

(2018) 02 GAU CK 0058
In the Gauhati High Court
Case No : 822 of 2014

ASHOK KUMAR TIBREWALA and ORS

APPELLANT

Vs

THE STATE OF ASSAM and ANR

RESPONDENT

Date of Decision : 22-02-2018

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 482](#) - Saving of inherent powers of High Court
[Indian Penal Code, 1860](#), [Section 34](#), [Section 405](#), [Section 17](#)

Citation : (2018) 02 GAU CK 0058

Hon'ble Judges : Mir Alfaz Ali

Bench : Single Bench

Advocate : M MORE, B GOGOI

Judgement

1. This criminal petition under Section 482 Cr.P.C. has been filed praying for quashing the proceeding in C.R. Case No.337/2014 under Section

406 IPC read with Section 34 IPC, pending in the Court of the learned Judicial Magistrate First Class, Kamrup (M), Guwahati.

2. The present petitioners are the owners and Directors of the Company, namely, M/s Coronet Labs Pvt. Ltd. The respondent No.2 entered into

an agreement with the Company M/s Coronet Labs Pvt. Ltd for carrying on business as consignment agent of M/s Coronet Labs Pvt. Ltd for the

States of Assam, Arunachal Pradesh, Manipur, Mizoram, Meghalaya, Nagaland, Tripura and Sikkim and the agreement was made on

29.05.2010. As per the agreement, the respondent paid Rs.5,00,000/- as security money. It was agreed that on termination of agreement, the

complainant shall return the stock of goods in its possession and the accused shall refund the security deposit along with the accrued interest after

adjusting the arrear, if any, towards sales of goods. Pursuant to the said agreement, the respondent No.2 paid Rs.5,00,000/- as security money.

As per the agreement, the respondent No.2 was required to provide storage facilities/godown for distribution of products. The required rent,

electricity charge, cost of loading and unloading etc; were to be borne by the respondent No.2. Under the terms of agreement, the responsibility to

sale the products was on the accused No.1, M/s Coronet Labs Pvt. Ltd. Pursuant to such agreement, the complainant/respondent No.2 duly

discharged its responsibility and the first consignment was received on 30.08.2010. The business between the petitioner and the respondent No.2

continued smoothly for some time. However, during continuance of the business, the shares of M/s Coronet Labs Pvt. Ltd. was purchased by

another company, namely, Arvind Remedies Ltd. A memorandum of understanding and share purchase agreement was executed between them

and accordingly said Arvind Remedies Ltd became the full owner of the company under the name and style of M/s Coronet Labs Pvt. Ltd. After

continuance of the business for some time, the sales of articles dwindled and consequently delivery of the goods ceased. Some of the goods for

which payment was made by the respondent No.2 was lying with the respondent No.2. The petitioners asked the respondent No.2 to return those

goods to their agent at Patna on the condition, that the cost thereof shall be remitted to the complaint/respondent No.2 as per the provisions of

clause-31 of the contract. The complaint/respondent No.2 returned such goods, but no payment was received from the petitioners. It was alleged

in the complaint that by not making payment the petitioners have misappropriated the goods returned by the respondent No.2 which costs

Rs.3,23,200/-. Thereafter, a meeting was held on 01.11.2012 for settlement of the dispute and in the said meeting, the dispute was ultimately

settled and petitioners undertook to pay Rs.28,00,000/- to the respondent No.2, out of which Rs.5,00,000/- was paid by the petitioner No.1 and

it was agreed that the balance amount would be paid before 31.12.2012. As the payment was not made as per the settlement, the second

respondent lodged a complaint against the petitioners and three others under Section 406 IPC and the learned trial Court took cognizance under

Section 406/34 IPC against the petitioners on the basis of the said complaint and issued process.

3. Challenging the order of the learned trial Court taking cognizance, the petitioners have filed the instant petition under Section 482 Cr.P.C.

praying for quashing the complaint and the proceeding in CR Case No.337/2014.

4. Mr. SK Goswami, learned counsel for the petitioner basically urged two points i.e., dispute between the parties is purely civil arising out of

business transaction for which the remedy is available in the Civil Court and no criminal offence under Section 406 IPC has been made out. Mr.

Goswami further contended that since the allegation made in the complaint makes out purely a civil dispute, having no ingredients of criminal

offence, the proceeding deserves to be quashed in order to prevent the abuse of process of the Court. To buttress his submissions, Mr. Goswami

placed reliance on the following decisions:

1. Jaswantrao Manilal Akhaney Vs. State of Bombay reported in AIR (1956) 575

2. State of Haryana Vs. Bhajan Lal reported in (1992) Supp 1 SCC 335

3. G. Sagar Suri and Another Vs. State of U.P And Others reported in (2000) 2 SCC 636

4. S.W. Palanitkar Vs. State of Bihar reported in (2002) 1 SCC 241

5. GHCL Employees Stock Option Trust Vs. India Infoline Ltd reported in (2013) 4 SCC 505

5. Learned counsel for the respondent No.2 submitted that mere availability of civil remedy does not debar the complainant to lodge a complaint, if

the same materials also make out a criminal offence. If the allegation made in the complaint prima-facie makes out an offence, such complaint

cannot be quashed at the threshold merely on the ground of availability of the civil remedies.

6. Before advertent to the rival contentions of the learned counsels, let me have a quick look at the authorities relied by the learned counsel for the

parties. The ratio laid down by the Apex Court in G. Sagar Suri and Another Vs. State of U.P (supra) was that if a matter, which is essentially of a

civil nature, has been given a cloak of criminal offence merely to pressurize the accused, such criminal proceedings taking a shortcut of other

remedies available, should not be encouraged and before issuing process, the Court should exercise a great deal of caution while issuing process in

a proceeding which are essentially of civil nature.

7. In *GHCL Employees Stock Option Trust Vs. India Infoline Ltd (supra)*, the Apex Court held that "there is no dispute with regard to the legal

proposition that the case of breach of trust or cheating are both a civil wrong and a criminal offence, but under certain situations where the act

alleged would predominantly be a civil wrong, such act does not constitute a criminal offence.

8. In *Jaswantraai Manilal Akhaney Vs. State of Bombay (supra)*, the Apex Court observed that when same set of facts give rise to civil as well as

criminal action, if there is no mens-rea, or if the other essential ingredients of an offence are lacking, the same facts may not sustain a criminal

prosecution, though a civil action may lie. The Apex Court therefore, held that it is to be seen whether the allegation made in the complaint contains

the requisite criteria or essentiality for constituting an offence. Merely because a civil action is possible that does not by itself exclude the criminal

liability.

9. The Apex Court in *S.W. Palanitkar Vs. State of Bihar (supra)* held that, "every breach of trust may not result in an offence of criminal breach of

trust, unless there is evidence of a mental act of fraudulent misappropriation. An act of breach of trust involves a civil wrong in respect of which the

person wronged may seek his redress for damages in Civil Court but a breach of trust with mens-rea gives rise to a criminal prosecution as well.

10. The common thread passing through all these authorities is that when same set of facts attract both civil and criminal action, only because civil

remedy is available, criminal remedy cannot be excluded, if the facts disclose the ingredients of the criminal offence. What is important to note in

such situation is whether the matter is predominantly of civil nature or a civil dispute. If the matter is essentially of civil nature and it has been

decorated with criminal colour, only to create pressure for liquidation of civil debt by taking a shortcut way, such proceeding cannot be allowed to

continue, as the same will amount to abuse of the process of criminal Court.

11. In the present case complaint was lodged alleging commission of criminal breach of trust and learned trial Court also took cognizance under

Section 406 IPC. It is no doubt true, that breach of trust is both civil and criminal wrong. But, in order to attribute culpability to a breach of trust,

there must be mens-rea i.e. criminal intention. Unless there is mental act of

fraudulent and dishonest misappropriation, mere act of breach of trust shall not attract the offence of criminal breach of trust. Thus, when the facts alleged in a case of breach of trust are predominantly of civil nature giving rise to civil wrong, such acts may not give rise to criminal action for want of requisite mens-rea. Thus, Courts need to be cautious while taking cognizance of offence of criminal breach of trust and issuing process. When criminal elements necessary to constitute offence are lacking, and attempt is made to give criminal colour to a matter which is predominantly and out and out a civil dispute, criminal Court should refrain from invoking the criminal provision. Keeping in view the above proposition of law, let me examine the instant case, whether the allegations made in the complaint make out an offence of criminal breach of trust under Section 406 IPC. The offence of criminal breach of trust has been defined under

Section 405 IPC which reads as follows:

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

12. A plain reading of the above definition shows that in order to constitute an offence under Section 405 IPC for criminal breach of trust following ingredients are essential: (i) accused was entrusted with or dominion over the property, (ii) accused dishonestly misappropriated or converted to his own use that property, (iii) accused dishonestly used or disposed of the property in violation of any direction of law prescribing the mode of discharge of the trust or in violation of any contract express or implied for discharge of the trust. Therefore, entrustment and dishonest misappropriation are most essential for constituting an offence under Section 405 IPC.

13. In the instant case, as per the agreement, the respondent No.2 was engaged as consignment agent for which he had to deposit Rs.5,00,000/- as security deposit and the amount was to carry interest. Admittedly the

business between the parties continued as per the contract and when the supply of products ceased because of dwindling of the business, the respondent No.2 was asked to return the goods which was lying with the respondent No.2. It has been averred in the complaint that ownership of the goods would remain with the petitioners (principal) and responsibility for sale of the goods was also with the petitioners. It was also in the agreement that on termination of the contract, stock of goods in possession of the respondent No.2, shall be refunded to the petitioners and the petitioners should refund the security deposit after adjusting arrear dues if any.

From the allegation made in the complaint, it is apparent that when the dispute arose between the parties, there were meetings and the liability of the petitioners was settled at Rs.28,00,000/-. Out of the said Rs.28,00,000/-, an amount of Rs.5,00,000 being the security was already paid.

However, the petitioners failed to pay the remaining Rs.23,00,000/-.

14. Thus from the allegations made in the complaint, it is apparent that both the parties entered into business agreement in respect of selling of the products of the petitioners and their business, continued for some times as per the terms of the agreement. Because of fall in the business supply of goods ceased. The respondent No.2, as per the agreement and on request of the petitioners returned goods which were in custody of the respondent No.2. However, the petitioners did not pay the dues of the respondent No.2. As per the allegations, there were meetings and ultimately, the liability of the petitioners was settled at Rs.28,00,000/- out of which Rs.5,00,000/- was paid. On the above facts and materials, the first question needs to be answered is, whether there was entrustment of property with the petitioners.

15. It is no doubt true, as can be seen from the expression ""whoever being in any manner entrusted with the property"" in Section 405 IPC, that all the technicalities of law of trust may not be necessary for a trust envisaged by Section 405 IPC in order to constitute an offence of criminal breach of trust. But the basic elements of creation of a trust must be there. The Apex Court in *Jaswantrao Manilal Akheney Vs. State of Bombay* (supra) dealing with the trust in the context of criminal offence under Section 405 IPC held as under:

But when S.405 which defines ""criminal breach of trust"" speaks of a person

being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or too be disposed of by him on the happening of a certain event. The person who transfers possession of the property to the second party still remains the legal owner of the property and the person in whose favour possession is so transferred has only the custody of the property to be kept or disposed of by him for the benefit of the other party, the person so put in possession only obtaining a special interest by way of a claim for money advanced or spend upon the safe keeping of the thing or such other incidental expenses as may have been incurred by him.

16. The basic elements for creation of a trust is that owner of the property makes over it to another person, who simply retain it as custodian to be dealt with or disposed of, in terms of the trust. If the trustee dishonestly misappropriates or dishonestly keeps such trust property for his own use he shall be liable for criminal breach of trust. It is therefore abundantly clear that the ownership of the property which become the subject matter of breach of trust, remains with the owner and the same is only placed in the hands or custody of the accused or the trustee. Thus for the purpose of constituting an offence of criminal breach of trust, complainant needs to show, that he was the owner of the property and the same was made over to the accused as trustee to be discharged or disposed of in a particular manner. In the instant case, from the allegations made in the complaint as indicated above, the ownership of the goods remained with the petitioners and the respondent No.2 was engaged as consignment agent. The allegations made in the complaint do not disclose that there was entrustment of property with the petitioners or the petitioners had the dominion of any property on being made over to them then by the respondent No.2. The liability of the petitioners in the instant case admittedly arose in course of the business transactions between the parties, as per the contract entered into between them. Though it was alleged that Rs.5,00,000 was given as security deposit, from the allegations made in the complaint it is clear that Rs.5,00,000 was already returned by the petitioners to the respondent No.2. The financial liabilities, which the petitioners owed to the respondent No.2

arose only in course of business transaction between the parties.

Therefore, such financial liability arising out of business transaction between the parties, in my considered view cannot be considered as

entrustment.

17. Failure or negligence to pay the debt, liability for which arose in course of business transaction, is out and out a civil dispute. Mens-rea or

criminal intention or dishonest intention cannot be injected into such civil dispute, nor there can be an automatic presumption of dishonest

misappropriation. The elements of entrustment and dishonest misappropriation not being present in the instant case, the penal provision of Sections

405/406 IPC cannot be attracted.

18. It is now well settled as held by the Apex Court in State of Haryana And Others Vs. Bhajanlal And Others (supra) that when the allegations

made in the complaint or FIR taken in its face value and accepted in their entirety do not make out a criminal offence, the High Court can and

should quash the proceeding either for preventing the abuse of process of Court or to secure the ends of justice. In the case of R P Kapur Vs

State of Punjab reported in AIR 1960 SC 866, also the Apex Court held that when the complaint or FIR taken in its face value does not make out

a criminal offence, the High Court can and should exercise the power to quash the criminal proceeding either to prevent the abuse of process of

Court or to secure ends of justice.

19. In the instant case as indicated above, the elements of entrustment being one of the essential ingredients for constituting offence under Section

406 IPC is lacking. In absence of the basic ingredients for constituting offence of criminal breach of trust, i.e., the entrustment or dominion of the

property, the complaint cannot be held to have made out any offence under Section 406 IPC. The allegations made in the complaint demonstrating

out and out a civil dispute, the present proceeding appears to be a shortcut way to pressurize the petitioners to pay the money, liability for which

arose in course of business transaction between the parties. Since allegations made in the complaint failed to make out a criminal offence, I am of

the view that allowing the present criminal proceeding to continue will amount to abuse of the process of the court. Accordingly the complaint as

well as the criminal proceeding in CR Case No.337/2014 is quashed.

20. Send down the LCR.