(1991) 03 BOM CK 0040

In the Bombay High Court

Case No : Criminal Application No. 2038 of 1990

C.J. Shah and others APPELLANT

Vs

Brij Mohan Wadhwa and another RESPONDENT

Date of Decision : 20-03-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 204, 482
Penal Code, 1860 (IPC) — Section 114, 403, 405, 406, 420

Citation : (1992) 1 BomCR 322 : (1991) CriLJ 1906

Hon'ble Judges : D.J. Moharir, J

Bench : Single Bench

Advocate : B.K. Raje, app, D.D. Mello, for the Appellant; A.S. Khandeparkar, for the Respondent

Judgement

1. This is an application u/s 482 of the Cr.P.C. in which the petitioners No. 1 to 7 pray for the quashing of the order of issue of process against them u/s 204 of the Cr.P.C. for committing the offence of criminal breach of trust u/s 406 of the I.P.C. The order impugned reads as under :

"Issue process against accused No. 1 only u/S 406 of I.P.C. Metropolitan Magistrate, 33rd Court, Ballard Pier, Bombay.

This process came to be issued upon a complaint, the gist of which may be stated as follows :

The petitioners No. 1, 2, 3 and 4 are the partners of the firm petitioners No. 5, 6 and 7, all of which have their office at 64, Sahar Road, Andheri (East), Bombay. The petitioners, it was alleged, approached the complainant one Brij Mohan Wadhwa, some time in July 1987 and represented to him that these three firms petitioners No. 5, 6 and 7 had been carrying on business as Builders and Contractors, that the partners of the firms were persons experienced in the business and field of building construction, that they had at that point of time several construction projects on their hands all of them being very profitable one.

The petitioners, it is alleged, further represented to the complainant-respondent No. 1 Wadhwa that if he were to provide them with money in the form of deposits, they would pay interest at 20% P.A. plus 10% incentive on fixed deposit. Accordingly on 18th July 1987, the respondent No. 1 complainant deposited Rs. 5000/- each in the name of the two firms i.e. petitioners No. 5 and 6. He was furnished with fixed deposit receipts of this date. Thereafter from time to time the complainant-respondent No. 1 deposited total amount of Rs. 60,000/- with the petitioners and fixed deposit receipts were issued to him by the petitioners. Presumably upon demands, made by the respondent, three cheques of Rs. 1500/-, Rs. 250/- and Rs. 500/- were issued in favour of the respondent-complainant on 10-4-1988, 18-6-88 and 15-5-88 respectively. When presented for encashments, these cheques were as alleged in the complaint, dishonoured by the bank and returned to the complainant with the endorsement ''Referred to Drawer''. This was in spite of the fact that the fixed deposit receipts had already matured. The petitioners-accused are also alleged to have thereafter made representation to the complainant that for reasons beyond their control, it had not been possible for them to make payments of the matured fixed deposit receipts and they requested the complainant for grant of time to repay the amounts of the respective fixed deposit receipts with interest as agreed.

2. The sum of Rs. 45,000/- was still due and outstanding under these fixed deposit receipts as the respondent-complainant alleged and which it may be observed here only, is an indication that a repayment to the extent of Rs. 15,000/- had thus come to be made to the respondent-complainant, by the petitioners-accused persons. In spite of further assurance under a letter dt. 8-2-1989, no payment was forthcoming from the petitioners and, therefore, the present complaint was filed.

3. The allegations germane to the charge of commission of offences u/s 420 read with S. 114 and alternatively u/s 403 read with S. 406 of the I.P.C., to be found in para 4 of the complaint, are that the petitioners-accused had made false representation with a view to induce the complainant to part with the said amounts, by way of fixed deposit, that the petitioners-accused had falsely represented the complainant that several construction projects are on their hands, painted a very rozy picture about the prospects of the complainant''s earning a big sum on these deposits, these false representations, at the time they were made to the complainant, were to the knowledge of the petitioners, that the complainant was induced to part with the several sums of money, totaling to Rupees 60,000/- which but for such fraudulent representations he would not have done.

4. The learned Metropolitan Magistrate upon receiving this complaint recorded statement upon verification thereof, which is also filed on record at Exh. B. The statement of verification would not also appear to differ substantially from the allegations in the complaint. Therein also the complainant stated on oath that the three cheques referred to above, when represented for encashments, had come

to be returned to him, and that the cheques as were issued, were with the knowledge that the petitioners do not have to their credit and balance, the respective amounts stated in the cheques.

5. The learned Metropolitan Magistrate considering these allegations and statement of verification, proceeded to pass an order and directed issue of process only u/s 406 of the I.P.C. and that again, against the accused No. 1 C. J. Shah. By this petition, u/s 482 of the Cr.P.C. exception is now taken that the complaint as presented was, apart from being false to the knowledge of the respondent complainant, a sheer abuse of process of law and is, therefore, required to be interfered with by appropriate orders of this Court u/s 482 of the Cr.P.C. The provisions of S. 482 read as under :-

"Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice".

Learned counsel Shri D''Mello appearing for the petitioners has explained, in the first instance that all the seven accused persons have come to join in this petition u/s 482, irrespective of the fact that the order of issue process only u/s 406 of I.P.C. has come to be passed only against the accused No. 1 and not the remaining accused. He has produced before me the original summons from the Court, issued against the petitioner-accused No. 1. The summonses to the other accused persons have Act been issued. However, it must be straightway observed that in the present petition no contention has been raised that the summonses as issued to the other petitioners No. 2 to 7 should be directed to be withdrawn for the reason that process has not been ordered to be issued against them at all. Basically, the petition, therefore, stands presented by the petitioner-accused No. 1 C.J. Shah only. It would not be possible for the Court, therefore, to take into consideration at the stage of this hearing, a further representation in regard to the wrong implementation of the order of issue of process, as distinguished from a wrong order itself.

6. The gravamen of the attack on the complaint, and the order dated. 25-5-1990 as passed, is that upon a consideration of the allegations in the complaint, uncontraverter as they must be taken represented, and duly sworn upon statement of verification as it appears, no cause of an offence u/s 406 of the I.P.C. must appear to have been made out. Learned Counsel Shri D''Mello took me at length through the allegations, in particular those appearing in para 2 of the complaint, to be read with para 4 thereof. It is pointed out to me and indeed the learned counsel for the respondent No. 1 Shri Khandeparkar is unable to meet the proposition that what has been described as false representations made by the petitioner No. 1 must be those which had been enumerated in para 2 thereof. In respect of the knowledge of these representations, as the respondent complainant stated specifically that one or the other was falsely made to him that it was so falsely made, to the knowledge of the petitioner No. 1 itself.

7. In any event it will be appreciated that these allegations are entirely insufficient to attract the provisions of S. 405 of the I.P.C. which defines criminal breach of trust. S. 405 of the I.P.C. reads as under :

"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 willfully suffers any other person so to do, commits "Criminal breach of trust".

It is, therefore, pointed out by the learned counsel that in the present case, beyond the incurring of several liabilities for the repayment of the amount of the fixed deposit receipts with interest or for that matter, a further liability to pay a 10 % incentive at that even, there cannot be found any criminality attaching to the conduct of the petitioners. What is prima facie indicated is a transaction of deposit of money by the respondent complainant with the petitioners upon an agreement to pay a certain amount of interest thereon. The liability to refund the amount with interest as assured upto the date of the maturity would, therefore, be only a matter of civil liability and in respect of which, by reason of non-payment upon presentation, no further element of criminality would be imputable to the petitioners. The mere fact of the inability on the part of the petitioners to pay back the amount due under the fixed deposit receipts, is not such as per se attracts or spells out a criminal intention. For, it is also to be appreciated from S. 405 of I.P.C. as reproduced above that there has to be a dishonest mis-appropriation of the amount in question, or the conversion thereof by the petitioners to their own use, or there has to be a dishonest use or disposal of the amount, in violation of any specific direction of law in regard to the discharge of the amount entrusted i.e. the discharge in relation to the contract between the parties of payment of the amount of the fixed deposit receipts with interest. It is, therefore, obviously not a case where the respondent-complainant has been made to wilfully suffer such dishonest misappreciation at the hands of the petitioner. Shri Khandeparkar for the respondent, however, endeavoured to submit that the fact that the petitioners had issued cheques dated 10-4-88. 18-6-88 and 15-5-88, which bounced back, is in itself sufficient to indicate the fact of awareness on the part of the petitioners that they did not have any necessary funds to their credit and any balance in their account, to permit of encashments of the cheques when so presented with the bank. The again the presentation of the cheques and even the dishonour thereof by the petitioner''s bank does not in itself, as a specific event, establish the existence of an intention to dishonestly misappropriate the various amounts of the fixed deposit on such dates as they were made I indeed find it interesting to observe that the allegations in para 2 of the complaint were basically ones which were made upon Commission of offence u/s 420 of the I.P.C. In respect of the commission of that of process was not, however, issued by the trial Court. The process as issued is only u/s 406 and which as observed, cannot be found warranted upon the allegations in the complaint even duly verified as they are in the circumstances the order directing the issue of process to the petitioner No. 1 u/s 406 of the I.P.C. must be found entirely unsustainable in-as-much as the complaint only spells out a civil liability in it, on the part of the petitioners, to pay back the amount due on the respective fixed deposit receipts.

8. The petition is allowed. The order of issue of process dated 25-5-1990 is hereby quashed.

9. Petition allowed.

