
(2003) 12 PAT CK 0076

In the Patna High Court

Case No : Criminal. Misc. Nos. 23171 of 2000 and 8617 of 2001

Oriental Insurance Co. Ltd. and Others etc.

APPELLANT

Vs

State of Bihar and Another

RESPONDENT

Date of Decision : 03-12-2003

Acts Referred:

Citation : (2004) 3 RCR(Criminal) 210

Final Decision : Allowed

Judgement

S.N. Jha, J.—The Oriental Insurance Company Limited and its officials -- five in number -- posted in the regional offices at Patna, Bangalore and Gauhati, and the branch office at Patna have come to this Court for quashing the order of the Judicial Magistrate 1st Class, Patna dated 24-5-2000 in Complaint Case No. 610/2000 taking cognizance and issuing processes under Sections 406, 409 and 420 Indian Penal Code against them.

2. The case of the complainant-opposite party, M/s. Poddar Industries, is that it is a partnership firm. In 1992 the Branch Manager of the petitioner company approached its partner and requested him to insure the factory building with all equipments along with the boundary wall and the partners agreed for the same. The rate of premium was thereafter fixed after site inspection as per the cost value of the goods insured. Finally, the company issued fire policy "C" with coverage of special perils like flood etc. for one year. The policy was renewed every year. The last renewal was for the period 13-7-99 to 12-7-2000. On 1-8-99 in the night the boundary wall of the factory -- about 100 feet in length--fell down on account of heavy rains causing loss to the complainant. On 2-8-99 the local Branch Manager was informed about the loss and he was requested to depute a surveyer for assessment of the loss. The surveyer accordingly assessed the loss and the complainant submitted claim on 14-8-99. On 10-12-99 the complainant was informed by letter dated 30-11-99 that the claim had been rejected. On 10-12-99 itself the complainant sent letter to the Branch Manager requesting him to assign reasons why the claim had been rejected requesting him further to

supply copy of the surveyer's report. On 14-12-99 the Branch Manager informed that the collapse of the boundary wall was on account of faulty design and structural defects and that on the date of occurrence there was no renewal of the policy. According to the complainant, the reasons are baseless and highly motivated. The complainant obtained the meteorological report from the concerned department of the Government of India which shows that in the month of July, 1999 rainfall occurred on 24 days out of 31 days totalling 3359 mms. Further, the Company had received premium of Rs. 4668/- on account of renewal of the policy -- and the policy stood renewed. The reasons assigned for rejecting the claim were thus false, groundless and motivated. The complainant on these facts alleged that it had been cheated by the accused persons in conspiracy with each other for their wrongful gain causing wrongful monetary loss to the complainant and also committed criminal breach of trust and are therefore liable to be punished for those offences.

3. The case of the petitioners as stated in the quashing application, briefly, is that the Oriental Insurance Company Ltd. is a subsidiary of the General Insurance Co. of India, a public sector company having its registered and head office at New Delhi and a regional office at Patna. A fire policy "C" was issued to the complainant on the basis of proposal submitted by it allowing insurance cover for the buildings including plinth and foundation and other items for the period 13-7-99 to 12-7-2000. The policy covered loss of items insured due to flood. On 2-8-99 the complainant informed the Branch Manager of Branch I at Patna that in the preceding night boundary wall of factory about 100 feet in length had collapsed. Claim No. 1/2000 was lodged and the reason shown for the loss was that due to heavy rain the boundary wall had fallen and damaged the pipes. The company appointed Sri S. K. Sinha, Surveyer and Loss Valuers for the assessment of loss as required u/s 64UM of the Insurance Act 1938. On 7-9-99 he submitted report after obtaining opinion of the expert that fall of the structure was not due to flood or inundation. As per the rules, the Company appointed Sri Abhay Kumar Dutt Verma, Surveyer and Loss Valuers and Investigator to make investigation with respect to the rain fall on August 1, 2 and 3, 1999 at Patna. On 12-10-99 he submitted his findings after obtaining certificate from the Meteorological Department as per which rainfall on 1-8-99 was 0.0 mm; on 2-8-99, 33.00 mms; and on 3-8-99, 2.2 mms. On the basis of said reports on 30-11-99 the Branch Manager informed the complainant that its claim had been repudiated. On 14-12-99 the reasons for repudiation were communicated to the complainant on request. The complainant thereafter represented to the regional office for reinvestigation. On 17-3-2000 the regional office informed the complainant that on review of the claim the decision of the Branch Office was correct and the same did not require any modification.

4. The complainant thereafter filed complaint, registered as Complaint Case No. 610(c) of 2000, before the Chief Judicial Magistrate, Patna which was transferred to the file of Sri Hasan Nawaj Judicial Magistrate, 1st Class, Patna for enquiry. On 24-5-2001 Sri Hasan Nawaj by the impugned order took cognizance and issued

summons against the petitioners as indicated at the outset.

5. The petitioners have assailed the impugned order on the ground that the officials of the petitioner-company are public servants in terms of Section 107A of the Insurance Act, 1938 with effect from 1-6-69, and read with Section 38 of the General Insurance Business (Nationalisation) Act, 1972 they cannot be prosecuted for any act done by them in good faith muchless without sanction u/s 197 of the Criminal Procedure Code. Secondly, the repudiation of claim does not invite any criminal liability and the same can be settled in a civil suit.

6. After stay and notice, when these applications came up for final disposal before the learned single Judge, on behalf of the petitioners reliance was placed on a decision in the case of Gaur Sarkar @ God Sarkar, Smt. Alpana Singh, R.P. Awasthi @ Ranjan Pd. Awasthi and The Oriental Insurance Company Ltd. Vs. State and Another, wherein it has been held that after nationalisation of the Insurance Company its officers and employees have become public servants and no action can be taken without obtaining necessary sanction as required u/s 197, Criminal Procedure Code. Without stating so in the order, but apparently doubting correctness of the decision, the learned Judge for order dated 10-4-2002 referred the case for hearing by Division Bench and that is how the cases came up before this Bench.

7. Shri Rana Pratap Singh, learned Counsel for the petitioners, submitted, firstly, that no offence muchless the alleged ones under Sections 406, 409 and 420 of the Indian Penal Code is made out and the dispute involved being of civil nature the order taking cognizance against the petitioners amounts to abuse of the process of Court and the same is therefore fit to be quashed. Secondly, the officers and employees of the petitioner company enjoy protection u/s 38 of the General Insurance Business (Nationalisation) Act, 1972 and being public servants in terms of Section 107A of the Insurance Act, 1938 read with Section 21, Clause 12th, of the Indian Penal Code, they cannot be prosecuted without sanction of the competent authority. Reliance in support of the second proposition was placed on State Vs. O.P. Dogra and Others, apart from the case of Gaur Sarkar (2001 Cri LJ 137) (supra).

8. Shri Tara Kant Jha appearing for the complainant-opposite party submitted that the decision in the case of Gaur Sarkar that the officers and employees of nationalised insurance company cannot be prosecuted without sanction u/s 197, Criminal Procedure Code is not correct. Section 197 in terms applies to public servants "not removable from his service save by or with the sanction of the government" and the officers/employees of the Insurance Company do not come within its purview. They may be public servants otherwise in terms of Section 107A of the Insurance Act as held in the case of State Vs. O.P. Dogra and Others, but for prosecuting them no sanction is required. It is on this ground, according to the Counsel, that the cases were referred to Division Bench and the term of reference may accordingly be answered and the cases may be heard on merit in the usual course. In support of the contention that no sanction is required for

prosecuting officers/employees of the Insurance Company, reliance was placed on National Insurance Company Ltd. and Others Vs. Narendra Kumar Jhanjhri, 9. From the order dated 10-5-2002 by which the cases were referred to Division Bench it does not appear that the reference was on a particular point. It is true that the order refers to the case of Gaur Sarkar (2001 Cri LJ 137) (supra). If the decision therein is followed that would be end of the matter, for, there being no sanction u/s 197, Criminal Procedure Code the impugned order taking cognizance has to be quashed on that ground alone, but as I have observed above, the learned Judge had some reservations about correctness of the said decision. There being a contrary decision on the point in the case of National Insurance Company Ltd. and Others Vs. Narendra Kumar Jhanjhri, though not noticed in the order of reference, the cases were rightly referred to Division Bench but it does not mean that the Court should confine itself to that point alone; the endeavour rather should be to finally decide the cases on merit. Sooner the uncertainty about litigation comes to an end, better for the parties. Accordingly, I propose to decide the cases finally on merit rather than confine this order to the question of requirement of sanction u/s 197, Criminal Procedure Code.

10. I am of the view that the applications are fit to be allowed on the first point urged by the counsel for the petitioners, but having regard to the significance of the question I would like to express my views on the second point too. I take up that point first.

11. The sheet anchor of the argument that without sanction no official/employee of the petitioner-company can be prosecuted being public servants is Section 107A of the Insurance Act, 1938 read with Section 38 of the General Insurance Business (Nationalisation) Act, 1972 (hereinafter referred to as General Insurance Business Act, for brevity). Section 107A which came by amendment, by Insurance (Amendment) Act, 1968 (Act 62 of 1968), with effect from 1-6-69 reads as under :--

"Every whole-time Chairman, whole-time Director, Auditor, Liquidator, Manager and any other employee of insurer shall be deemed to be a public servant for the purposes of Chapter IX of the Indian Penal Code".

It would appear on a plain reading of the Section that, firstly, the status of public servant conferred on Chairman etc. is by a legal fiction (deemed to be) and, secondly, the Clause "deemed to be a public servant" is qualified by words "for the purpose of Chapter IX of the Indian Penal Code". Chapter IX (Sections 161 to 171) of the Indian Penal Code refers to offences relating to taking gratification by public servants in different kinds, violation of any law by public servants with intention or knowledge of the resultant injury to any person or framing an incorrect document by them or their unlawful engagement in trade, purchase etc. of property or impersonation of a public servant and wearing garb etc. of a public servant etc. with a fraudulent intent. It is evident that making them public servant was intended to bring those engaged in insurance business (see the definition of "insurer" in Section 2(9) of the Insurance Act) including the officers

and employees of an Insurance Company under the mischief of the penal provisions of Chapter IX of the Penal Code. This becomes further clear from the statement of objects and reasons as well as the preamble of Bill No. 31 of 1968 which led to Insurance (Amendment) Act, 1968 (Act 62 of 1968). It states that the Bill is intended to provide for the extension of social control over insurers carrying on general insurance business and more effective supervision and control over the insurers. It is in this back ground that the provisions of Section 107A of the Insurance Act have to be understood.

12. As a matter of fact, similar provision is there in Section 31 of the General Insurance Business Act which too provides that "every officer or other employee of the Corporation or of an acquiring company shall be deemed to be a public servant for the purposes of Chapter IX of the Indian Penal Code". Reference may also be made to Section 21 of the Indian Penal Code which defines the term "public servant", particularly Clause 12(b) thereof to which our attention was drawn in terms of which every person in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in Section 617 of the Companies Act, 1956 comes under the definition of public servant.

13. In view of the express provisions of Section 107A of the Insurance Act read with Section 31 of the General Insurance Business Act there is no scope for any doubt that officers/employees etc. of an Insurance Company are public servants but as indicated above they are deemed to be public servants for a different purpose -- to make them subject to the penal provisions of Chapter IX of the Indian Penal Code. In *State Vs. O.P. Dogra and Others*, the Supreme Court held that Jupiter Insurance Company having been merged with the Oriental Fire and General Insurance Company, after nationalisation becoming part of the General Insurance Company of India, the officers/employees thereof are in the same position as officers/employees of Life Insurance Corporation who are public servants within the meaning of Section 12 of the Ranbir Penal Code (akin to Section 21 of the Indian Penal Code) and therefore they are liable to be prosecuted under the Jammu and Kashmir Prevention of Corruption Act. The decision. It would appear, does not advance the case of the petitioners; rather it supports the views that I have taken above that the object behind conferring the status of deemed public servants was to bring the officers/employees etc. of the Insurance Companies under the mischief of penal provisions of Chapter IX of the Indian Penal Code.

14. It was submitted on behalf of the complainant that; notwithstanding their deemed status as public servants, the officers/employees of the petitioner-company are not entitled to protection u/s 197 of the Penal Code which applies to a public servant (apart from a Judge or Magistrate) "not removable from his office save by or with the sanction of the Government". The officers/employees of the petitioner company are not appointed by the government nor they are removable from their office with out sanction of the Government and there fore

the protection u/s 197 is not available to them. I find substance in the contention. The decision in the case of Gaur Sarkar (2001 Cri LJ 137) (supra) contains no reasons for taking view to the contrary except that after nationalisation they have become public servants and are therefore entitled to protection u/s 197 of the Criminal Procedure Code. The decision does not appear to have laid down a correct law.

15. Though the decision in Gaur Sarkar's refers to Section 197, Criminal Procedure Code alone and the submissions of the Counsel for the complainant revolved around Section 197, I consider it proper to also refer to Section 19 of the Prevention of Corruption Act, 1988 which too provides for similar sanction in the matter of prosecution of public servants. The requirement of previous sanction for prosecution of public servants therein arises in cases of offences punishable under Sections 7, 10, 11, 13 and 15 of that Act -- relating to public servants taking gratification etc., and therefore Section 19 of the said Act too cannot be availed of by the petitioners in these cases. In the case of National Insurance Company Ltd. and Others Vs. Narendra Kumar Jhanjhri, this Court took a view that the offences under the Insurance Act are not like offences u/s 405, 409 or 120B of the Indian Penal Code and therefore no sanction is required for proceeding under the Insurance Act. For reasons different, as indicated hereinabove, I have come to the same conclusion and accordingly. I hold that Section 197, Criminal Procedure Code is not applicable in the case of officers/employees of an Insurance Company in absence of any express provision simply because they are deemed to be public servants and accordingly there is no bar to their prosecution without such sanction. Section 107 of the Insurance Act provides for previous sanction of the Advocate General in the matter of proceeding against officers etc. of the Insurance Company but that is a different provision altogether.

16. As a matter of fact the acts envisaged in Section 406 or 409 or 420 or for that matter other cognate offences occurring in Chapter XVII of the Indian Penal Code cannot be part of duty of a public servant and for this reason too Section 197, Criminal Procedure Code cannot be availed of by a person accused of committing such offences. The object of Section 197, Criminal Procedure Code is to protect public servant etc. from harassment of a frivolous, tendentious and vexatious litigation relating to acts in the discharge of official duty as succinctly observed in Harihar Prasad, etc. Vs. State of Bihar,

"To put it shortly, it is no part of the duty of a public servant, while discharging his official duties, to enter into a criminal conspiracy or to indulge in criminal misconduct. Want of sanction u/s 197 of the Code of Criminal Procedure is, therefore, no bar."

17. Reliance was placed on Section 38 of the General Insurance Business Act. That Section protects officers and employees of the Corporation i.e. the General Insurance Corporation of India (of which the Oriental Insurance Company Ltd., petitioner herein, is a constituent) from suit, prosecution or other legal

proceedings for anything done or intended to be done under the Act in good faith. Before proceeding further the Section may be quoted as under :

"No suit, prosecution or other legal proceeding shall lie against any officer of the Central Government or officer or other employee of the Corporation or of acquiring company for anything which in good faith is done or intended to be done under this Act."

Submission was made as if officers and employees of the Corporation enjoy some kind of immunity from prosecution, apart from other legal proceedings. However, on a bare reading it is manifest that what Section 38 protects is act done or intended to be done in "good faith".

18. The expression "good faith" has not been defined in the Insurance Business Act. It is however defined in various statutes such as the Indian Penal Code, the General Clauses Act, 1897, the Limitation Act, 1963 etc. Besides, the term occurs -- though not defined therein -- in various statutes such as Section 178 of Indian Contract Act, Section 51 of Transfer of Property Act. Where the term is not defined, as would appear from the case law on the point, unless a different meaning can be given in context in which occurs, the meaning given in the General Clauses Act has to be applied. I shall first refer to the definition in the Indian Penal Code wherein it is defined u/s 52 as under :--

"Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention."

In the General Clauses Act, Section 3(22) defines the term as under :--

"Thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not"

In the Limitation Act the definition u/s 2(h) is as under :

"Nothing shall be deemed to be done in good faith which is not done with due care and attention."

19. It is not necessary to find out the definition of "good faith" in other enactment, for, in absence of any definition in the relevant statute the definition in the (Central) General Clauses Act applies to all Central enactments passed after 1897. The definition in the Indian Penal Code or the Limitation Act or other Acts would be relevant in context of the particular enactment -- having regard to the context, the aims and objects etc. I may however briefly observe that while the definition of the term in the Indian Penal Code or the Limitation Act is negative, the General Clauses Act gives a positive definition to the term under which anything done "honestly" will be deemed to be done in good faith. The definition is certainly wider than the one in Section 52 of the Indian Penal Code under which the act cannot be said to have been done in good faith unless it is done or believed to be done with "due care and attention". In other words, a negligent act cannot be an act in good faith under the Indian Penal Code though

it may be so under General Clauses Act if it is done honestly.

20. What is however important is that whether under the General Clauses Act or the Indian Penal Code the act is done in good faith or not is a matter of evidence. It is question of fact to be decided on the basis of materials on record of the particular case. Thus whether the particular act would come within the purview of Section 38 of the General Insurance Business Act or not would depend on evidence i.e. the facts and circumstances of the case. The plea of "good faith" therefore is not a ground on which alone the prosecution can be quashed at the threshold stage itself. It is in the nature of defence which an accused may take in a criminal case and therefore whether under the General Insurance Business Act read with the General Clauses Act or under the Indian Penal Code -- when the question arises as to whether the particular act was done in good faith within the meaning of Section 38 of the General Insurance Business Act, the party taking such defence is required to prove it by evidence. In this view of the matter, the submission that the petitioners cannot be prosecuted because of view of the provisions of Section 38 of the General Insurance Business Act cannot be accepted for quashing the cognizance order. The protective umbrella of Section 38 is not so wide as to cover all acts and omissions.

21. However, as I have indicated above these applications are fit to be allowed on the first point. It may at the outset be stated that the normal rule is that, same set of facts may give rise to both civil and criminal liability and merely because a case of civil liability is made out is no ground to quash the complaint. As observed recently in the case of M/s. Medchl Chemicals and Pharma P. Ltd. Vs. M/s. Biological E. Ltd. and Others, both criminal law and civil law remedy can be pursued in diverse situations. They are not mutually exclusive but coextensive and they essentially differ in their content and consequence. The object of criminal law is to punish an offender who commits an offence. This does not, however, affect civil remedies at all for suing the wrongdoer. "It is anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred".

22. It is also well settled that the jurisdiction u/s 482, Criminal Procedure Code is to be sparingly exercised and in the case of quashing of the complaint or cognizance order the Court is required to consider the allegations in the complaint or statement of the witnesses as a whole on the face value and to see whether they make out any case against the accused or not. Where it does not disclose ingredients of any offence the complaint or the cognizance order may be quashed. Other situations in which cognizance may be quashed are where the allegation in the complaint are so patently absurd and inherently improbable that no prudent person can over reach the conclusion that there is sufficient ground for proceeding against the accused; where the discretion exercised by the Magistrate in issuing processes is capricious and arbitrary based either on no evidence or on materials which are wholly irrelevant or inadmissible; or where the complaint suffers from some fundamental and legal defects such as want of

sanction or absence of complaint by the competent authority, and the like. The point urged by the Counsel has to be considered on the touchstone of the above legal position.

23. I have already referred to the substance of complaint at the out set. The gist of the complaint is that on representation of the petitioner-company the complainant agreed to take policy to provide insurance cover of special perils like flood etc. However after boundary wall of the complainant's factory collapsed on account of heavy rain causing damage to the pipes, the accused persons refused to entertain the claim.

24. Whether on representation of the officials of the petitioner-company or on request of the complainant, it is an admitted position that the complainant took the policy for the first time in 1992. The policy was renewable every year and it was renewed every year up to the year 1999-2000. Mens rea is an integral part of every criminal offence. In the case of cheating or misappropriation or breach of trust or the like the intention to cheat or misappropriate the money or commit breach of trust must be shown to be in existence at the very beginning of the transaction. It is only then that the liability of the person concerned can be said to be criminal. This is what distinguishes criminal liability from civil liability.

Where a person enters into agreement intending to cheat him or so on, repudiation of the agreement may constitute criminal offence but where there is no such criminal intention at the beginning but on any ground or for a reason he thinks relevant and adequate, he repudiates the agreement it may give rise to civil liability simpliciter and his prosecution in such a case would be an abuse of the process of the Court. There is no allegation in the instant case that between 1992 and 1999 there was any intention on the part of the petitioner-company and its officials to cheat the complainant or misappropriate the money. A dishonest intention is the soul of these offences. In terms of definition of "dishonestly" u/s 24 of the Indian Penal Code, any act done with intention of causing wrongful gain to oneself or wrongful loss to another is said to do that thing dishonestly. In other words, intention to cause wrongful gain to oneself and wrongful loss to another must be there at all times. If there was no such intention at the beginning, even if it be assumed that the person subsequently intended to cause wrongful gain to oneself, it would not bring the act within the mischief of a criminal offence.

25. Soliciting of business is normal phenomenon in commercial world which is also true of insurance business. Every year hundreds and thousands of insurance policies are issued to customers as a routine. Dispute may arise between the parties in future but it does not mean that officials on whose representation/ inducement to customers to take policy intended to cause wrongful gain to the company or themselves and wrongful loss to the customers.

26. In the instant case the decision to repudiate the policy was based on the findings of the Surveyor and Investigators based on the meteorological reports.

u/s 64UM(2) of the Insurance Act no claim in respect of a loss shall (unless otherwise directed by the controller) be admitted for payment or settled by the insurer unless he has obtained a report on the loss that has occurred from a person who holds a licence issued under that Section to act as a surveyor or loss assessor. The decision to reject the claim was in consonance with the report of Surveyor and Loss Assessor/Investigator. It does not appear in the facts and circumstances that there was any criminal intention i.e. mens rea on the part of the concerned officials of the petitioner-company to cheat the complainant or misappropriate money so as to make them liable for prosecution. I am satisfied in the circumstances that the petitioners' prosecution would be an abuse of the process of the Court and it is a fit case in which this Court should exercise inherent powers u/s 482 of the Criminal Procedure Code to quash the same.

27. In the result, these applications are allowed. The impugned order of the Judicial Magistrate dated 24-5-2000 in Complaint Case No. 610/2000 is quashed.

B.N.P. Singh, J.

28. I agree.