

(2017) 02 KAR CK 0015
In the Karnataka High Court
Case No : Criminal Petition No. 9308 of 2016

Naresh Balasubramaniam

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 15-02-2017

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Information Technology Act, 2000 — Section 66D, Section 72A
Penal Code, 1860 (IPC) — Section 405, Section 406, Section 416, Section 417, Section 419, Section 420
Prize Chits and Money Circulation Schemes Banning Act, 1978 — Section 4, Section 5

Citation : (2017) 3 KantLJ 208

Hon'ble Judges : Anand Byrareddy, J.

Bench : Single Bench

Advocate : Sri Shyam Sundar M.S. Advocate, for the Petitioner; Sri Chetan Desai, Government Pleader, for the Respondent No. 1/ State

Final Decision : Allowed

Judgement

Anand Byrareddy, J.—This petition is filed in the following background:

Respondent 2 herein is said to have filed a complaint as on 22-6-2016, before the Cyber Crime Police Station, CID Division, Bangalore, which is said to have been registered as Crime No. 66 of 2016 and the FIR is said to have been filed before the Court of the Additional Chief Metropolitan Magistrate, Bangalore.

The said second respondent is said to have alleged in her complaint that she is a resident of Bangalore. And that a year prior to the complaint, she had come into contact with one Sri Harsha Ramesh, who is said to have introduced himself as a representative of a large international, multilevel marketing company known as Q-Net Limited. She is said to have been persuaded by the said Ramesh to join a commission based network, which she could manage from her residence. She was said to have been lured with the promise of large profits by investing nominal amounts of money. She was required to purchase certain lifestyle items

through internet transactions, apart from involving two others into the business which would trigger a chain of transactions and that she would receive commission on all sales so generated and that occurred subsequently.

The complainant was said to have been told that the Q-net business in India was being conducted by M/s. Vihaan Direct Selling (India) Private Limited, under one Karthik. She was thus persuaded to transfer a sum of Rs. 2.55 lakhs by way of online transfer to a particular account number, said to have been provided by the said Ramesh, and is said to have handed over a sum of Rs. 55,000/-, in cash. Prior to this she had been called to a hotel to meet two women executives of the said company, who are said to have attempted to explain the business model to her, and that she had been immediately unsure of the genuineness of the business. However, she was said to have been persuaded to pay the above amounts and also further amounts after raising a bank loan.

The complainant is then said to have been invited to a conference where the business was sought to be explained in greater detail. But, she claimed that she was even more doubtful of the soundness of the business and is said to have demanded a refund of all her money. But she is again said to have been persuaded to attend a very grand conference at Dubai, which was said to have been attended by over 10,000 people, with many celebrities gracing the occasion.

After returning from Dubai, it transpires that no one from Q-Net contacted her. She is then said to have learnt from an internet search that Q-Net was part of another group known as Q-I and that the aforesaid Vihaan Direct Selling (India) Private Limited, was being controlled by Q-I, which was said to be located in Hongkong. And the complainant stated that she had discovered that the Q-Net group had earlier conducted its business in India in the name of Gold Quest International Private Limited and Quest Net Enterprises Limited, and that serious legal action is said to have been initiated by the Indian Government on account of shady business practices having come to light.

It was further stated that the Bangalore operations of the business were being controlled by one Suresh Timri and Srinivas Vanka, who were said to be actively defrauding people of large sums of money, by involving them in the said business.

It was further said to have been stated that the Mumbai Police were investigating the business of the very same group, it was further stated that the website of the Q-Net group had been deliberately blocked by the Indian Government to prevent further fraud by the said entity and its personnel.

She had thus said to have sought criminal action against the aforesaid persons and entities. The police have accordingly registered the case against several individuals for offences punishable under Sections 66-D and 72-A of the Information Technology Act, 2000 (hereinafter referred to as "the IT Act", for brevity) and under Sections 406, 420, 419, 405, 417 and 416 of the Indian Penal Code, 1860 (hereinafter referred to as the IPC", for brevity).

It is the case of the petitioner that he was not one of the individuals named in the complaint aforesaid. It is only on completion of an investigation said to have been conducted by the Police that the petitioner has been arrayed as accused 4 in the charge-sheet now filed as on 18-10-2016 in Case No. C.C. 23238 of 2016, for offences punishable under Section 66-D of the IT Act and Sections 417, 419 and 420 read with Section 34 of the IPC and Sections 4 and 5 of the Prize Chits and Money Circulations Schemes (Banning) Act, 1978 (hereinafter referred to as "the PCMCS Act", for brevity). The Trial Court is said to have taken cognizance of the offences alleged.

2. It is contended on behalf of the petitioner that there is no factual basis, in the petitioner being named as one of the accused. Though the petitioner is an executive of the company Q-Net at its place of business in Malaysia, and the petitioner being a resident of Malaysia, there are no allegations against the petitioner of having committed any criminal acts and the entire exercise of an investigation has not only resulted in the petitioner being drawn into proceedings with which he is totally unconnected but it has other serious repercussions against a legal business of a multinational business entity. The Q-Net and its licensees are claimed to be a legitimate business group operating their business all over the world similar to other direct marketing conglomerates such as M/s. Amway, M/s. Oriflame, M/s. Hindustan Unilever, etc., which business is basically marketing of products directly from the manufacturer to the consumer thus drastically reducing the price, which would otherwise be much higher on account of distributors wholesale agents, sub-agents, retailing outlets, being involved. Apart from advertising and other indirect expenses boosting up the price of the same product, manifold vis-a-vis conventional marketing. That this is an accepted business model the world over and cannot be termed as fraudulent.

It is further contended that Q-Net, a multi-level marketing enterprise operates in India through Vihan Direct Selling (India) Private Limited. In a multilevel marketing model, the company operates through Independent Representatives (IRs). These IRs sell products on behalf of the company through the direct selling method, viz., without middlemen or the requirement of a retail outlet. It is pointed out that the main allegation in the complaint is that certain IRs had made the complainant part with money for which she had not received any goods or services. However, the police have charge-sheeted the petitioner, a resident of Malaysia, on the allegation that he is a Managing Consultant of Q-Net India apart from one Vijay Eswaran also a resident of Malaysia, claimed to be a Promoter of Q-Net.

It is asserted that the complaint does not make out a criminal case against the petitioner but could at best be a consumer dispute, as against any persons who may have received money from the complainant. However, the police in seeking to taint the legitimate business of Q-Net as fraudulent on the grievance of the complaint is not justified and has resulted in grave prejudice to the petitioner and his company.

Accordingly, the learned Counsel for the petitioner would contend that the allegations against the petitioner in the charge-sheet are imaginary and without basis and seeks that the proceedings be quashed.

3. On the other hand, the learned Government Pleader would seriously oppose the petition and in line with the Statement of Objections filed, would claim that the so-called business of the petitioner's company is nothing but what is termed as a "pyramid business", and that the modus operandi is that each of its customers is called an Independent Representative (IR) who makes an initial investment and in turn introduces two other customers who are also required to invest and would in turn act as IRs and they in turn introduce two more customers each, and all the sale transactions that take place by the chain, that can grow endlessly, would fetch a share of the price to each IR, under whom the pyramid base grows.

It is contended that Q-Net is a company based abroad and has not obtained any licence or authority to conduct its business in India but are inducing customers to part with huge amounts of money through so-called agents in India, such as M/s. Vihaan Direct Selling (India) Private Limited without reciprocal provision of goods or services and are thus committing fraud.

Further, it is contended that according to the business plan of the petitioner's company, a person can become an independent representative of the company, only if he is sponsored by another independent representative. The incentives to which a newly enrolled independent representative is entitled to is based on the number of independent representative business associates he sponsors. The income which the independent representative gets therefore depends on an event or contingency relative to or applicable to the enrolled new representatives into the scheme. The scheme is formulated as an inducement for enrolment of new members to earn higher incentives with a view to make quick or easy money. The petitioner's company promises payment of incentives to the sponsorer on the business turned out by the newly sponsored and enrolled representatives which constitute an event or contingency relative to the enrolment of such members. The petitioner's company not only craved for quick and easy money from its distributors, but also provided alternative inducements to its members to earn quick or easy money. The activities of the petitioner's company squarely covers the ingredients of Section 2(c) of the PCMCs Act, i.e.: (a) making quick or easy money depending on an event or contingency relative or applicable to the enrolment into the scheme and thus attracts the definition of "Money Circulation Scheme" as provided in Section 2(c) of the "Prize Chits or Money Circulation Schemes (Banning) Act, 1978" apart from offences under Information Technology Act and the Indian Penal Code, 1860.

The learned Government Pleader has placed reliance on portions of an order of the Bombay High Court which is said to have rejected an anticipatory bail petition filed by one Suresh Timri, who is also an accused in the present case.

The observations of the Bombay High Court insofar as the multi-level marketing business is concerned are as follows:

"24. The statements of the witnesses reveal that the dishonest concealment of true facts and the real business of the company. The persons, who dominate and navigate the will of the others, have an advantage which they can turn to their account. In the present case, such advantage is gained undoubtedly by dishonestly and in deceitful manner. There are instances of dishonest concealment of facts i.e., genuine nature of the products and by the persons working for the company i.e., I.Rs and with intention to earn wrongful gain to them and the company and wrongful loss to others. The motto of the company "sell more, earn more" appears very attractive and innocuous. However, this motto is fully camouflaged. The company stands on a basic statement that people can be fooled. Thus, the true motto is sell more earn more" by fooling people.

25. The submissions of the learned Senior Counsel for the applicants-accused that selling the product at a very high price is not an offence, is true and cannot be controverted in the marketing business. It depends on the marketing capacity of an individual and so the level of his profit. However, in this marketing, the IRs are directed to give all the names and details of the relatives, phone numbers of their acquaintances, references and thereafter the persons in the higher level, who are given some positions, contact these acquaintances and references and the chain is multiplied. The persons who are gullible, are bound to be prey of such kind of persuasion which is coloured with inducement. In fact, it is a chain where a person is fooled and then he is trained to fool others to earn money. For that purpose, workshops are conducted where study and business material is provided with a jugglery of words, promises and dreams. Thus, the deceit and fraud is camouflaged under the name of e-marketing and business."

The learned Government Pleader has also placed reliance on paragraph 22 of the order, as well, which reads thus:

"22. Responding to the submissions of the prosecution that the IRs of lower level of pyramid are doing aggressive marketing and they are threatening and pestering people for selling the products and for becoming members, Mr. Desai argued that the applicants/accused cannot be vicariously liable. They have started the scheme with a noble object and they cannot be held responsible for some overreach or aggressive steps or illegality of some IR while marketing the company products. It is true that the doctrine of vicarious liability is unknown to the criminal law. However, apart from the behaviour of such pressurising tactics which are used by the IRs on the lower level of the pyramid, material is brought before me to show that many workshops and sessions are conducted regularly at various places by the company. Undoubtedly, all these workshops and sessions and training centres are run at the behest of the applicants-accused by the Directors and shareholders i.e., the applicants/accused and thus, they have control either directly or remotely, over the dishonest inducement and aggressive

marketing which is the modus operandi of this company."

Hence it is contended that the complainant in the present case on hand had also been taken to a Conference at Dubai, and that therefore the top executives of the company were involved in defrauding gullible persons such as the complainant and it is hence contended that the activities of the petitioner and his company squarely fall within the ambit of Sections 2(c) and 3 to 6 of the PCMGS Act and the case is squarely covered by the decision of the Supreme Court in *Kurianchaty Chacko v. State of Kerala* (2008)8 SCC 708.

Hence the learned Government Pleader seeks dismissal of the petition.

4. On a consideration of the material produced and the rival contentions. it is seen that it is neither the case of the de facto complainant nor the police that the petitioner had committed any overt act in inducing the complainant from parting with any money or that he had influenced her in doing so, but the petitioner appears to be included in the charge-sheet only on account of the fact that he is said to be a Managing consultant of M/s. Q-Net India. It is not indicated that M/s. Q-Net has a presence in India other than through M/s. Vihaan Direct Selling (India) Private Limited. It is not shown that the petitioner is associated with the latter. This circumstance alone would render the proceedings initiated against the petitioner bad in law. He is shown to be a resident of Malaysia in the charge-sheet, that is yet another factor that would dilute the case against the petitioner.

5. Secondly, the complaint is only as regards the complainant being disillusioned about the business and not having received any benefit for money she may have parted with. This could at best be a civil dispute or at the worst a cause of cheating by the person or persons who have received the same. It is nobody's case that the petitioner has received any money.

6. Thirdly, the petitioner is sought to be prosecuted as an officer of the main company M/s. Q-Net, which is said to be engaged in multilevel marketing or direct marketing. The police appear to proceed on the basis that the activities of a multilevel marketing company is illegal and arbitrary. There is a suspicion created about the business in some circles while there are others who vouch for it as a sound business model. The doubts and strong words employed by the Bombay High Court in denigrating the business itself, is a case in point.

7. As contended by the Counsel for the petitioner and as seen from abundant material produced before this Court it is evident that "Direct Selling" has emerged as a global industry. A report prepared by the Federation of Indian Chambers of Commerce and Industry discloses that direct selling and multilevel marketing in India is estimated to be to the tune of several hundred crores of rupees. And that it has emerged as an independent industry. It is also expressed therein that direct selling and multilevel marketing are forms of economic activity that could play a very important role in a country like India, as it envisages low transactional cost mechanisms for sale of consumer products without the need for large marketing infrastructure.

8. In consideration of the fact that direct selling and multilevel marketing are important industry verticals, the Government of India has issued an Advisory to the State Governments and Union Territories, which contain "Model Framework for Guidelines on Direct Selling". The model guidelines clearly indicate that multilayered network of subscribers to a scheme formed by a direct selling company, which consists of subscribers enrolling one or more further subscribers in order to receive any benefit, directly or indirectly, where the benefit is, as a result of sale of goods or services for such subscribers, is not illegal.

9. Material of unimpeachable character pertaining to the activities of Q-Net have been produced before Court. A perusal of the material and the charge-sheet averments prima facie indicate that the activities of Q-Net and Vihan i.e., the multilevel marketing companies, do not constitute offences under the Prize Chits and Money Circulation Schemes (Banning) Act, 1978. The activities of the company do not fall within the definition of "Money Circulation Scheme" under Section 2(c) of the Act, nor does it fall within the definition of Prize chit" under Section 2(e) of the Act. When the activities of these companies do not constitute either Money Circulation Scheme or Prize Chit, the offences under Sections 4 and 5 of the Act, do not even remotely apply to such activities and consequently charging the accused for such offences is unsustainable.

10. The reports of FICCI also specify that the absence of a clear legislation and regulatory framework for multilevel marketing companies, have led to severe problems for such companies operating in the country. The present case clearly demonstrates that fact. Legislation such as the Prize Chits and Money Circulation Schemes (Banning) Act, 1978, which do not even remotely apply to the activities of multilevel marketing companies, are applied by the Investigating Authorities leading to disastrous results.

11. Further, a prima facie perusal of the FIR and the charge-sheet reveals that the ingredients of the offences under Sections 417, 419 and 420 are not made out. The allegation pertains to payment of certain monies in anticipation of certain services and in the event of a deficiency of service, the appropriate course of action would be to initiate proceedings under the Consumer Protection Act, 1986 and not initiate criminal prosecution under the provisions of the IPC. The advisory issued by the Central Government in terms of the Model Framework Guidelines on Direct Selling also recognises this fact and specifies that the entire activity of direct sellers and direct selling entities should be guided by the provisions of the Consumer Protection Act, 1986.

12. The Hon"ble Supreme Court of India has repeatedly observed that Criminal Law should not be set in motion to settle civil disputes by giving such disputes a colour of criminality. In *G. Sagar Suri and Another v. State of Uttar Pradesh and Others* (2000)2 SCC 636 and *Hira Lal Hari Lal Bhagwati v. Central Bureau of Investigation, New Delhi* (2003)5 SCC 257, the Supreme Court has observed that matters essentially of a civil nature should not be given a cloak of criminal offences and criminal proceedings should not be used as shortcut for other

remedies available in law. The Court has further observed that in such instances, the jurisdiction under Section 482 ought to be exercised to quash such criminal proceedings.

13. The instant case is a typical case where criminal legislation which are not even remotely applicable to the circumstances of the case have been invoked to substantiate the charges. The dispute, if at all, is between a consumer and a direct seller and ought to be adjudicated under the provisions of the Consumer Protection Act, 1986. As a consequence, the FIR and the charge-sheet are unsustainable and deserve to be quashed.

14. Accordingly, the petition is allowed and the proceedings in Case No. C.C. 23238 of 2016 on the file of the IACMM, Bangalore, stands quashed insofar as the petitioner is concerned.