

(1988) 07 CAL CK 0027
In the Calcutta High Court
Case No : Matter No. 2384 of 2987

Diwan Brothers and Another

APPELLANT

Vs

Collector of Customs and Others

RESPONDENT

Date of Decision : 27-07-1988

Acts Referred:

Citation : (1989) 40 ELT 316

Hon'ble Judges : Ajit K. Sengupta, J

Bench : Single Bench

Judgement

Monoj Kumar Mukherjee, J.—In this revisional application the four petitioners pray for quashing the proceeding of Case No. C-2536 of 1977, now pending against them in the 6th Court of the Metropolitan Magistrate, Calcutta, under Sections 120B and 420 of the Indian Penal Code.

2. The case has been instituted on a complaint filed by the opposite party, Radha Krishna Agarwalla, Managing Director of M/s. Calicut Engineering Works (P) Ltd., of 26A, Camac Street, Calcutta. The material allegations on which the complaint is based are as follows:

The petitioner No. 1 is the Manager of the Machinery Division of Batliboi & Co. (P) Ltd. (hereinafter referred to as the Company) having its Branch Office at 26. R. N. Mukherjee Road, Calcutta. The petitioners Nos. 2, 3 and 4 are the Principal Officers of the Company and are attached to its Head Office at Bombay. The complainant was on the look out of one Gear Hobbing Machine which was to be installed at the complainant's factory at 1/2B, Khagendra Chatterjee Road, Calcutta-2 for a better output in manufacture of Gear. The petitioners Nos. 2, 3 and 4 sent, on behalf of the Company, the petitioner No. 1, to the complainant's office in or about the middle of January, 1977 and he represented that having come to learn that the company of the complainant was on the look out of one imported Gear Hobbing Machine, he had been sent by the other three petitioners to negotiate for sale of one of such machine. He further stated that as the Manager of the Machine Tools Division he was instructed by the other petitioners

to negotiate the sale. The petitioner No. 1 further stated that the Company represented Strojimport Foreign Trade Co. Ltd., Czechoslovakia (hereinafter referred to as the foreign Company) and was permitted by State Trading Corporation to import and sell the said machine in India and if the complainant was interested to purchase such machine the petitioners would be able to supply a brand new latest model which was known as Model OF-16 Gear Hobbing Machine. The petitioner No. 1 further represented that he would be able to make delivery of the said machine from the incoming consignment which had already been shipped to Bombay Port. The petitioner No. 1 handed over a printed leaflet showing the data and illustration of OF-16 Gear Hobbing Machine, As the complainant was hesitating to finalise the transaction, the price of the machine being over 8 lakhs of rupees, the petitioner No. 1 represented that the new model OF-16 was much more economic and productive and was used for precision jobs and that Mr. A. Golasik and Mr. F. Kulisik of the Foreign Company who were coming to India shortly would be in a position to explain the working and technicalities of the said machine to the complainant to his entire satisfaction. As per the said arrangement the petitioners Nos. 2, 3 and 4 sent the petitioner No. 1, Mr. A. Golasik and Mr. F. Kulisik to the complainant's place of business on or about Feb. 18, 1977 and all of them represented and assured that a new machine of OF-16 Model would be supplied and if payment was made before delivery there would be certain concessions in the price. The complainant being thus induced by the aforesaid representation, which ultimately proved to be false, placed an order for supply of one new machine of OF-16 Model for Gear Hobbing and advanced a total sum of Rs. 8,24,474.67 (Rupees Eight Lakhs Twenty-four thousand four hundred seventy-four and paise sixty-seven only) in full and final payment of the said machine on three different dates, namely, 2-3-77, 29-3-77 and 30-3-77 by cheques. The machine with accessories were delivered in five boxes on 31-3-77 and at the time of delivery the contents could not be verified and this fact was duly intimated by the company of the complainant to that of the petitioners". On 1-4-77 the boxes were opened and to the utter surprise of the complainant and his men it was found that:

(a) Marking on the boxes were hand written and not stencil cut as in the usual practice by the manufacturers. Even there do not indicate the name of the ship. Invoice No. Custom's Import clearance etc. as per normal overseas practice.

(b) The whole consignment was repacked in five wooden crates out of which one was completely broken, bringing out the parts packed in it.

(c) No packing list could be found in any of the packing cases nor operation and maintenance manual nor even catalogue, maker's name, year of manufacture etc. which is invariably included in the crates in all overseas packings.

(d) Going into further details it was observed that there were 8 tubful of water accumulated inside the cavity of the machine.

(e) The machine was badly rusted on most of the vital part's bright surfaces,

pitted on many places and weathered for a pretty long period.

(f) It was repainted locally as is evident from the fact that even some instructions plates have been painted over and from the spillage paint marks on bright surfaces and even on rusted portions of the machine.

(g) The machine supplied is machine No. 0436140, Type FO-16 which is an old model as against Type OF-16, the latest design of the manufacturer for which the petitioner placed an order and made advance payment before delivery was effected. It was further detected that many vital parts were old and of different design and even the electrical and electronical control panel and motors had either been repaired or replaced in an attempt to give it a new outlook.

3. The complainant immediately appointed two reputed surveyors and both of them gave their detailed survey report which was annexed to the complaint. The general finding of both the experts were that the company supplied FO-16 Gear Hobbing Machine in place of OF-16 and the same was old, repainted, repacked and heavily damaged by rain water and rusted and some of the parts were missing. The complainant immediately wrote a letter to the, company on 2-4-77 stating inter alia that a wrong, old and defective machine had been supplied instead of a new one as was represented. The complainant also sent one of its Directors to Bombay and explained the discrepancies to the petitioner No. 4 at his Bombay office who suggested refund of the money paid by the complainant and to take back the machine in case no new Model OF-16 could be supplied by them. The complainant also wrote a letter to Mr. A. Golasik on 6-4-77 intimating that an old, rusted and different machine had been supplied. The petitioners neither replied to the said letters nor took any step to replace the machine or refund the money.

4. From the above facts and circumstances the complainant concluded that the petitioners entered into a criminal conspiracy to cheat the company of the complainant and in pursuance of the said criminal conspiracy they made false representation to the complainant and thereby induced the complainant to pay the price of the machine before delivery which he would not have paid had he not been so cheated by the petitioners. According to the complainant, the petitioners had the dishonest intention and fraudulently induced the complainant to pay the price of the machine in advance although they had no intention to deliver the machine of OF-16 Model. The complainant accordingly prayed for warrant of arrest against the petitioners for having committed offences punishable under Sections 120B/420 of the Indian Penal Code.

5. The learned Chief Metropolitan Magistrate, Calcutta before whom the complaint was filed, took cognizance upon the complainant, examined the complainant on solemn affirmation, who during such examination also produced certain letters and documents, and his two witnesses, namely, Ratan Patra, a Director and Moni Mohan Bose an Engineer of his Company. On being satisfied from the materials placed before him that there were sufficient ground for

proceeding the learned Magistrate issued summons against the accused persons under Sections 120B and 420 of the Indian Penal Code. After the petitioners entered appearance, the case was transferred to the 6th Court of the Metropolitan Magistrate for disposal. Before the transferee Court, the petitioners filed an application praying for an order of discharge u/s 245(2) of the Code of Criminal Procedure, and to that a rejoinder was filed by the complainant. The learned Magistrate, after hearing the parties, rejected the application of the petitioners as he was unable to hold that the charge against the petitioners was groundless. The petitioners thereafter, moved this Court and obtained this present Rule. In this Court also the complainant-opposite party has filed an affidavit in opposition controverting the statements and allegations made by the petitioners in the application on which the instant Rule was issued.

6. Mr. Nalin Chandra Banerjee, the learned Advocate appearing for the petitioners urged four grounds in support of the Rule. He firstly urged that the machine that was supplied to the complainant was the machine contracted for and as such there was no question of any breach of contract far less of cheating. In the next place he contended that the petitioners had no dishonest intention as they were acting as the representatives of the manufacturers of Czechoslovakia and whatever representations the petitioner No. 1 made, as alleged by the complainant, were according to the instructions and directions of the manufacturers. The third contention of Mr. Banerjee was that even if the allegations made by the complainant were accepted in their entirety, they at best made out a case of breach of contract but not of cheating. The last contention of Mr. Banerjee was that even if it was assumed that the representation was a false and dishonest one, on the own showing of the complainant, it was made by the petitioner No. 1 alone and the other three petitioners could not be prosecuted as there is not an iota of material against them. In support of his contention Mr. Banerjee has taken me through the complaint, the initial deposition of the complainant, the letters and documents filed by the complainant and the letters and documents filed as annexures to the revisional application of the petitioners and the affidavit in opposition of the complainant.

7. Mr. Roy, the learned Advocate appearing on behalf of the complainant, assailed all the contentions raised by Mr. Banerjee. Mr. Roy firstly argued that for the purpose of quashing at this stage, this Court cannot evaluate evidence nor can it look into document; filed by the petitioners along with the revisional application as annexures thereto as the complainant has a right to deny or explain the contents thereof at the appropriate stage of the trial. According to Mr. Roy, if the contentions raised by the petitioners in the revisional application vis-a-vis those of the complainant as presented in the affidavit in opposition are to be judged that would amount to embarking upon an enquiry to ascertain which of the version is true and such a course would be outside the domain of this Court at this stage of the proceeding. In support of his contention Mr. Roy has relied upon the decision of the Supreme Court in the case of R.P. Kapur Vs. The State of Punjab, . Mr. Roy in the next place contended that if the materials on record

are looked into in the light of the above decision of the Supreme Court there cannot be any manner of doubt that there are materials on record to indicate that there are sufficient grounds for proceeding against all the four petitioners.

8. In the light of the contentions raised by the parties, it has to be first determined what is the nature and scope, of the inherent powers of this Court u/s 482 of the Code for quashing of a proceeding. In that context it has also to be ascertained what are the materials which the Court can look into for exercising such powers. This question assumes importance having regard to the fact that the petitioners have invited my attention to certain letters and documents which were not before the learned Magistrate for the purpose of issuing process. Incidentally, it may be mentioned that the complaint in the instant case was filed on 22-4-1977, at a time when the parties were still corresponding and in fact some of the letters and correspondences that have been annexed to the revisional application and the affidavit in opposition are beyond that date.

9. In the case of R.P. Kapur Vs. The State of Punjab, the Supreme Court illustrated some categories of cases "where inherent jurisdiction could and should be exercised for quashing the proceeding and they are:

- i) cases in which there is a legal bar against its institution or continuance;
- ii) cases where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not constitute the offence alleged and
- iii) cases in which though the allegations made against the accused persons constitute the offence alleged, there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge.

In dealing with the third category of cases the Supreme Court further observed at p. 1242 of Cri LJ:

In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction u/s 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained

10. Similarly in Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, the Supreme Court laid down the following categories of case; where an order of the Magistrate can be quashed or set aside:

- i) Where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;
- ii) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;
- iii) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and
- iv) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

It then observed that the above mentioned cases were purely illustrative and provided sufficient guidelines to indicate contingencies where the High Court could quash proceedings, it further observed that once a Magistrate had exercised discretion in issuing process it was not for the High Court or even the Supreme Court to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to finding out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. According to the Supreme Court these considerations were totally foreign to the scope and ambit of an enquiry u/s 202 of the Code of Criminal Procedure which culminated into an order u/s 204 of the Code.

11. While laying down the nature and extent of the powers u/s 482 of the Code the Supreme Court, in the case of State of Karnataka Vs. L. Muniswamy and Others, observed (At p. 1492):

In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Courts' inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a Court proceeding ought not to be permitted to degenerate into an weapon of harassment or persecution in a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature.

Under what circumstances such a power could be exercised, the Supreme Court referred to the case of R.P. Kapur Vs. The State of Punjab, ;

Considerations justifying the exercise of inherent powers for securing the ends of justice naturally vary from case to case and a jurisdiction as wholesome as the

one conferred by Section 482 ought not to be encased within the strait-jacket of a rigid formula.

12. In *Madhu Limaye Vs. The State of Maharashtra*, three principles were laid down to be noticed by the High Court while exercising its inherent powers, namely:

i) that the power is not to be restored to if there is a specific provision in the Code for the redress of grievance of the aggrieved party;

ii) that it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice;

iii) that it should not be exercised as against the expressed power of law engrafted in any other provisions of the Code.

13. The above decisions of the Supreme Court have explicitly laid down the nature, extent and scope of the inherent powers of the High Court for the purpose of quashing a proceeding, but the question which still remains to be decided in the instant Rule is what are the materials the High Court can take into consideration and rely upon while exercising such powers at a stage when process has only been issued.

14. While setting aside an order of a Magistrate issuing process in exercise of the revisional jurisdiction this Court has to confine itself to the materials from which he obtained satisfaction that there were sufficient grounds to issue process against the accused; and those materials necessarily will be the statement of the complainant and the witnesses recorded u/s 202. The High Court exercises revisional powers only to ascertain whether the impugned order of the inferior criminal Court is correct, legal or proper and the fact that the record can be and is called for from the concerned Court is only indicative of the fact that the materials from which the inferior court obtained satisfaction to pass the order were required to be looked into for such ascertainment. But in exercising the inherent power, the scope is much more expansive in that the Court can quash a proceeding for ends of justice or to prevent an abuse of the process of the Court. That necessarily means that while exercising inherent powers the Court need not confine itself to the propriety, legality or correctness of the order of the Magistrate and for that matter the materials on which such order was passed.

15. To cite an example. On the basis of a complaint and examination of the complainant u/s 200, the Magistrate issues process against an accused. Against such issuance of process the accused invokes the jurisdiction of this Court for exercising both revisional and inherent powers. While so invoking the accused produces incontrovertible materials before this Court to indicate that previously a complaint was filed on the same allegations which after trial ended in acquittal in his favour and contends that the prosecution is barred u/s 300 of the Code. In such a case, if the materials placed before the Magistrate disclose an offence this Court by exercising revisional power cannot set aside the order, which is proper,

correct and legal. But in such a case this Court fails in its duty if it does not exercise its inherent power to quash the proceeding relying on the further materials placed before it regarding the previous complaint. The position therefore is clear that while exercising inherent powers for quashing a proceeding the Court can look into materials, besides those which were before the learned Magistrate for issuing process. The next question is what kind of further material the Court can look into. Answer to this question will be found in the decision of the Supreme Court in the case of R.P. Kapur Vs. The State of Punjab, when it said that the High Court while exercising inherent powers, should not embark upon an enquiry as to whether the evidence in question is reliable or not. It is of course true that at the time of issuance of process the question of evidence does not arise and such occasion can arise in a case where quashing is prayed for, after evidence has been gone into or charge has been framed. But then the principle laid down by the Supreme Court will also be available in respect of materials which can be translated into evidence,

16. Having given my anxious and careful consideration on this aspect of the question, I am of the view that while exercising its inherent power for quashing a proceeding in which process has only been issued, this Court can look in to and rely upon materials, besides those on which process was issued, which can be translated into admissible and relevant evidence, but it should not embark upon an enquiry in which an appreciation of the materials may be necessary to support or dislodge the accusation.

17. I now propose to discuss the grounds raised by Mr. Banerjee on the basis of the materials placed before me, in the light of the foregoing discussions. As regards his first contention that the machine that was supplied was the machine contracted for, the deposition of the complainant and the report of the two experts who examined the machine *prima facie* show that the machine contracted for was not the machine delivered. Mr. Banerjee has relied upon a letter dated April 26, 1977 written by the Deputy Trade Commissioner of the Czechoslovak Socialist Republic in India (Calcutta branch) addressed to the complainant's Company wherein it was stated that the machine that was supplied was the machine ordered for. In that letter it was explained that the marking FO 16 appearing in the machine and the mark OF-16 as ordered for were the same; besides it was pointed out that the machine was a brand new one and not an old or rusted one as contended by the complainant. If this letter is to be relied upon, necessarily an enquiry has to be made as to whether the contention of the complainant is true or that of petitioners. Consequently at this stage I am unable to accept this contention of Mr. Banerjee.

18. In support of his second contention that the petitioners had no dishonest intention as they were acting as the representatives of the manufacturers of Czechoslovakia and whatever representation they made was according to the instructions and directions of the manufacturers. Mr. Banerjee has relied upon the above mentioned letter dated April 26, 1977 and another letter dated April

21, 1977 sent by the manufacturer to the Company, wherein the manufacturers had taken the responsibility of having issued the machine and that too a new one as ordered for. Whether on the basis of these letters an inference of absence of mens rea will be drawn, is a question of fact and determination of such a question at this premature stage will again amount to embarking upon an enquiry. In that view of the matter I am unable to accept this contention of Mr. Banerjee also.

19. In support of his contention that the materials even on its face value, makes out a case of breach of contract and not of cheating, Mr. Banerjee has referred to certain letters, including the two mentioned above. Apart from the reasons earlier given for my inability to rely upon those letters at this stage, I feel that the complainant should be given an opportunity to explain the contents of the letters during trial if they are produced and exhibited at the instance of the accused. In any case without an appreciation of the materials, I cannot decide whether those letters rule out, a case of cheating. Suffice it to say that the complaint and the statement of the complainant and his witnesses and the documents relied upon by the complainant during his examination u/s 200, make out a prima facie case of cheating.

20. The last point that now falls for determination is whether a case of cheating and conspiracy has been made out against all the accused persons. According to Mr. Banerjee that even if it is assumed that there is a case of cheating the materials on record do not make out any case whatsoever against petitioner Nos. 2, 3 and 4. To appreciate this contention of Mr. Banerjee I have gone through the materials on the basis of which the learned Magistrate issued process against the petitioners.

21. In his complaint the complainant has made out a case that it was the petitioner No. 1 who made all the representations. The allegations against the other petitioners in the complaint are that they are the principal officers of the company and that the accused No. 1 represented that he was sent by the other accused persons and he was representing them also. The only other allegation that finds place in the complaint is that one of the directors of the complainant's Company, after delivery of the machine, went to Bombay and explained the discrepancies to the petitioner No. 4 S. Yusuf who offered to refund the money and to take back the machine in case no new Model OF-16 could be supplied. In his examination u/s 200 the complainant corroborated the statements made in the complaint and did not. say anything more than what was stated therein. The other two witnesses examined by the complainant did not state anything beyond what was stated by the complainant. From the letters and the documents the complainant referred to and relied upon during his examination, I find that the letters written on behalf of the Company were issued under the signature of the petitioner No. 1 and not by the other petitioners. The letters addressed by the complainant to the Company were specifically marked for attention of petitioner No. 1 except one letter copy of which was sent for attention of the petitioner No.

4.

22. All these materials on record do not make out any case of conspiracy amongst the four petitioners to cheat the complainant or his Company. The allegation made against the petitioner No. 4 does not even prima facie show that he made any dishonest representation or was a party to any conspiracy. The averment made in the complaint that the petitioner No. 1 stated that he was representing the other accused persons or he was sent by them by itself does not foist any liability on the other petitioners even if the statement is admissible u/s 10 of the Evidence Act. On consideration of all these aspects of the matter I am of the view that the discretion exercised by the Magistrate in issuing process against the petitioners Nos. 2, 3 and 4 was arbitrary and capricious having been based on insufficient material. As against the petitioner No. 1 however there are materials to indicate prima facie that he made a dishonest representation and induced the company of the complainant to part with the price of the machine.

23. On the conclusions as above, this application succeeds in part. The proceeding against the petitioners Nos. 2, 3 and 4 is hereby quashed. As a corollary thereto, the accusation of conspiracy against the petitioner No. 1 fails and the order issuing process against him u/s 120B of the Indian Penal Code is hereby set aside. The proceeding u/s 420 of the Indian Penal Code against the petitioner No. 1 will however continue,

24. Before parting with this record I would like to point out that this judgment will not debar the Magistrate from issuing process against the other three accused persons in accordance with law if during the proceeding of the case admissible and relevant evidence is brought on record to indicate their involvement in the offence alleged. I also make it clear that in proceeding with the case the learned Magistrate will not be bound by any of the observations made hereinbefore touching the merits of the case.

25. The Rule is thus disposed of.