remitted to it.

3.5. On 25th August 2000, the complainant/respondent No.1 repaid the first ICD and the loan account was closed.

3.6. It is pertinent to note that the interest that was being charged on ICD was being regularly recovered by accused No. 1 Company uptill 6th August 2001. In the meanwhile, the complainant/respondent No.1 was in constant communication with the accused No.1 Company, seeking the details of the sale of shares. However, these requests were rebuffed, with accused No.1 Company asking the complainant/respondent No.1 not to confuse the issue of sale of shares with the issue of interest on ICD.

3.7. On 2nd August 2001, accused No.1 Company issued another notice to the complainant/respondent No.1, demanding the repayment of the ICD of Rs. 50,00,000/- as the value of the pledged shares had fallen to Rs. 44,25,000/-, failing which the pledged shares would be sold.

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3.8. Subsequently, on 14th August 2001, complainant/respondent No.1 proposed to repay Rs. 25,00,000/- initially in five equal monthly installments, with the first installment to be paid on or before 25th August 2001. However, on the same day, accused No.1 Company invoked the arbitration clause in the ICD agreement and appointed a Sole Arbitrator, claiming the outstanding amount due from the complainant/respondent No.1.

3.9. During the pendency of the arbitration proceedings, accused No.1 Company sold the 15,00,000 pledged shares for an amount of Rs.24,67,631/- to one Doogar and Associates Ltd., which was later renamed as Morgan Ventures Ltd. in the year 2004. Importantly, accused Nos. 2 to 4 were also Directors in this transferee Company.

3.10. The complainant/respondent No.1, on 11th February 2011, filed a criminal complaint being CC No. 56/SW/2011 against accused Nos.1 to 4, alleging fraud, cheating and criminal breach of trust, before the trial court. Vide order dated 11th September 2012, the Magistrate issued process against all the accused for offences punishable under

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Sections 403, 406, 420 and 120-B of Indian Penal Code, 1860 (for short, "IPC").

3.11. The aforesaid order was challenged by filing a Criminal Revision Application No. 1276 of 2012 before the Court of Session for Greater Bombay at Bombay. Vide order dated 16th January 2016, the said criminal revision application was allowed, and the matter was remanded to the trial court, who was directed to re-record verification under Section 200 of the Code of Criminal Procedure,1973.

3.12. In the meantime, on 9th December 2015, an arbitral award was passed in favour of accused No.1 Company and the complainant/respondent No.1 was held liable to pay the claim amount of Rs.34,59,218/- with interest at the rate of 36% per annum.

3.13. Pursuant to the remand order dated 16th January 2016, the trial court, vide order dated 22nd March 2017, issued process under Sections 406, 420 read with Section 34 of the IPC read with Section 15-HA of the Security Exchange Board of India Act, 1992 (for short, "SEBI Act") against accused Nos. 1 to 4.

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3.14. Aggrieved by the same, the accused filed Criminal Revision Application being No.128 of 2017 before the Court of Sessions, Dindoshi, Mumbai. Vide order dated 2nd December 2019, the said revision application was partly allowed. Insofar as the process issued against accused No.1 Company, it was completely quashed and set aside, whereas, the issuance of process against accused Nos. 2 to 4 was set aside only under Section 420 of the IPC and Section 15-HA of the SEBI Act. However, issuance of process against accused Nos. 2 to 4 for the offences punishable under Section 406 read with Section 34 of the IPC stood confirmed.

3.15. Challenging the aforesaid order, criminal writ petitions were filed both by the complainant/respondent No.1 and accused Nos. 2 to 4/appellants herein. The High Court, vide the impugned judgment dated 26th April 2021, allowed the criminal writ petitions filed by the complainant/respondent No.1 and dismissed the criminal writ petitions filed by accused Nos. 2 to 4, thereby affirming the order of the trial court and confirming the issuance of process against them under Sections 406 and 420 read with

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Section 34 of IPC. The charges under Section 15-HA of the SEBI Act were dropped at the instance of the complainant/respondent No.1, who averred before the High Court that he would not pursue the application under the same.

3.16. Hence, the present appeals.

4. We have heard Shri Shyam Divan, learned Senior Counsel and Shri Vaibhav Malhotra, learned counsel appearing on behalf of the accused Nos. 2 to 4-appellants, Dr. Abhishek Manu Singhvi, Mrs. Anjana Prakash, learned Senior Counsel appearing on behalf of the complainant /respondent No.1 and Shri Siddharth Dharmadhikari, learned counsel on behalf of the respondent No.2-State.

5. Shri Divan submitted that the complaint, even taken at its face value, does not disclose that ingredients of any offence have been made out. He submits that, along with the Inter-Corporate Deposit Agreement (hereinafter referred to as the "ICDA"), the complainant/respondent No.1 had pledged the shares in question. As per the LoP, the accused No.1 Company was entitled to invoke the pledge at any time in the

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event of default or otherwise. In the LoP, the authority was also given to sell and dispose of the said securities. He further submits that, as per the LoP itself, the accused No.1 Company could have sold the shares to themselves.

6. Shri Divan further submits that, with regard to the very same dispute, the arbitration proceedings were conducted between the parties. The complainant/respondent No.1 has participated in the said arbitration proceedings and an arbitral award is also passed by the learned Arbitral Tribunal. He submits that the same is challenged by the complainant/respondent No.1 by a proceeding under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Arbitration Act"). He further submits that it could clearly be seen that the dispute between the parties, if any, is purely of civil nature and continuation of the criminal proceedings would amount to nothing else but an abuse of process of law.

7. Dr. Singhvi, on the contrary, submits that the complainant/respondent No.1 had informed the accused persons/appellants herein as early on 5th June 2000 to sell

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the shares. However, the accused persons/appellants chose not to sell the shares at that point of time as the market price was much higher. He submits that the very fact that the shares were sold by the accused persons/appellants to a Company wherein accused Nos. 2 and 3 are also Directors, at a meagre price, clearly exhibits a dishonest intention on their behalf. He submits that the complainant/respondent No.1, for the first time, came to know about the illegal act committed by the accused persons/appellants in the year 2009 and as such, there is no delay in lodging the complaint. He submits that, in any case, the trial court, the Revisional Court as well as the High Court have concurrently held that insofar as the offence punishable under Section 406 of the IPC is concerned, a case is made out. He therefore submits that an interference with the concurrent findings of fact would not be permissible. He, therefore, prays for dismissal of the complaint.

8. With the assistance of the learned counsel for the parties, we have perused the documents placed on record.

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9. It is not in dispute that an ICDA came to be entered into between M/s Ganesh Benzoplast Limited, i.e. the complainant/respondent No.1 herein and M/s Morgan Securities & Credits Pvt. Ltd., i.e. accused No. 1, on 7th March 2000. Under the said ICDA, accused No.1 Company had agreed to grant the complainant/respondent No.1 the said ICD of Rs.50,00,000/- for a period of 90 days at an interest rate of 26% per annum. It will be relevant to refer to Clauses 2 and 3 of the terms of the ICDA, which read thus:

> "2. The Borrower is aware that the ICD is being granted by the lender on the basis of securities agreed to be provided as per the terms of the sanction.
>
> 3. The borrower hereby irrevocably agrees that it shall arrange to issue an irrevocable instruction to their dematerialised participant to mark a lien in favour of the lender till the ICD and any other dues remains unpaid. All expenses related to dematerialising of shares shall be bone by the borrower."

10. It could thus be seen that the ICD was granted by the lender on the basis of the securities agreed to be provided as per the terms of the sanction. The complainant/respondent No.1 has also irrevocably agreed that it shall arrange to issue

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an irrevocable instruction to its dematerialized participant to mark a lien in favour of the lender till the ICD and any other dues remains unpaid. It will further be relevant to refer to the following part of Clause 9 of the ICDA:

> "**9.** ....
> a) Any installment of interest if any required to be paid in installment as agreed hereinabove remains unpaid even after the expiry of 3 days from the respective due date for payment.
>
> b) Any shortfall in the security pledged vide Letter of Pledge executed subject to which facility granted is not replenished even after giving due Notice as provided therein.
>
> c) ....
> d) ....
> e) ....
> f) ....
> h) ....
> i) ...."

11. It is thus clear that in the event of any of the events occurring in sub-clauses (a) to (i) of Clause 9 of the ICDA, the lender would be entitled at its discretion to enforce its rights as mentioned in the ICDA, Deed of Personal Guarantees, Corporate Guarantee and LoP. A perusal of sub-clause (a) of Clause 9 of the ICDA would reveal that, if any installment of interest required to be paid as per the ICDA remains unpaid

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even after the expiry of 3 days from the respective due date for payment, accused No.1 Company was entitled to enforce its rights as mentioned in Clause 9 of the ICDA. Similarly, if any shortfall in the security pledged vide LoP executed, subject to which facility was granted, was not replenished even after giving due Notice, accused No.1 Company was entitled to invoke Clause 9 of the ICDA.

12. It will further be relevant to refer to Clauses 5 and 8(5) of the LoP, which read thus:

> "5. The Pledgee may invoke the pledge at any time in the event of default or otherwise for as many number of shares as the Pledgee/ lender deems fit in its sole discretion. However, such invocation of pledge will not amount to sale of share to the lender and the borrower will not be entitled to any credit/ adjustment on such invocation transfer of shares to the lenders account on that date. The amount which may be realised against as and when actual sale in effected by the lender in the market and in that circumstances only the borrower will be entitled to adjustment of the sale proceeds so realised against the ICD dues. Pledger agrees that it has understood the concept and shall not create any dispute on the same.
>
> 8. ……
>
> i) ………
> ii) ………
> iii) ………..

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> iv) ....
> v) In order to enable you to sell and dispose off the said securities under the circumstances mentioned in clause 7 above, We hereby give you the authority to undertake all deeds and acts to dispose off the said shares in adjust the outstanding amount. We hereby confirm that we will not dispute or claim any loss on account of price at which securities are sold by the lender to himself, its group companies or to any outsider."

13. A perusal of Clause 5 of the LoP would reveal that the Pledgee was entitled to invoke the pledge at any time in the event of default or otherwise for as many number of shares as the Pledgee/lender deems fit in its sole discretion. It further provided that such invocation of pledge would not amount to sale of shares to the lender and the borrower would not be entitled to any credit/adjustment on such invocation/transfer of shares to the lender's account on that date. It further provided that the amount which may be realized against as and when actual sale is effected by the lender in the market and in that circumstances only the borrower would be entitled to adjustment of the sale proceeds so realized against the ICD dues. It would further

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reveal that the Pledger had agreed that it has understood the concept and shall not create any dispute on the same.

14. A perusal of sub-clause (v) of Clause 8 of the LoP would reveal that a specific authority has been given by the Pledgee to sell and dispose of the said securities under the circumstances mentioned in the LoP. The complainant/respondent No.1 has also agreed to undertake all deeds and acts to dispose of the said shares to adjust the outstanding amount. The complainant/respondent No.1 has further agreed that it would not question whether accused No.1 Company had got the best price for the securities.

15. A perusal of the terms of the ICDA as well as the LoP would clearly reveal that, in the event of any of the events occurring as provided in Clause 9 of the ICDA, accused No. 1 Company was entitled to sell the shares either to itself, its group companies or to any outsider. The accused No.1 Company had also agreed not to dispute or claim any loss on account of the price at which such securities were sold.

16. A perusal of the entire complaint would reveal that the only allegation is that accused No.1 Company had sold the

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shares to itself when the market price of the shares had fallen. The allegation is that "*The accused in order to acquire more shares of complainant waited for further fall in share price and sold them only in 2001 for Rs. 24,67,531/-. Thus the accused jointly and severally are liable for unauthorized, illegal and fraudulent sale and also for breach of trust. The accused not only misappropriated the shares, but also cheated the complainant as the securities were handed over only as a surety in trust and on assurance ·of the accused which later proved to be false that the same will be dealt as per guidelines of SEBI.*"

17. The aforesaid averments are totally contrary to the terms agreed between the parties in the ICDA as well as in the LoP. As already discussed hereinabove, the ICDA as well as the LoP specifically authorizes the accused persons/appellants to sell the shares either to themselves or their group of companies. It is further to be noted that accused No.1 Company had already invoked the arbitration clause on 14th August 2001. In the arbitration proceedings, a specific stand was taken by the complainant/respondent

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No.1 that accused No.1 Company should have invoked the pledge at the stage of the first default, i.e. in May 2000. However, the accused persons/appellants waited till August-September, 2001 to sell the pledged shares which had in the meanwhile depreciated in value. Another allegation made before the arbitration proceedings was that accused No.1 Company had manipulated the price of the shares. It will be relevant to refer to Issue No. 2 framed by the learned Arbitrator, which reads thus:

> "2) Whether the 15 lakh equity shares which were pledged have been sold? If so, when, at what rate, to whom and to what effect? (OPP).
> (The above issue will include the contention that the Claimant has not sold the shares at the best available price. This will also cover the allegation that as to whether the Claimants were obliged to sell the shares as stated in the letter of 3rd May, 2000)."

18. It will be relevant to refer to the following observations of the learned Arbitrator made in his award dated 9th December 2005:

> "32. Pertinently, the average price at which-the pledged shares were sold by the Claimant on 24.03.2001 works out to Rs.2.47 per equity share, as per Respondent No. l's own assertion [as mentioned in undated written note referred

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> in para b (supra)). It is also not in1 dispute, as noted above, that the average market price per share as on 02.08.2001 was Rs. 2.95 per share. Such marginal fluctuations in the price of shares; and that too when the Claimant was constrained to realize the entire security in the face of habitual default by Respondent No.1; with not many takers for the shares; cannot be described as a consequence of price manipulation, resulting in any wrongful loss to the Respondents.
>
> 33. Had the share been priced at something like Rs. 8 or 10 per share in August, 2001; then a sale by the Claimant in the region of Rs.2/- etc. could possibly have attracted an allegation of price manipulation. However, in the given circumstances, and for the reasons stated hereinabove, the allegations levelled by Respondent No.1 are misconceived and are liable to be rejected."

19. It is thus clear that the complainant/respondent No.1 was having knowledge of the sale of shares in the year 2001 itself when the arbitration proceedings were initiated. In the complaint, it is alleged that, during the pendency of the arbitration proceedings, the complainant/respondent No.1 became suspicious of the illegalities committed by the accused persons/appellants and sought for certain information. However, since the accused persons/appellants did not give the information, the complainant/respondent

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No.1 applied to Bombay Stock Exchange (for short, "BSE") and National Stock Exchange (for short, "NSE") in the year 2006 for details of sale of its shares by the accused persons/appellants on 24th August 2001, 31st August 2001, 3rd September 2001 and 12th September 2001. It is stated in the complaint that only thereafter, in the year 2006, the complainant/respondent No.1 came to know of the fact that most of the shares were sold at the closing time of the share market and at the lowest price of the day. It is averred that, only at that point in time, the complainant/respondent No.1 came to know that the shares were sold by the accused persons/appellants to their own companies.

20. It could thus be seen that, though the complainant/respondent No.1 was aware about the sale of shares as early in the year 2001, he did nothing till the year 2006 when, according to it, it had applied to BSE and NSE for details. Even after the year 2006, the complainant/respondent No.1 waited till the year 2011 to lodge the complaint. Though, it is sought to be urged by the complainant/respondent No.1 before us that it came to know

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about the fraudulent act of the accused persons/appellants in the year 2009, which gave a cause of action to it to file the complaint, there is no averment to that effect in the complaint.

21. Insofar as the other contention that the shares were sold at a lesser price than the market price is concerned, there is no averment in the complaint in that regard. In any case, the transactions have been made through the BSE and NSE. As such, the contention in that regard is without substance. In any case, a specific finding has been given by the learned Arbitrator in that regard. As already informed to us, the said arbitral award is under challenge in the proceedings under Section 34 of the Arbitration Act. We do not wish to observe anything about the merits or demerits of the said award as the competent court is seized of the same.

22. However, it would clearly reveal that the complainant/respondent No.1 has attempted to turn a purely contractual dispute between the parties into a criminal case. Not only that, there is an inordinate delay in lodging the complaint. Though the complainant/respondent No.1 was

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aware about the sale of the shares in the year 2001, it did not do anything except filing an application before the learned Arbitrator. According to the complainant/respondent No.1, it received the information from the BSE and NSE in the year 2006, which fortified its suspicion about the fraud being played. Even thereafter, for a period of 5 years, it was silent and filed the complaint only in the year 2011. As already stated hereinabove, though an attempt was made at the time of hearing to contend that it has only filed the complaint after it came to know about the fraud in the year 2009, there is no averment to that effect in the complaint.

23. We find that the complaint, taken at its face value, does not disclose that any of the ingredients of the offence complained of have been made out. In the totality of the circumstances, we find that the present complaint is nothing else but an abuse of process of law. We, therefore, find that the appeals deserve to be allowed.

24. In the result, we pass the following order:

(i) The appeals are allowed;

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(ii) The impugned judgment dated 26th April 2021 passed by the High Court and the order dated 22nd March 2017 passed by the trial court are quashed and set aside;

(iii) The complaint bearing CC No. 56/SW/2011 filed before the trial court under Section 403, 406, 420 and 120B of the IPC is dismissed.

25. However, we clarify that nothing observed herein or in the impugned orders would weigh with the forum seized of the arbitral award in the proceedings under Section 34 of the Arbitration Act or in any other proceedings, if taken recourse to by the appellants, if they are entitled in law.

26. Pending application(s), if any, shall stand disposed of.

..............................J.
[B.R. GAVAI]

..............................J.
[VIKRAM NATH]

NEW DELHI;

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APRIL 28, 2023.