

(1988) 07 BOM CK 0020

In the Bombay High Court

Case No : Criminal Application No's. 2294 of 1987 and 984 of 1988

Arun Dattatray and Others

APPELLANT

Vs

Shaikh Nizam Babumiya Jagirdar and Another

RESPONDENT

Date of Decision : 04-07-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 204, 397, 482
Penal Code, 1860 (IPC) — Section 309, 34

Citation : (1988) 3 BomCR 695

Hon'ble Judges : S.M. Daud, J

Bench : Single Bench

Advocate : K.M. Desai and A.K. Thakore, instructed by Kanga and Co, for the Appellant; V.H. Gumaste, M.A. Rane, Ahmed A. Irani and G.G. Khan for respondent No. 1 and K.H. Chopde, Public Prosecutor, for the Respondent

Judgement

S.M. Daud, J.—The main petition is for the purpose of quashing an order whereby the petitioners therein have been summoned to appear before the Judicial Magistrate, First Class at Srirampur to answer charge of having committed offences punishable u/s 409 r/w. 34 of I.P.C.

2. Respondent No. 1 in the main petition who is the petitioner in the 1988 application and who shall hereinafter be referred to as the complainant, is a cultivator-cum-practicing Advocate of Srirampur in District Ahmednagar. He owns some agricultural land at village Bklahare, Taluka Srirampur, District Ahmednagar. Petitioners 1 to 10 are the Directors of a company incorporated under the Companies Act doing business in the name and style of "The Maharashtra Sugar Mills Ltd." This Mills being in the private sector and apparently finding it difficult to get cultivation to supply sugarcane to it, introduced a scheme. Under this scheme the Mills stood guarantee for repayment of loans advanced by the State Bank of India's branch at Tilak Nagar. The cultivator was to receive the amount by way of advance towards the price payable unto him for the expected delivery of the cane. The amount was to be adjusted against the price payable to him by the Mills. The Mills was to pass on

the recovered amount advanced to the Bank. Interest, if any, payable on the same received by the cultivator was to be paid by the Mills. Under this arrangement a sum of Rs. 6375/- was advanced to the complainant by the Bank. On 16th December, 1986, the complainant delivered cane to the Mills and out of the value thereof a sum of Rs. 6375/- was deducted as amount payable to the Bank for the advance made by it. On 22nd May, 1987, the complainant received a notice from the Bank intimating him that the sum of Rs. 6375/- was still outstanding, and that he had to repay alongwith interest. A copy of this notice was also sent to the Mills, drawing it's attention the fact that it had stood surety for the repayment of the advance and was under an obligation to make the repayment as early as possible. Complainant on 3rd August, 1983 appeared before the JMFC, Srirampur and tendered a complaint. This complaint recites the aforementioned details as also that the Mills was a Board managed company, the Board consisting of Accused Nos. 1 to 9, the Accused No. 10 was a Director (Works), the Accused No. 11 was the accountant and Accused No. 12 was the General Manager, that all the accused were in charge of the affairs of the Mills, that despite having recovered Rs. 6375/- on 29th December, 1986, they had not transmitted the amount to the Bank and that this amounted to criminal breach of trust. Something to the same effect was stated by the complainant in his preliminary statement which has been labelled as a "verification". After the preliminary statement had been recorded the learned Magistrate passed an order in these words :

"Cognizable offence is disclosed from the statement of complainant. Hence P.S.I. City P.S. is directed to investigate the matter u/s 202 of Cri.P.C. and to submit his report within one month positively."

In his complaint the complainant, had expressed an apprehension about his reach of the accused describing them as very influential persons and therefore in a position to overawe the police. He specifically solicited an order that the complaint be not referred to the police for enquiry or investigation. As was to be expected, he felt aggrieved by the order of the Magistrate and therefore preferred a revision to the Sessions Court at Ahmednagar. The revision bearing No. 276 of 1987 was heard by an Additional Sessions Judge who sustained the contention raised by the complainant. The Magistrate was directed to issue process against the petitioners for the offence punishable u/s 409 r/w. 34 of the Penal Code. This is assailed in the main application. The 1988 application is for requisitioning certain documents from the Bank and has virtually served its purpose by the Bank having been directed to and it having produced the desired documents.

3. In the 1987 application, the petitioners contend that the Additional Sessions Judge was in error in directing the Magistrate to take cognizance. In fact no offence had been made out against them or any of them. The truth was that the Bank had been paid its dues on 14th August, 1987 and there was no question of breach of trust, much less criminal breach of trust. The complaint raised

questions essentially of a civil nature and it was an error on the part of the Additional Sessions Judge to direct the issue of process. As a matter of fact, the Sessions Judge had no jurisdiction to interfere with the order passed by the Magistrate, for basically that Magistrate, had not taken cognizance but had deferred the taking of cognizance until such time as the as the Police investigation was over and a report received from the Investigating Officer. The order passed by the Magistrate on 3rd August, 1987 was perfectly correct and should not have been interfered with.

4. Counsel have been heard at great length and the questions that arise before me are:

(i) Whether the Sessions Court was in error in entertaining the revision?

(ii) Whether the complaint did not disclose the commission of any offence?

Addressing myself to the first question, I must say that the Magistrate has expressed himself somewhat inartistically. The order passed by him is a contradiction in terms. On the one hand he speaks as if the complainant and the complainant's verification make out the existence of a cognizable offence. At the same time he has directed a Police Officer to investigate and submit a report. It was argued that the verbal inaccuracy part, the order passed by the Magistrate fell u/s 202(1) of the Code of Criminal Procedure, 1973. A careful examination of section 202 would show that a direction of investigation to a Police Officer or any other person as may be thought fit by the Magistrate, is to be given by a Magistrate, only if he thinks it fit to postpone his issue of process. What amounts to issue of process has been the subject of several decisions. Basically, once a Magistrate finds that he is required to take cognizance of the case, he has to direct issue of process. He cannot at one and the same time say that circumstances exist requiring him to take cognizance of an offence and in the very next breath direct the police to carry out an investigation. Basically, the order passed by the Magistrate is beyond the purview of the first clause of section 202. Consistent with the first sentence of the order passed by the Magistrate, what the Magistrate had to do was to direct the issue of process to the persons complained against and not deferring the issue of process awaiting, a report of the Investigating Officer. The argument that this was an interlocutory order and therefore not revisable, cannot be accepted. The position is that one stage of the case has been fully dealt with. To the extent of that stage, the order was not interlocutory. Therefore, the Sessions Court was not in error in entertaining the revision. Can it be said that the Sessions Court was wrong in directing the Magistrate to issue the process against the accused? The Magistrate himself had remarked that a cognizable offence had been made out. Therefore, the Sessions Court was merely correcting an error in directing the Magistrate to act as required by section 204(1) Cri.P.C.

5. The more important question is whether the complaint made out a case requiring the issue of process. A number of decisions have been cited before me

to show the width as also the limits of the High Court's power u/s 482 of the Code. It is not necessary to burden this judgment by a reference to all the authorities. Of the main authorities cited before me the one most appropriate to the instant case is the Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, . In that case, it was observed:-

"It, is, therefore, manifestly clear that proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are, without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its powers u/s 482 of the present Code."

Now, I am aware of certain decisions which have permitted travelling beyond the confines set out in the portion reproduced above. But basically the correct position is as stated above. Confining ourselves to the complaint, the verification and the two documents tendered by the complainant, what one gets is as follows: Complainant was able to get an interest free advance from the Bank on the intervention of the Mills which advance was to be repaid by him to the Bank through the agency of the Mills. In keeping with this arrangement, the complainant received the amount of Rs. 6375/-. He delivered sugarcane to the Mills in December 1986 of a value in excess of Rs. 6375/-. The Mills adjusted this sum and retained it with itself for being transmitted to the Bank. In the last week of May 1987, complainant became aware that the Mills had failed to honour the commitment undertaken by it. Therefore, on 3rd August, 1987, he moved the Court to take action against the Mill's Directors, its Accountant and General Manager. The complaint speaks of the role played by petitioner No. 1 giving the impression as if there had been a face to face talk between that person and the complainant. That there is no truth in this depiction is made clear by the complainant's verification, where all that is stated is that petitioner No. 1 was the Managing Director of the Mills till December 1986 and that he had reduced the complainant to supply sugarcane to the Mills. This is not borne out by the two documents upon which the complainant relies. In fact both these documents have been executed by others. In the very nature of things, it is impossible to believe that a public limited company incorporated under the Companies Act would act through its Board of Directors in day to day matters. The argument that the complainant should be given an opportunity to establish this allegation of his viz. that the Directors were in charge of the day to day affairs cannot be accepted. Cognizance not to be taken on the mere say so of persons interested in trying to rope in as many persons as it be possible. In the authority mentioned above vicarious liability was held restricted to persons who by the very nature of their duties had to be presumed to be in the know of the affairs. In this case the financial affairs were being attended to by the Accountant and the "General Manager of the Mills. This means that as against petitioners 11 and 12 there is a triable case. In so far as the petitioners 1 to 10 are concerned, their joined is

unwarranted. Mr. Rane for the complainant says that as the case proceeds his client maybe in a position to establish the culpability of petitioners 1 to 10. I am not for the present concerned with what can be established in future. What I am restricted to is the record at present. That does not disclose any national incriminating petitioners 1 to 10. If and when something is made out against them in future and if the proceeding so permits, the Magistrate may be requested to take appropriate action. The result of the foregoing discussion is that the direction to take cognizance vis-?-vis petitioners 1 to 10 is illegal and is hereby quashed. In so far as the taking of cognizance against petitioners 11 and 12 is concerned, the same is sustained. In the 1987 application the rule is made absolute to the above extent. Rule vis-?-vis petitioner 11 and 12 is a discharged. I wish to make it clear that whatever has been stated above, is for the limited purpose of appraising the maintainability of the complaint in the light of the material made available and only for assessing the correctness or otherwise of the "issue process" order. Nothing stated herein shall be construed as an opinion or conclusion in regard to the merits. On a request made by Mr. Rane I direct that the documents received from the Bank and the original R & P, be send back to the Magistrate as early as possible.