

(2007) 12 GAU CK 0015
In the Gauhati High Court
Case No : Criminal Revision No. 358 of 2003

Kartik Das and Ors.

APPELLANT

Vs

Abhijit Saikia

RESPONDENT

Date of Decision : 20-12-2007

Acts Referred:

Penal Code, 1860 — Section 405
Penal Code, 1860 (IPC) — Section 405

Citation : (2008) 4 GLR 827

Hon'ble Judges : Aftab H.Saikia, J

Bench : Single Bench

Advocate : A.M.Mazumdar, B.C.Das, N.Saikia, D.Mazumdar, Advocates
appearing for Parties

Judgement

1. Heard Mr. D. Mazudmar, learned counsel for the petitioners and Mr. A.M. Mazudmar, learned senior counsel assisted by Ms. N. Saikia, learned counsel appearing for the respondent.

2. The quashment of the criminal proceeding being Criminal Case No. 1789C of 2003 pending before the learned SubDivisional Judicial Magistrate (Sadar) No. 1 Guwahati initiated on the basis of the complaint filed by the respondents for alleged commission of offences under sections 406/417/420/427, IPC against the petitioners has been sought in this revision petition filed under section 482 read with section 397 of Cr.P.C.

3. The pleaded case herein is that in the compliant as mentioned above filed by the respondent, inter alia, alleged that respondent as Complaint being the Director of M/s. Eden Cold Storage (P.) Ltd., entered into an agreement with the petitioners/accused, being partners of the company under the name and style of "Quality Potato Company" situated at Jalpaiguri in the State of West Bengal for supply of Potatoes on 1.3.2003 and as per agreement the petitioners were to supply 15,000 quintal of potatoes to the respondent complainant at the rate of Rs. 278 per quintal inclusive of costs and expenses, freight charges and the

supply should be made within 14.3.2003. The Respondent paid an amount of Rs. 20 lakh as advance to the petitioners for supply of potatoes. Another agreement was also made between them on 6.3.2003 for supply of 9,000 quintals of potatoes at the rate of Rs. 276 per quintal under the same terms and condition as made in the earlier agreement and there also respondent paid an amount of Rs. 9 lakh as advance.

4. However on 14.3.2003 the respondent received the potatoes supplied with the accused but found the same to be inferior in quality. As per the agreement the petitioners were bound and liable to supply potatoes of mature quality with matured skin but in the instant case petitioners with a view to cheat the complainant and to gain more, supplied inferior quality potatoes in contravention of the terms and condition of the agreement. Though the respondent immediately communicated such situation to the petitioners for violation of clause 6 of the agreement, the petitioners did not pay any heed to such complaint rather served a notice to the complainant on 1.4.2003. The petitioners using strong sentences denied those allegations brought by the respondent and further threatened the respondent unless and until he made the payment of their dues within a fortnight. In fact the respondent was not liable to pay unless he was supplied with potatoes as per terms and condition of the agreement. Under such factual situation it was complained that the accused with a mala fide motive supplied inferior quality of potatoes intentionally violating the terms and condition of the agreement with a view to cheat the rising and amateur business of the respondent at Guwahati, by making a prayer in the complaint itself to take cognizance of the offence against the petitioners under section 406/417/420/427, IPC.

5. Relying on the averments and statements made in the complaint itself, the learned counsel Mr. D. Mazumdar, at the very outset, has strenuously contended that exface the allegations made in the complaint do not give rise to the essential ingredients for taking cognizance of offence under sections 406/417/420/427, IPC. Further he has submitted that the entire case is of civil nature and the same is evident from the statements made in paragraphs 8 and 10 of the petition wherein the complainant/respondent admitted himself that the petitioners had intentionally violated the terms and conditions of the agreement particularly clause 6 of the agreement as per his allegation of inferior quality potatoes were being supplied.

6. Mr. D. Mazumdar has also drawn attention to this court to the communication made by the petitioners to the respondent as regards the payment of their outstanding bills of Rs. 9,34,543 and assurance was given by the respondent to clear his balance amount on condition of active cooperation.

7. On the other hand Mr. A.M. Mazumdar, learned senior counsel has vehemently objected the submissions and contentions so made on behalf of the petitioners to the effect that the petitioners cheated to the respondent by supplying inferior quality potatoes in violation of the terms and conditions of the agreement. He

has also stated that till date they had paid Rs. 61 lakh of payment and now Rs. 9 lakh had to be paid to the respondent according to the petitioners which they were not liable to pay due to loss and damages suffered by the respondent as alleged and it is a fit case where under the facts and circumstances of the case the revision petition may be dismissed so as to facilitate the trial of the petitioners on the basis of the complaint so lodged by the complainant.

8. We have given our thoughtful consideration to the rival submissions on behalf of the parties and also meticulously perused the materials available on record including the statements and averments made in the complaint so annexed to this revision petition including other relevant documents/communications made by and between the parties as regards their supply of potatoes and the subsequent communication as regards seeking payment of outstanding bills.

9. Since allegations of commission of offence under sections 406/417/420/427, IPC have been made in the complaint, it would be appropriate to carefully go through the provisions of those Sections including sections 405 and 415, IPC. The provisions of sections are quoted as under:

"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".

406. Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

415. Cheating. Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation. A dishonest concealment of facts is a deception within the meaning of this section."

417. Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

420. Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable, or any thing which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of

either descriptions for a term which may extend to seven years, and shall also be liable to fine.

427. Whoever commits mischief and thereby cause loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or fine, or with both."

10. from an ordinary reading of section 405, IPC it would go to show that to constitute a criminal breach of trust essential ingredients are (i) entrusting a person with property or with any dominion over property, (ii) that person entrusted (a) dishonestly misappropriating or converting that property to his own use ; or (b) dishonestly using or disposing of that property or willfully suffering any of the person so to do in violation (i) of any direction of law prescribing the mode in which such trust is to be discharged, (ii) of any legal contract made, touching the discharge of such trust.

11. So far section 415 is concerned which provides a definition of cheating, essential ingredients are : (i) there should be fraudulent or dishonest inducement of a person by deceiving him, (ii)(a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or (b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived ; and (iii) in cases covered by (iiXb), the act of omission should be one which causes or is likely to cause damages or harm to the person induced in body, mind, reputation or property.

12. The words "dishonesty" and "fraudulently" that occurred in section 420, IPC are defined in sections 24 and 25, IPC respectively which read as under:

"24. Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly.

25. A person is said to do a thing "fraudulently" if he does that thing with intent to defraud, but not otherwise."

13. The expression entrustment has been defined in Black's Law Dictionary (Seventh Edition) as "giving (with the person) responsibility for something usually after establishing a confidence in relationship".

14. The Supreme Court in a case reported in State of Gujarat v. Jaswantlal Nathalal, AIR 1968 SC 700 referred in Rameswar Hazarika v. State of Assam, 2005 (4) GLT 191 by this High Court observed as follows :

"The expression "entrustment" carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. Further the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. A mere transaction of sale cannot amount to an entrustment."

15. In another case in *Som Nath Puri v. State of Rajasthan*, reported in AIR 1972 SC 1490 the Apex Court explaining the term "entrustment" as occurred in section 405 in paragraph 7 observed as follows :

".....Section 405 merely provides, whoever being in any manner entrusted with property or with any dominion over the property, as the first ingredient of the criminal breach of trust. The words "in any manner" in the context are significant. The section does not provide that the entrustment of the property should be by someone or the amount received must be the property of the person on whose behalf it is received. As long as the accused is given possession of property for a specific purpose or to deal with it in a particular manner, the ownership being in some person other than the accused, he can be said to be entrusted with that property to be applied in accordance with the terms of entrustment and for the benefit of the owner....."

16. In *Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre*'s case AIR 1998 SC 709, the Apex Court in paragraph 7 held as under:

"7. The legal position is wellsettled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroversial allegations as made prima facie established the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilized for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

17. In a case of *S. W. Palanitkar and Others v. State of Bihar and Another*, (2002) 1SCC 241 the Apex Court had the occasion to deal with the exercise of inherent power of the High Court under section 482, Cr.PC for quashing of a criminal proceeding initiated for the offence under sections 405/406/450 and 420 and in paragraphs 8, 15, 18 and 27 in the said case observed as under :

"8. Before examining respective contentions on their" relative merits, we think it is appropriate to notice the legal position. Every breach of trust may not result in a penal offence of criminal breach of trust unless there is evidence of a mental act of fraudulent misappropriation. An act of breach of trust involve a civil wrong in respect of which the person wronged may seek his redress/or damages in a civil court but a breach of trust with mens rea gives rise to a criminal prosecution as well.

15. In case of a complaint under section 200, Cr.PC or IPC a Magistrate can take cognizance of the offence made out and then has to examine the complainant and his witnesses, if any, to ascertain whether a prima facie case is made out

against the accused to issue process so that the issue of process is prevented on a complaint which is either false or vexatious or intended only to harass. Such examination is provided in order to find out whether there is or not sufficient ground for proceeding. The words "sufficient ground" used under section 203 have to be construed to mean the satisfaction that a prima facie case is made out against the accused and not sufficient ground for the purpose of conviction."

18. Cautioning against issuing of process so that it should not be an instrument in the hands of the private complainant as vendetta to harass the person needlessly, this court in *Punjab National Bank v. Surendra Prasad Sinha*, (1993) Supl (1) SCC 499 has this to say in para 6: (SCC pp. 5040 5, para 6).

"6. It is also salutary to note that judicial process should not be an instrument of oppression or needless harassment. The complaint was laid impleading the chairman, the managing director of the Bank by name and a host of officers. There lies responsibility and duty on the Magistrate to find whether the accused concerned should be legally responsible for the offence charged for. Only on satisfying that the law cast liability or creates offence against the juristic person or the persons impleaded then only process would be issued. At that stage the court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime object of criminal justice but it would not be the means to wreak person vengeance. Considered from any angle we find that the respondent had abused the process and laid complaint against all the appellants without any prima facie case to harass them for vendetta."

27. In the case on hand, we have already stated above that except against appellant 7, no offence was made out against the remaining appellants as the ingredients of offences alleged against them were not satisfied. Unfortunately, the High Court failed to exercise jurisdiction under section 482, Cr.PC to correct manifest error committed by the learned Magistrate in issuing process against appellants 16 and 8 when the alleged acts against them did not constitute offences for want of satisfying the ingredients of the offences. The approach and considerations while exercising power and jurisdiction by a Magistrate at the time of issuing process are to be in terms of sections 200 to 203 under Chapter XV, Cr.PC, having due regard to the position of law explained in various decisions of this court, and whereas while exercising power under section 482, Cr.PC the High Court has to look at the object and purpose for which such power is conferred on it under the said provision. Exercise of inherent power is available to the High Court to give effect to any order under Cr.PC, or to prevent abuse of the process of any court or otherwise to secure the ends of justice. This being the position, exercise of power under section 482, Cr.PC should be consistent with the scope and ambit of the same in the light of the decisions aforementioned. In

appropriate cases, to prevent judicial process from being an instrument of oppression or harassment in the hands of frustrated or vindictive litigants, exercise of inherent power is not only desirable but necessary also, so that the judicial forum of court not be allowed to be utilized for any oblique motive. When a person approaches the High Court under section 482, Cr.PC to quash the very issue of process, the High Court on the facts and circumstances of a case has to exercise the powers with circumstances as stated above to really serve the purpose and object for which they are conferred."

18. In the case at hand on close perusal of the complaint so instituted by the respondentcomplainant, it appears that the complainant entered into an agreement with the petitioners for supply of potato on 1.3.2003 with the terms and conditions that the accused petitioners should supply 15,000 quintals of potatoes to the respondentcomplainant @ Rs. 278 per quintal inclusive of cost except freight charge which should be supplied within 14.3.2003 and complainant also paid an amount of Rs. 20 lakhs as an advance. Thereafter another agreement was also made on 6.3.2003 between the complainant and the accused/petitioners for supply of 9000 quintals of potatoes @ Rs. 276 per quintal with the same terms and conditions as the earlier one. Complainant also paid an amount of Rs. 9 lakhs as advance. However on 14.3.2003 the complainant received the potatoes of inferior quality so supplied by the accused and accordingly it was alleged that the petitioners violated the terms and conditions so stipulated under clause 6 of the agreement. It was also alleged that when the complainant raised objection for such supply of inferior quality of potatoes without paying any heed to such objection, on the other hand, the accused served notice upon the complainant threatening him to pay their due payment within fortnight. Under such circumstances, the complainant in his complaint alleged in paragraphs 8, 9 and 10 as under :

"8. That the complainant states that the accused are legally liable to indemnify the complainant for nonsupply of potatoes as per clause 6 of the agreement. The supply of inferior quality of potatoes has already caused immense loss to the complainant. The complainant is also contemplating to file a suit for damages before the proper forum of law.

9. That accused have supplied potatoes of inferior quality with a mala fide motive to cheat the complainant to gain more profit. The subsequent action of the accused itself speaks of the evil motive of the accused. Had they no ill feeling they would have tried to solve the matter amicably after receiving the letter dated 1.4.2003 sent by the complainant.

10. That the complainant states that the accused have intentionally violated the terms and conditions of the agreement with a view to cheat the rising and amateur business of Guwahati. The accused first made the agreement then took huge amount of advance with the promise to supply the complainant with the potatoes to be stored in the Cold Storage for the rural people of Assam and then cheated the complainant by supplying less quantity of inferior quality potatoes.

Hence they committed offence both jointly and severally under section 406/417/420/427 of the Indian Penal Code. The evidence shall prove that the accused supplied the potatoes violating the terms and conditions of the agreement with a view to cheat the complainant, who has already suffered huge financial loss and damage."

19. Having scrupulously examined above averments and allegations made in the complaint as well as having referred to the judicial pronouncements as quoted above, it is felt that the essential ingredients of sections 406/417/420/427, IPC as discussed herein above are totally absent. Further it is noticed that the allegation of criminal breach of trust cannot be sustained inasmuch as there was no question of entrustment of any property by the opposite party to the petitioners to attract the provisions of those sections. That apart, the attending facts and circumstances of the case, clearly indicate that the dispute alleged in the complaint petition refers to a dispute of civil nature and accordingly, in considered view of the court, the instant criminal proceeding needs to be interfered with.

20. Be it mentioned herein that on 27.6.2003 at the time of admission of this revision petition, this court granted interim relief to the petitioners by suspending all further proceedings of the complaint case in question with a liberty to the respondents to move this court for modification or alteration or cancellation of the said interim order. However, no such application is forthcoming during that period.

21. Given facts and circumstances of the case and also in view of what has been discussed, stated and observed this court is of the view that the complaint case No. 1789C of 2003 stands quashed.

22. The interim order passed earlier has been made absolute.

23. In the result this criminal revision petition stands allowed.

24. Send down the LCR forthwith.