
(2010) 06 CAL CK 0083
In the Calcutta High Court
Case No : C.R.R. No. 3493 of 2009

Pravesh V. Jethwani

APPELLANT

Vs

State of West Bengal and Another

RESPONDENT

Date of Decision : 21-06-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 192(1), 202, 468, 482

Evidence Act, 1872 — Section 41, 42, 43

Penal Code, 1860 (IPC) — Section 120B, 406, 418, 420

Citation : (2010) 06 CAL CK 0083

Hon'ble Judges : Prasenjit Mandal, J

Bench : Single Bench

Advocate : Sabyasachi Banerjee, Angshuman Chakraborty and Indrani Chakraborty, for the Appellant; Amit Bhattacharya, Sandipan Ganguly, Aniket Mitra, Ayan bhattacharya for O.P. No. 2 and Pushpal Satpati, for State, for the Respondent

Final Decision : Allowed

Judgement

Prasenjit Mandal, J.—This application u/s 482 of the Code of Criminal Procedure, 1973 has been filed by the accused/petitioner for quashing the proceedings in connection with the complaint case No. 25089 of 2009 u/s 418/420 read with 120B of the I.P.C. pending before the learned Metropolitan Magistrate, Eighth Court, Calcutta and all orders passed therein including the order dated 29.07.2009 whereby the learned Metropolitan Magistrate was pleased to issue process, inter alia, against the petitioner herein.

2. The opposite party No. 2 filed the complaint case No. 25089 of 2009 under Sections 418/420 of the I.P.C. read with Section 120B of the said Court stating, inter alia, that the complainant carries on business of manufacturing polyethylene pipes and fittings under the name of a concern, namely, M/s. Din Polymers. The accused No. 1 is the proprietor of M/s. Ravi Enterprise, a proprietorship concern having its offence at 11, Pollock Street, Third Floor, Calcutta - 700 001. The accused No. 2 is a partner of M/s. Versions Trading Co.,

a partnership firm, situated in Dubai. Both the accused Nos. 1 and 2 made all the transactions with the complainant representing the above named concern and firm respectively. In June, 2003 the accused No. 1 requested the complainant to place orders for supply of raw materials. Then the complainant agreed to enter into business transactions with the conditions that (1) the accused must supply a sample and or specification of the ordered raw materials and (2) the supplied material must satisfy international quality and standard as per specification and exported through shipment conforming all formalities and international standard. The complainant placed orders for supply of PVC rasin of German origin. The accused persons by their invoice dated 28.07.2003 agreed to supply the materials at a consideration value determined by the parties. Those materials were despatched by the accused persons and on arrival of the same, the complainant took necessary steps for taking the materials but at the time of unloading the materials the complainant noticed that the materials supplied by the accused contain other chemicals which were not matching with the specification. The packing did not bear any slip or batch number which could confirm that the production was made in Germany. There was shortage of bags also and several bags were found in torn condition etc. Immediately, the complainant issued several letters to the accused No. 1, the Indian representative of the accused No. 2 intimating him about the shortage as well as bogus materials. The accused persons avoided her on various false pleas for which the complainant was constrained to file a civil suit and she got an order of injunction against which the accused No. 2 preferred an appeal before the Hon"ble High court which is still pending. As the materials of inferior quality were supplied, the complainant suffered loss. She also came to know that the accused persons were, by pursuing the bank officials, trying to encash the entire amount covered under the letter of credit, in spite of specific orders of the civil court. Thus, they have committed an offence under the above Sections. So, the complainant lodged the said criminal case before the learned Metropolitan Magistrate, Calcutta. On receipt of the said petition of complaint, the learned Chief Metropolitan Magistrate took cognizance of the offence and transferred the same to the learned Metropolitan Magistrate, Eighth Court, u/s 192(1) of the Cr.P.C. for enquiry and disposal. Then upon examination of the witness on S.A., the learned Metropolitan Magistrate issued summons upon the accused persons under the above noted sections on 29.07.2009. Being aggrieved by the such proceedings, the accused No. 2 has preferred this application for quashing the said proceedings.

3. Mr. Bhattacharya, the learned Advocate for the applicant, submits that the complaint case cannot proceed because transaction between the complainant and the accused persons was out and out a commercial one and if any default was made, civil action lies. The complainant is to take appropriate steps before the Civil Court. In fact, the complainant filed a civil suit in the year 2003 before the City Civil Court, Calcutta and got an order of injunction. Then the accused persons preferred an appeal against the order of injunction and a Division Bench

of the Hon''ble Court vacated the order of injunction on 18.12.2008. Thereafter, the complainant filed an application for recalling the order dated 18.12.2008 passed by the Division Bench of this Court and that application was, too, dismissed on 23.04.2009 with costs. The complainant, suppressing all such facts, filed the petition of complaint in 2009, though the alleged occurrence took place in 2003. So the criminal proceeding is not maintainable at all.

4. Mr. Ganguly appearing on behalf of the opposite party No. 2, submits that when cognizance was taken and process was issued upon the accused persons, the Hon''ble High Court should not dismiss the criminal proceedings on the ground that a civil suit is pending. He also submits that whether there was no mala fide intention on the part of the accused persons, it can be decided only on taking of evidence and not beforehand. He also submits that mere pendency of a civil suit will not entitle the accused person to be released from the case by quashing the proceeding. Mere pendency of a civil suit is not at all ground for quashing the criminal proceeding and every case whether civil or criminal shall be disposed of in accordance with law. The judgment of a civil suit cannot be binding unless the same comes within the provisions of Sections 41 - 43 of the Evidence Act. So the application for quashing the proceedings should be dismissed.

5. Mr. Satpati, learned Advocate for the State, submits that the complainant filed the complaint case suppressing the materials fact, so the petition of complaint should be dismissed.

6. Mr. Bhattacharya has referred the following decisions:

1. In the case of Murari Lal Gupta v. Gopi Singh reported in (2006) 2 SCC Cri 430 to show that in case of sale of certain immovable property when a criminal case was lodged u/s 420/406 and payment was made in part but the balance was not made, complaint u/s 406 and 420 of the I.P.C. is an abuse of the process of the Court.

2. In the case of Uma Shankar Gopalika v. State of Bihar and Anr. reported in (2006) 2 SCC Cri 49 to show that when a pure civil dispute is raised, complaint case u/s 420 or Section 120B I.P.C. is not maintainable.

3. In the case of Anil Mahajan v. Bhor Industries Ltd. and Anr. (2006) 1 SCC Cri 746.

4. In the case of Suresh v. Mahadevappa Shivappa Danannava and Anr. reported in 2005 SCC Cri 783

7. These 2 decisions lay down that when the fact constitutes breach of contract giving rise the cause of action file a civil case, the same fact does not become the cause of action at all to lodge a criminal case of the offence of cheating. So issuance of process under the Code of Criminal Procedure is not proper. The learned Magistrate erred in issuing the process.

8. Mr. Ganguly has referred to the following decisions:

1. In the case of Ajay Mehra and Anr. v. Durgesh Babu and Ors. reported in 2003 SCC (Cri) 1530 which lay down the scope and ambit of enquiry at the stage of issuance of process.

2. In the case of Harnam Singh v. Everest Construction Co. and Anr. reported in 2004 SCC (Cri) 1828 and V.G. Selvaraj v. State of W.B. and Anr. Reported in 2007 (4) Crmes 447 (Cal) on the effect of delay stating that the effect of delay is a matter of consideration at the time of trial.

3. In the case of Rajesh Bajaj v. State of NCT and Ors. reported in 1999 SCC (Cri) 401; M. Krishnan v. Vijay Singh and Anr. Reported in 2002 SCC (Cri) 19 and Bengal Shrichi Housing Development Ltd. and Ors. v. Shekhar Housing Private Ltd. and Anr. reported in (2009) 2 CLT 120 (HC) to show that the petitioner complaint need not contain all the ingredients of offence and many cheatings are committed in commercial transaction.

4. In the case of Mahesh Choudhary Vs. State of Rajasthan and Another, to show that merely because a civil dispute is made out, criminal prosecution cannot be quashed.

5. Bholu Ram v. State of Punjab reported in 2008 (5) RAJ 285 (SC) pointing out that mens rea can only be decided at the time of trial and not at the initial stage of filing of the complaint case.

6. K.G. Preem shanker v. Inspector of Police and Anr. reported in 2003 SCC (Cri) 223 on effect of decision of Civil Court on criminal proceedings.

9. Relying on the aforesaid decisions, Mr. Ganguly submits that after taking cognizance and then on examining witnesses u/s 202 of the Cr.P.C., when the learned Magistrate was satisfied about issuance of process, at that stage other materials could not be considered by the High Court to quash a proceeding.

10. As regards delay in lodging the criminal case, I find that the alleged occurrence took place in 2003 and the petition of complaint had been lodged in 2009, that is, after about six years. The allegations having been made u/s 418 and 420 of the I.P.C. and the cognizance also having been taken for offence u/s 420 of the I.P.C. too which is punishable with imprisonment for seven years, relying on 2004 SCC (Cri) 1830 and 2007 (4) Cri 447 (Cal) it can well be decided that the petition of complaint is not barred by limitation as per Section 468 of the Code of Criminal Procedure.

11. But, in the instant case, I find that the complainant lodged the civil suit immediately after the occurrence and prayed for order of injunction stopping money though he executed an irrevocable letter of credit in favour of the petitioner herein. The order of injunction restraining payment had been passed accordingly in the civil suit. Thereafter the defendant No. 2 filed an appeal before a Division Bench of this High Court which allowed the appeal setting aside the

order of injunction passed by the learned Judge, City Civil Court, Calcutta on 18.12.2008. Thereafter the complainant filed an application for recall of that order and his application for recall was dismissed with costs by a Division Bench of the High Court on 23.04.2009. After dismissal of his prayer for recall, on 21.05.2009 he filed the petition of complaint before the learned Chief Metropolitan Magistrate. Thus, I find that when the prayer for stoppage of payment of the complainant was rejected by the Civil Court, he immediately rushed to the criminal court for offences under Sections 418/420 of the I.P.C. The petition of complaint is completely silent over the result of his appeal or his petition for recall. She simply stated that the appeal preferred by her is pending though it was within her knowledge that her appeal was dismissed. Thereafter he petition for recall was also dismissed. This is a clear case of suppression of the material facts before the Criminal Court. Had such facts been mentioned in the petition of complaint, the learned Magistrate would not have entertained the petition of complaint because her prayer for injunction for / stoppage of payment on the basis of irrevocable letter of credit in favour of the defendant No. 2 had already been turned down.

12. Thus, I find that the complainant was proceeding against the accused persons to get her appropriate reliefs in the civil suit and she did not take any step for criminal case for six years. She did so when she was not, prima facie, successful in getting any immediate relief against the accused persons. The decision of 1999 SCC (Cri) 401 lays down that at the initial stage the High Court should not stall the investigation by declaring that it is a commercial transaction simplicitor when no semblance of criminal offence is involved. But this decision also lays down that the revisional or inherent powers for quashing the proceedings at the initial stage can be exercised only where a criminal proceeding is manifestly actuated mala fide and has been initiated maliciously with ulterior motive for wrecking vengeance on the accused with a view to spiting him due to private and personal grudge. This view is also observed in the decision of 2002 SCC (Cri) 19. If I consider from the stand point when the petition of complaint was filed after dismissal of his petition of injunction by the appellate Court and also the prayer for recall of the order, the ulterior motive for wrecking vengeance would appear.

13. Mr. Ganguly also submits that whatever the defence may be on behalf of the accused person such documents may be considered only at the stage of consideration of charge or at the time of trial and not at the initial stage of issuing process. So, the documents filed by the accused person should not be considered at this stage. This is not an absolute position when the complainant had a duty to say the exact position of the civil suit before the Court and when suppressed the order which were passed against him before the filing of her petition of complaint. So, I am of the view that the Court is not debarred to see the documents when the prayer for quashing the proceeding is made. Therefore, I am of the view that at the stage of exercising the jurisdiction u/s 482 of the Cr.P.C., when the complainant suppressed the material facts, the High Court is

empowered to look after the said documents.

14. Again, it is also one of the paramount duties of the High Court to see that a person who is apparently innocent and the dispute is purely civil in nature and appropriate steps have been taken long before, such innocent person is not subjected to persecution and humiliation on the basis of a false and wholly untenable complaint. I have relied the decision reported in R. Kalyani Vs. Janak C. Mehta and Others, in coming to such decision.

15. No doubt, mesne rea can only be decided at the time of trial and not at the stage of issuing process.

16. Though the same fact may give rise both the civil and criminal proceedings, when the complainant chose to proceed with a civil suit for appropriate reliefs six years back and the suit is still pending for final reliefs, the prayer for punishment of the accused person for the same set of cause of action after lapse of six years, I am of the view that such belated prayer is not entertainable in the circumstances.

17. In consideration of what I have observed above I am of the view that the situation demands that the prayer for quashing / setting aside the order impugned should be granted; otherwise it will be an abuse of process of the law. Accordingly, the revisional application is allowed.

18. The order dated 29.07.2009 passed by the learned Metropolitan Magistrate, Eighth Court, Calcutta in complaint case No. 25089 of 2009 is set aside. The said complaint case No. 25089 of 2009 pending before the learned Metropolitan Magistrate, Eighth Court, Calcutta stands quashed.

19. Considering the circumstances, there will be no order as to costs.

20. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.