(1987) 08 GUJ CK 0006

In the Gujarat High Court

Rajnikant Ambalal Patel APPELLANT

Vs

State of Gujarat and Another RESPONDENT

Date of Decision : 19-08-1987

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 561A
Criminal Procedure Code, 1973 (CrPC) — Section 482, 482
Penal Code, 1860 (IPC) — Section 406, 406, 420, 420

Citation : (1987) 2 GLR 1152

Hon'ble Judges : P.M. Chauhan, J

Bench : Single Bench

Judgement

P.M. Chauhan, J.—In all the three Miscellaneous Criminal Applications identical questions of law and fact are involved, and the parties are same and, therefore, they are disposed of by common judgment.

2. Miscellaneous Criminal Application No. 158 of 1985 arises out of the order in Criminal Case No. 1612 of 1984, Miscellaneous Criminal Application No. 159 of 1985 arises out of the order in Criminal Case No. 1613 of 1984, and Miscellaneous Criminal Application No. 160 of 1985 arises out of the order in Criminal Case No. 1614 of 1984, by the learned Metropolitan Magistrate, 5th Court, Ahmedabad, issuing process for the offences punishable under Sections 406 and 420, Indian Penal Code, against the petitioner on the complaint filed by opponent No. 2 Hitendrabhai Vadibhai Kapasi, the Accountant of Parekh Decorators.

3. Opponent No. 2, the Accountant of Parekh Decorators, filed the complaint contending that he is serving as Accountant in Parekh Decorators and has no personal knowledge about the allegations in the complaint, but has information about the accounts, etc. of Parekh Decorators as he is serving there as Accountant and, therefore, at the instance and under the instructions of the partner and Manager of Parekh Decorators he has filed the complaint. As contended in the complaint, the petitioner-accused is the proprietor of Happy

Home Decorators, and Parekh Decorators had allowed him to use some part of the premises of Parekh Decorators as a licensee, and in that the petitioner-accused had to display and sell his goods and had to pay licence fees and commission on the actual sale of goods as per the terms and conditions of the agreement. The agreement was entered into in the year 1972 and subsequently final agreement dated 15-4-1980 was entered into between the parties and the same was to remain in force till terminated. As per the agreement the petitioner-accused had to pay at the rate of 4Vi per cent. On the total amount of yearly sale proceeds subject to the minimum of Rs. 1,470/- per month to Parekh Decorators. That agreed amount for commission and service charges was to be increased by 5 per cent every year. It was also agreed that Parekh Decorators had to include in their advertisement for the furniture, etc. of the petitioner-accused, and for that the petitioner-accused had to pay at the rate of Wi per cent, of actual sale. According to opponent No. 2, it was also agreed that the petitioner had to credit the sale amount with Parekh Decorators who had to deduct the amount of commission and service charges at the interval of 15 days, and at the end of the month, surplus amount was to be paid to the petitioner. It is also stated that Parekh Decorators decided to terminate the agreement, and served notice to the petitioner-accused calling upon him to hand-over the possession on or before 1-12-1982. But instead of handing over possession, the petitioner filed Civil Suit No. 4918 of 1982 in the City Civil Court, Ahmedabad and asserted the tenancy rights in the premises and the Court granted ad-interim injunction, which was subsequently vacated. It is also contended in the complaint that during the hearing of the interim injunction application, the petitioner produced copies of the Income Tax returns for the years 1980-81, 1981-82 and 1982-83, and it transpired from the returns that the petitioner had to pay the total amount of Rs. 29,700/- for the commission, etc. in the year 1980-81, and instead of that, an amount of Rs. 17,640/- was paid, and misappropriated an amount of Rs. 12,060/-.

4. In Misc. Criminal Application No. 159 of 1985, copy of the complaint of Criminal Case No. 1613 of 1984 is produced, and in that, same fact about the commission amount of Rs. 29,700/- required to be paid, the amount of Rs. 17,640/- paid, and the amount of Rs. 12,060/-due to be paid, for the year 1930-81 is stated, but it is not stated as to what amount was required to be paid during the year 1981-82. In original complaint also same facts are stated. In complaint of Criminal Case No. 1613 of 1984, it is not stated as to what amount for the year 1981-82 is paid less or criminal breach of trust of particular amount is committed. However, from copy of accounts produced in the record of the complaint it transpires that sale proceeds were Rs. 6,59,138-75 paise in year ending on 31-3-1982, and the commission on sale was Rs. 18,522/- and for advertising Rs. 2,355-26 paise. In the complaint of Criminal Case No. 1614 of 1984 it was stated that for the year 1982-83 the amount required to be paid was Rs. 73,222/-, and the amount paid was Rs. 11,344/-, and the amount of Rs. 61,878/- was misappropriated. It is also stated that the petitioner-accused could

pay such less amount, as instead of crediting the entire sale proceeds with Parekh Decorators, and Parekh Decorators after deducting the commission and other amount required to be paid to Parekh Decorators a0s per the agreement and returning the surplus amount, the petitioner-accused kept with him the sale proceeds and showed false figures for the sale of the goods and paid the commission, etc. as per the agreement on the figures of the sale shown by the petitioner, and the Parekh Decorators came to know about it only when Income Tax returns were produced in the Civil Suit.

5. The learned Magistrate on the basis of the said allegations issued process for the offences punishable under Sections 406 and 420, Indian Penal Code, which orders are challenged in these Miscellaneous Criminal Applications u/s 482, Code of Criminal Procedure, 1973 (hereinafter referred to as ''the Code'').

6. Mr. P.M. Thakkar, learned Advocate for opponent No. 2 (original complainant) submitted that this Court should not exercise its inherent power u/s 482 of the Code as such power can be exercised only if it is necessary to prevent abuse of the process of the Court or otherwise to secure the ends of justice, and merely because the learned Magistrate issued the process for the offence punishable under Sections 406 and 420, Indian Penal Code, it cannot be said that the process of the Court is abused or, for the purpose of securing the ends of justice, this Court should set aside the order of the learned Magistrate. That submission of Mr. Thakkar cannot be accepted as the law on the point is now well-settled by various judgments of the Supreme Court which I would just refer, and also because the provisions of Section 482 of the Code do not restrict the exercise of the inherent power only in such cases. Section 482 of the Code specifically provides that any of the other provisions of the Code shall not be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under the Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. If on the facts alleged in the complaint, the case is not made out to issue process, and the process is issued by the Court, then for the purpose of preventing the abuse of the process of the Court it is necessary for the High Court to exercise the inherent power. Even it may be necessary to exercise the inherent power to secure the ends of justice.

7. It is well-settled that proceedings against the accused person at the initial stage can be quashed only if, on the face of the complaint or the papers accompanying the complaint, it appears that no offence is constituted. The test is that taking the allegations and the complaint as they are, without adding or subtracting anything, if no offence is made out then the High Court would be justified in quashing the proceedings in exercise of the power u/s 482 of the Code. The Supreme Court in Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, , on considering the various previous decisions of the Supreme Court expressed the above view. Similar view is also expressed in Dr. Sharda Prasad Sinha Vs. State of Bihar, .

8. In R.P. Kapur Vs. The State of Punjab, , considering the provisions of Section 561-A of the Code of Criminal Procedure, 1898, the Supreme Court enumerated certain categories of cases where the inherent jurisdiction to quash the proceedings can and should be exercised by the High Court, and one of the categories of cases is that where the allegations in the First Information Report or the complaint, even if taken at their face value and accepted in their entirety, do not constitute the offence alleged. In such cases no question of appreciating evidence arises, and can be decided only on the facts of the complaint or the First Information Report, and the documents accompanying the complaint or the First Information Report.

9. As the law on the point is well settled, it is required to consider as to whether the allegations made in the complaint prima facie constitute the offence of criminal breach of trust or cheating for which the process is issued under Sections 406 and 420, Indian Penal Code, by the learned Magistrate.

10. Reverting to the facts of the case, what is alleged is that the agreement was entered into between the petitioner-accused and Parekh Decorators that the percentage of the commission, etc. was required to be paid on the gross sale and the sale proceeds were to be deposited with Parekh Decorators and after deducting the agreed commission, etc., the remaining amount, was to be withdrawn by the petitioner-accused. But subsequently, the method of accounting appears to have changed and the sale proceeds were kept with the petitioner-accused and the commission amount, etc. was paid by him to Parekh Decorators and ultimately it was found that less amount was paid; only when in the civil suit the petitioner produced the Income Tax returns. Only allegation is that less amount was paid because of that particular accounting system, and the false amount of sale proceeds was shown to Parekh Decorators, it is alleged in the complaint that instead of paying amount required to be paid for commission, etc. less amount is paid and criminal breach of trust is committed by misappropriating the amount of difference. This is the only allegation in the complaint for the offence punishable u/s 406, Indian Penal Code. No allegation about cheating is made in the complaint. Complainant has no personal knowledge, but the complaint is based only on the basis of the sale amount, as stated in the Income Tax returns for three years.

11. From the allegations in the complaint it does not transpire that the petitioner has committed offence of criminal breach of trust or cheating. There is no allegation in the complaint that the petitioner-accused was entrusted with the property of Parekh Decorators or was put in the dominion over the property and the petitioner dishonestly misappropriated or converted to his own use that property or dishonestly used or disposed of that property in violation of the directions of the law prescribing the mode in which the trust was to be discharged. Mr. Thakkar, learned Advocate for opponent No. 2, tried in vain, to convince that the petitioner-accused was put in possession of, or dominion over the Immovable property, for the use of which commission was to be paid, and as

that commission amount on the actual sale was not paid, breach of trust was committed. This submission of Mr. Thakkar cannot be accepted, as it is not alleged in the complaint that any breach of trust with respect to any Immovable property was committed. On the contrary, it is the allegation that the petitioner was a licensee of the property and had to pay the commission amount for that. Admittedly, the goods sold were of ownership of the petitioner and he was entitled to the sale proceeds. Under the agreement at the most it was the liability of the petitioner to pay commission, service charges, etc. Till the petitioner parted with that amount it continued to be his property and can never be considered the property entrusted to him or dominion over that property given by Parekh Decorators. As the very basic requirement of entrustment of the property to the petitioner or giving dominion over the property to the petitioner is neither alleged nor can even prima facie, be inferred from the alleged facts, the offence of criminal breach of trust punishable u/s 406, Indian Penal Code, cannot be said to have been even prima facie made out. The learned Magistrate has erred in issuing the process for the offence u/s 406, Indian Penal Code, and that has resulted in gross abuse of the process of the Court.

12. For constituting an offence of cheating, it is necessary that the person should be deceived and fraudulently or dishonestly induced to deliver the property or to consent to retain the property or intentionally induced to do or omit to do anything which he would not do or omit to do if he were not so deceived, and such act or omission caused or likely to cause damage or harm to that person in body, mind, reputation or property. Deception of the person is the main ingredient of the offence of cheating, but that by itself is not sufficient to constitute the offence of cheating, and it is further required to establish that the person deceiving other person, fraudulently or dishonestly induced that person so deceived to deliver the property to any person or to consent that any person shall retain any property, or intentionally induce the person so deceived to do or omit to do anything which he would not do or omit to do if not deceived. In the complaint, no allegation is made that Parekh Decorators were deceived, or that the petitioner fraudulently induced Parekh Decorators to deliver any property or to consent to retain any property, or intentionally produced to do or omit to do anything. As such it transpires from the complaint that the complainant or Parekh did not contemplate any offence of cheating.

13. In the instant case, from the facts alleged, deception or fraudulent or dishonest inducement are prima facie not established or even can be inferred, and furthermore it cannot be said from the facts that any property was delivered by Parekh Decorators or consented to be retained because of such deception or fraud or dishonesty. Even intentionally inducing Parekh Decorators to do or omit to do anything which they would not have done or omitted to do, if they were not so deceived, and which act or omission caused or was likely to cause damage or harm to them in body, mind, reputation or property is not alleged or can be inferred from the facts alleged. What is alleged is only that the petitioner-accused paid less amount of commission by showing less sale proceeds of the

goods at Parekh Decorators and misappropriated the amount of difference. Admittedly, the goods sold were of the petitioner and not of Parekh Decorators. Prima facie, offence of cheating, therefore, is not established or cannot be inferred.

13.1. The learned Magistrate without considering the allegations in the complaint and applying the mind issued process for the offences punishable under Sections 406 and 420, Indian Penal Code. The same set of facts, allegations and intention at the initial stage, would never constitute the offence of criminal breach of trust and cheating both, but it may constitute either the offence of criminal breach of trust or of cheating.

14. For the above reasons, I consider this a fit case to exercise the inherent power of the High Court and quash the order issuing the process. In the result, all the Miscellaneous Criminal Applications are allowed, and the orders issuing process for the offences punishable under Sections 406 and 420, Indian Penal Code, by the learned Metropolitan Magistrate, 5th Court, Ahmedabad, in all the three cases are quashed and set aside. Rule issued in each of the applications is made absolute.

