(1977) 10 AHC CK 0010

In the Allahabad High Court

Case No : Criminal Miscellaneous Case No. 108 of 1974

Ram Niwas and Others APPELLANT

Vs

Zafar Abbas and Another RESPONDENT

Date of Decision : 10-10-1977

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 342, 482, 561A
Penal Code, 1860 (IPC) — Section 406, 420
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Criminal Procedure Code, 1973 (CrPC) — Section 342, 482, 561A
Penal Code, 1860 (IPC) — Section 406, 420

Citation : (1978) AWC 119

Hon'ble Judges : M. Murtaza Husain, J

Bench : Single Bench

Advocate : Saghir Ahmad, for the Appellant; B. Soloman, for the Respondent

Final Decision : Allowed

Judgement

M. Murtaza Husain, J.—This application u/s 561-A Code of Criminal Procedure (Old) has been filed for quashing the proceedings of Criminal Case No. 89 of 1973 (State v. Ram Niwas and Ors.) pending in the Court of Munsif-Magistrate, Sadar at Faizabad.

2. The Petitioner and Zafar Abbas, opposite party No. 1 who is the complainant of the case, which has given rise to this application, are residents of Mohalla Abdullahpur, in the town of Akbarpur in Faizabad district. Applicants Nos. 2 to 7 are the sons of Ram Niwas, Applicant No. 1.

3. At 8.30 a.m. on 5-5-1970 Zafar Abbas opposite party No. 1 lodged an FIR at police station Akbarpur alleging that offences under Sections 406 and 420 IPC were committed by the Petitioners. Akbarpur police investigated the case and ultimately submitted a charge-sheet against the Petitioners which has given rise to case No. 89 of 1973 which is at present pending in the court of Munsif-

Magistrate, Sadar at Faizabad. All the prosecution witnesses of fact have already been examined and statements of the accused have been recorded u/s 342 Code of Criminal Procedure (Old). The prosecution has now applied for sending a receipt, whose copy is Annexure 2, to Hand Writing Expert and the learned Magistrate has allowed that prayer.

4. The contention of the Petitioners in the present application is that on the allegations of the prosecution, and on the basis of entire oral and documentary evidence on record, no offence stands made out against the Petitioners and the pendency of the criminal case in question against them amounts to an abuse of the process of Court.

5. Section 561-A Code of Criminal Procedure (Old), which corresponds to Section 482 Code of Criminal Procedure (New), preserves the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under the Code of Criminal Procedure, or to prevent abuse of the process of any court, or otherwise to secure the ends of justice. ''Process'' is a general word, meaning in effect, anything done by the Court. An abuse of the process may be committed by a party litigating over again the same question which has already been decided against him, or by starting proceeding which is wanting in bonafides and is frivolous, vexatious or oppressive. Where, therefore, the High Court comes to the conclusion that the process started in the sub-ordinate court is being abused it has power under this section to quash the proceedings, or pass an order to set aside or stop such proceedings, or pass such other orders as will prevent the abuse. In the case of R.P. Kapur Vs. The State of Punjab, the Supreme Court has laid down some of the categories of cases where the inherent jurisdiction to quash proceedings can and should be exercised. They are:

(a) Where it manifestly appears that there is a legal bar against the institution or continuance of the criminal proceedings in respect of the offence alleged;

(b) Where the allegations in the FIR or the complaint, even if they are taken at their face value do not constitute the offence alleged; and

(c) Where the allegations made against the accused do constitute an offence alleged but there is either no legal evidence in support of the case, or the evidence adduced clearly or manifestly fails to prove the charge.

6. In the present case a perusal of FIR lodged by Zafar Abbas, Annexure 1, shows that all the Petitioners had entered into an agreement of partnership for the proposed business of touring talkies with the complainant and he had invested Rs. 10500 as his share of investment and he was promised to be paid Rs. 4500 as quarterly profit of the business. That business was actually started and some profit was paid to the complainant but the business was closed on 24-4-70. Ram Niwas, applicant No. 1, later on informed the complainant that a new permanent cinema hall shall be constructed out of the profits of the business and the complainant shall be paid the amount of profit as earlier agreed. When he met Ram Niwas after the closure of the business, he was told by him that

arrangements for the construction of a new cinema hall were going on. Later on when the cinema machine had been sent to Sardhana, district Meerut to the person, from whom the same was taken Ram Niwas asked the complainant to come to him for settlement of accounts. When the complainant went to his house Surendra Kumar accused picked up the complainant''s papers and ran inside the house. Applicant No. 1, Ram Niwas, then told him that he will not pay him anything. With these allegations it was alleged that offences Under Sections 420 and 406 IPC were committed by Petitioners.

7. Receipt dated 2-3-69, Annexure 2, which is prosecution''s own document, shows that applicant No. 3 Kailash Chand was carrying on business of touring cinema. He was in need of Rs. 10500. He took that amount as a loan from Zafar Abbas on the promise of paying him Rs. 1500 per month as profits. It was further'' mentioned therein that if the business failed the entire amount of Rs. 10500, shall be returned to Zafar Abbas. This receipt belies the complainant''s allegations contained in the FIR.

8. The uncontroverted allegations of the Petitioners in their affidavit are that Rs. 10500 were taken as loan from Zafar Abbas in order to run a business of touring talkies known as Shiva Touring Talkies for which licence was obtained from the District Magistrate by Kailash Chand, applicant No. 3. He started business and paid profits to Zafar Abbas as agreed. The period of licence expired on 14-10-1960 and, therefore the business closed. On 9-10-1969 Zafar Abbas entered into an agreement, Annexure 3, directly with Suresh Chand from whom cinema machine was earlier taken by Kailash Chand and he started his own cinema business in the name of Jai Hind Touring Talkies for which Zafar Abbas obtained licence on 25-10-1969. He had filed an affidavit, Annexure 4, before the District Magistrate, Faizabad, wherein he clearly mentioned that he had no concern with Shiva Touring Talkies. These contentions of the Petitioners find support by Annexures 3 and 4 and also by receipt, Annexure 2. There is consequently no reason to disbelieve them. The version of the occurrence given by Zafar Abbas complainant in the FIR Annexure 1, is thus prima facie fabricated and those allegations stand completely belied by prosecutions own documents, namely, Annexures 2 to 4. Those documents show that the entire allegations of the prosecution constitute only a civil wrong of breach of contract against the Petitioners and not an offence of cheating or criminal misappropriation. The distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the. time of inducement which may be judged by his subsequent conduct but for which the subsequent conduct is not the sole criterion. Mere breach of contract can obviously not give rise to a criminal prosecution.

9. It has been pointed out by their Lordships of the Supreme Court in Mahadeo Prasad Vs. State of West Bengal, that if the accused had at the time he promised to pay cash against delivery, an intention to do so, the fact that he did not pay would not convert the transaction into one of cheating. In Mobarik Ali Ahmed Vs.

The State of Bombay, it was reiterated by their Lordships of the Supreme Court that the question whether the evidence discloses only a breach of civil liability or a criminal offence of cheating depends upon whether the complainant in parting with his money acted on the representation of the accused and in belief of the truth thereof and whether those representations, when made, were in fact false to the knowledge of the accused and whether he had a dishonest intention from the outset.

10. In the present case, it is admitted to the prosecution that profits were paid to the complainant by Kailash Chand after taking a sum of Rs. 10500 from him. If on account of non-renewal of licence, which Kailash Chand held for running a touring talkies and, on account of the machine and other accessories having been obtained by the complainant directly from Suresh Chand Kapoor and another licence having been obtained by him for running Jai Hind Talkies the business of Shiva Touring Talkies came to an end, the complainant can seek his appropriate remedy in the civil court. The FIR lodged by the complainant with a fabricated version of the occurrence and the consequent prosecution of the Petitioners for offence under Sections 420 and 406 IPC, the case relating to which offences stands belied by prosecution''s own documents, amounts to abuse of the process of Court.

11. In Hari Prasad Chamaria Vs. Bishun Kumar Surekha and Others, the complainant intended to start business, and gave in full faith a large amount to the Respondents for the same. The Respondents started business in their own name and refused to render accounts or return money. The complainant prosecuted the accused u/s 420 IPC, The accused prayed for quashing of proceedings u/s 561-A Code of Criminal Procedure which were quashed by the High Court. The complainant went up in appeal to the Supreme Court. Their Lordships observed that:

Even assuming prima facie all the allegations in the complaint to be true they merely amount to a breach of contract and could not give rise to criminal prosecution. There was nothing in the complaint to show that the Respondents had dishonest or fraudulent intention at the time the Appellant parted with the money nor did the complaint indicate that the Respondents had induced the Appellant to pay them the amount parted with. The Appellant also did not allege the Respondents making any representation to him for parting with the money. Mere fact, that they did not abide by their commitment as to starting of the business in complainant''s name as agreed to would not fasten them with criminal liability.

12. The above observations apply with full force to the facts of the present case. In my opinion, the prosecution of the applicants Under Sections 420 and 406 IPC in Case No. 89 of 1973 is nothing but abuse of the process of Court and ends of justice demand that proceedings of that case should be quashed. I, therefore, allow this application and quash the proceedings of Case No. 89 of 1973 (State v. Ram Niwas and Ors.) pending in the Court of Munsif Magistrate Sadar, Faizabad.