(2011) 06 KL CK 0165

In the High Court Of Kerala

Case No : Criminal M.C. No. 2844 of 2009

N.T. Muraleedharan APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 22-06-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 482
Penal Code, 1860 (IPC) — Section 405, 408, 420

Citation : (2011) 3 KLJ 166

Hon'ble Judges : N.K. Balakrishnan, J

Bench : Single Bench

Advocate : K.V. Sohan and Sreeja Sohan. K, for the Appellant; L.G. Suresh Babu (PP) and M. Sasindran, for the Respondent

Final Decision : Allowed

Judgement

N.K. Balakrishnan, J.—Petitioner is the accused in C.C.437/06 on the file of the Judicial First Class Magistrate, Payyannur. A complaint was filed by the 2nd respondent before that Court against the petitioner alleging Commission of offences u/Ss.408, 420 IPC etc. It was forwarded to the police u/s 156(3) Cr.P.C. After investigation final report was filed against the petitioner alleging commission of offences u/Ss.408 and 420 IPC. It was alleged that the petitioner who was an agent or employee of the complainant committed criminal breach of trust and cheating to the tune of about Rs. 20 lakhs during the period from 1995 to 2004 by quoting excess price for the tea which was purchased by the petitioner in the auction conducted at Kochi. This petition is filed to quash the complaint and the cognizance taken against the petitioner in C.C. 437/36.

2. Learned counsel for the petitioner submits that originally the complainant conducted business under the name and style as T.C. Abdulla and Company'' in Tobacco and Tea Dust. On the death of Abdulla Haji the business was partitioned. The tea dust business was taken over by the defato complainant. A partnership was constituted under the name and style ''Parammel Traders'' of which the

complainant is the Managing Partner. At that time one Kunhiraman Nambair was the accountant of ''Parammel Traders''. According to the complainant during 1988 and 1989 petitioner was made an agent for participating in the auction for tea-dust held at Kochi and for that purpose an establishment named as ''Jayasree Traders'' was formed and accused was made its owner. It was further alleged that the petitioner was paid half percent Commission for the work attended by him. According to the complainant the petitioner continued as an agent of the firm ''Parammel Traders''. It was contended that the petitioner quoted higher rates than the rates shown in the auction and received more amount from the complainant.

3. The learned counsel for the petitioner submits that admittedly ''Jayasree Traders'' is the proprietary concern of the petitioner. The petitioner is the licensee of the same. He has been participating in the auction for tea-dust at Kochi from 1989 onwards. The tea-dust purchased by him in auction was used to be distributed by him originally to P. C Abdulla and subsequently to ''Parammel Traders'' for which he used to take reasonable profits. The allegation that he is only an agent of ''Parammel Traders'' or of the complainant is denied by him. The learned counsel submits that no document whatsoever was produced to show that the petitioner was only an agent of the complainant. It is further pointed out that the name ''Jayasree Traders'' is named after the petitioner''s daughter Jayasree. The allegation that the company was only a ''dummy'' of the complainant is stoutly denied by the petitioner.

4. There is force in the submission made by the learned counsel for the petitioner that action against the petitioner cannot be sustained on the alleged plea of binami set up by the complainant. The whole foundation of the case set up by the complainant is that the petitioner showed higher rates than the rates quoted by him in the auction conducted at Kochi and thus he has swindled huge amount On the other hand the petitioner contends that he took part in the auction on his own accord and not as an agent of the complainant and that after purchasing the same he used to sell the same to the complainant quoting a slightly higher rate taking into account the expenses incurred by him and also a reasonable profit which he is entitled to get. Even if the amount quoted by him was slightly higher it cannot invite any penal action because as it is a business transaction he is entitled to aspire for a reasonable profit, maintaining commercial morality.

5. Learned counsel for the petitioner would submit that the complaint based on which the police investigated the case was filed long after the petitioner filed a suit before the Sub Court, Payyannur as O.S. 170/04 claiming the amount covered by two bills. According to the petitioner amounts covered by those two bills as per which tea dust was sold to the complainant was to be paid by the complainant but as he failed to pay the amount the suit was filed. It was also pointed out that another partnership firm was constituted in which petitioner and complainant''s son are partners. A suit O.S. 57/05 was filed by the petitioner against the other partners for dissolution of partnership and for rendition of

accounts and that suit was decreed O.S. 170/04 was dismissed. Appeals against the judgments and decrees in O.S. 170/04 and O.S. 52/05 are pending before this Court.

6. It is also pertinent to note that though the complainant, in his written statement in O.S.170/04 stated that he would be filing a counter claim, for reasons best known to him no counter claim was made. He did not file any suit for realisation of the amount of loss alleged to have been sustained by him on account of the alleged breach of trust committed by the petitioner. That itself according to the petitioner would unravel the falsity of the case set up by the complainant. Learned counsel for the petitioner would submit that a criminal prosecution cannot be used as an instrument of oppression or harassment for taking vengeance or with an ulterior motive to pressurize the accused, to yield to the demand made by the complainant. Learned counsel for the petitioner would submit that there is no averment to the effect that the petitioner had obtained any amount from the complainant fraudulently or dishonestly nor is there any allegation that the petitioner had made any promise or representation which induced the complainant to part with any amount. It is also pointed out that there is only a vague, imprecise and non specific statement that the petitioner had committed criminal breach of trust during 1995 to 2004. There is not even a specific allegation as to whether any amount was entrusted to the petitioner or that he committed breach of trust in respect of any amount over which he was having control. If at all, the complainant can only seek for rendition of accounts, if as a matter of fact the petitioner as an agent did not properly account for the money received by him as an agent of the complainant. Mere non- accounting or improper accounting will not attract an offence u/s 420 or 408 IPC. According to the learned counsel for the petitioner even if the case as stated by him in the complaint is taken at their face value and accepted in entirety it will not constitute the offence alleged.

7. It is true, inherent power u/s 482 Cr.P.C. should not be exercised to stifle a legitimate prosecution. But the entirety of the facts and circumstances delineated earlier would make it clear that the dispute is purely of a civil nature. Learned counsel for the revision petitioner has relied upon the decision in V.R. Dalai v. Yogendra Naranji Thakkar and another, AIR 2008 SC 2793 in support of his submission that if the dispute between the parties is civil in nature the Court should not allow criminal proceedings to go on. That was a case where the allegation was that the accused committed offences u/s 405 and 420 IPC. It was alleged that the accused cheated the complainant to deprive him of the share in profits by dissolving the firm behind the back of the complainant. It was found that the partnership firm was cancelled from the very inception and it was never acted upon and as such it was found that there was no question of the complainant deriving any profit there from or of any wrongful act on the part of the accused so as to satisfy the essential ingredients of S. 405 and 420 IPC.

8. It was held by the Hon''ble Supreme Court in Indian Oil Corporation Vs. NEPC

India Ltd. and Others, that where the first ingredient of criminal breach of trust, that is entrustment is missing, the same would not constitute a criminal breach of trust.

9. In Anil Mahajan v. Bhor Industries Ltd. and Anr., (2005) 10 SCC 228 it was held by the apex Court:

The substance of the complaint is to be seen. Mere use of the expression cheating in the complaint is of no consequence. Except mention of the words ''deceive'' and ''cheat'' in the complaint filed before the Magistrate and cheating in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MOU where from it can be inferred that the accused had the intention to deceive the complainant to pay.

10. It is submitted by the learned counsel for the petitioner that it was not stated in the complaint as to the exact amount which was stated to have been entrusted by the complainant to the accused or what exactly was the amount which was under the control or domain of the accused which was alleged to have been misappropriated by the accused or converted to his own use. As stated earlier the allegation is to the effect that for the period from 1995-2004 the accused committed criminal breach of trust and cheating. It is not clear that there was any entrustment of the amount nor was any amount in the domain or control of the accused Demanding or collection of excess profit, even if it is accepted to be so, cannot amount to cheating or criminal breach of trust Non-accounting or improper accounting or wrong accounting even if it is accepted to be there is a matter to be ascertained by a civil Court of competent jurisdiction, based on the documents produced by the parties. It is inconceivable how the criminal Court can be asked to find out what should have been the rate quoted by the petitioner, and what should have been the price or commission collected by the petitioner as agent (even if he was an agent) and then to hold that by collecting such excess amount the petitioner committed cheating or criminal breach of trust.

11. Learned counsel for the respondent/complainant would submit that as the power u/s 482 has to be exercised with great care and caution, this Court should not venture to examine the matter in detail as it would have to be done only by the trial Court. But on going through the complaint it is seen that the dispute is essentially of a civil nature but has been given a cloak of criminal offence.

12. In the decision in G. Sagar Suri and Another Vs. State of U.P. and Others, it was held;

It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal Court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction u/s 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

With regard to the point in dispute there is only the suit filed by the petitioner for realisation of the amount covered by the two bills which is now pending in appeal. This complaint is thus seen to be only a short cut for other remedies. I find that a dispute of civil nature has been given a cloak of criminal offence and as such it would be an abuse of process of Court to allow the prosecution to go on. Therefore the further proceedings in C.C. 437/06 in Annexure No. XI is quashed. Petition is allowed accordingly.