
(2002) 09 BOM CK 0130

In the Bombay High Court

Case No : Criminal Writ Petition No. 1068 of 2002

Securities and Exchange Board of India

APPELLANT

Vs

Hindustan Lever Ltd. and Another

RESPONDENT

Date of Decision : 03-09-2002

Acts Referred:

Constitution of India, 1950 — Article 227

Criminal Procedure Code, 1973 (CrPC) — Section 202, 204, 482, 483

Citation : (2002) 09 BOM CK 0130

Hon'ble Judges : S.S. Parkar, J

Bench : Single Bench

Advocate : Subhash Jha With Mr. Shailesh, Mr. K.J. Reddy and Mrs. Priyanka Thakoor instructed by V.N. Shingnapurkar, for the Appellant; Amit Desai With Mr. Prakash Naik, Advocates, for the Respondent No. 1 and Mr. D.R. More, APP, for the Respondent No. 2, for the Respondent

Final Decision : Allowed

Judgement

S.S. Parkar, J.—Rule. By consent rule is made returnable forthwith. Respondents waive service. Heard both sides.

2. This petition is an eye opener and illustrates how a party, who can afford the luxury of litigation, can obstruct or delay the course of justice even before it is set in motion. This is precisely what has happened in the complaint lodged by none other than SEBI which was constituted by an Act of 1992 for the purpose of providing protection to the interest of investors in securities and to promote the development and to regulate the security markets. This has happened in the teeth of, not one, not two, but quite a few judgments of the highest court of the land which are binding on all the courts in India. If this is allowed, it is not unlikely that the matter would travel right upto the Apex Court even before the process is issued in the complaint which gave rise to the present controversy.

3. The present petition arise in the following context:

On 23rd November, 1998 SEBI had filed complaint against the Respondent No. 1- Company and its Directors in the Metropolitan Magistrate's Court at Bombay for offence under Regulation 3 of SEBI (Insider Trading) Regulation 1992 read with Sections 24(1), 26 and 27 of the SEBI Act, 1992. Even before the Magistrate had applied his mind to the said complaint had issued process, in the matter, the respondents who were proposed accused filed an application before the Magistrate's court on 28th June 1999 raising their objections for issue of process against them. As the Magistrate wanted to entertain the said application and hear the proposed respondents-accused, the complainant asked for time for filing reply to the said application. From that time onwards the matter was adjourned on several occasions for one or the other reason, which is attributed by the counsel for the petitioners to the adjournment sought on behalf of the respondent-accused, but controverted by the counsel for the respondents before me.

4. The present petition has been filed for quashing the application dated 28th June 1999 filed on behalf of the respondents-accused and seeking directions for the trial to proceed in accordance with law expeditiously.

5. The petitioners had filed reply to that application before the trial court and questioned the locus of the respondents to be heard in the matter before the process was issued. On the basis of the said reply the Magistrate was urged to decide preliminary point whether the respondents were entitled to make any application or to be heard in the matter. However, that preliminary objection was not decided though there is lapse of more than three years from the date of the application was made and more than three and half years have passed since the complaint was filed in the Magistrate's court.

6. So far as the question of right of the accused to be heard before the process is issued against him is concerned, is settled by the catena of judgments of the Apex Court. Reference may be made in this connection, firstly, to the judgment of the Supreme Court in the case of Chandra Deo Singh Vs. Prokash Chandra Bose and Another, . In para 7 of the judgment, the Apex Court has observed as follows:

"(7) Taking the first ground, it seems to us clear from the entire scheme of Ch.XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on. But since the very question for consideration being whether he should be called upon to face an accusation, he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so. It would follow from this, therefore, that it would not be open to Magistrate to put any question to witnesses at the instance of the person named as accused but against whom process has not been issued, nor can he examine any witnesses at the instance of such a person. Of course, the Magistrate himself

is free to put such question to the witnesses produced before him by the complainant as he may think proper in the interest of justice. But beyond that, he cannot go....."

The Apex Court has further observed in the said paragraph as follows:

".....Whether the complaint is frivolous or not has, at that stage, necessarily to be determined on the basis of the material placed before him by the complainant. Whatever defence the accused may have can only be enquired into at the trial. An enquiry under S.202 can in no sense be characterised as a trial for the simple reason that in law there can be but one trial for a an offence. Permitting an accused person to intervene during the enquiry would frustrate its very object and that is why the legislature has made no specific provision permitting an accused person to take part in an enquiry....."

7. In the later decision of the apex court in the case of Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, , it is observed in para 4 of the Judgment as follows:

"4. It would thus be clear from the two decisions of this Court that the scope of the inquiry u/s 202 of the Code of Criminal Procedure is extremely limited-limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint - (i) on the materials placed by the complainant before the court; (ii) for the limited purpose of finding out whether a prima facie case of issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. In fact it is well settled that in proceedings u/s 202 the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not."

That was a case where the High Court had considered the documents produced by the accused in revision application at the stage when the matter was pending u/s 202 of the Code. Deprecating the same the Supreme Court observed in para 6 of the Judgment as follows:-

"6.In fact the Magistrate considering the question as to whether process should be issued against the accused or not cannot go into the material placed by the accused and therefore the High Court could not have given any such directions while disposing of the previous revision. The impugned order of the High Court proceeds on the basis that it was incumbent on the magistrate to have considered the documents and their effect on the truth or falsehood of the allegations made by the complainant. This was an entirely wrong approach. As we are clearly of the opinion that the magistrate was fully justified in completely excluding the documents from consideration, we refrain from making any observation regarding the effect of those documents. In fact the documents filed by the respondents were mere copies and they were, therefore, not admissible. At any rate, at the stage of Section 202 or Section 204 of the Code of Criminal Procedure as the accused had no locus standi the magistrate had absolutely no

jurisdiction to go into any materials or evidence which may be produced by the accused who could be present only to watch the proceedings and not to participate in them. Indeed if the documents or the evidence produced by the accused is allowed to be taken by the magistrate then an inquiry u/s 202 would have to be converted into a full-dress trial defeating the very object for which this section has been engrafted. The High Court in quashing the order of the Magistrate completely failed to consider the limited scope of an inquiry u/s 202..... We are constrained to observe that the High Court went out of its way to write a laboured judgment highlighting certain aspects of the case of the accused as appearing from the documents filed by them which they were not entitled to file and which were not entitled in law to be considered."

The above passage leaves absolutely no doubt that neither the accused can be heard nor the documents produced by him can be considered by the Magistrate at the stage of proceedings pending u/s 202 of the Code.

8. Similarly, in the case of Dr. S.S. Khanna Vs. Chief Secretary, Patna and Another, , it has been observed by the Supreme Court in paragraph 8 of the Judgment, relying on the earlier decisions of that Court, while interpreting Section 202 of Cr.P.C. as follows:

"..... The section does not require any adjudication of the person against whom the complaint is preferred. Such a person cannot even be legally called to participate in the proceedings u/s 202 of the Code....."

9. As against that reliance is placed on behalf of the respondents-accused on the judgments of the High Courts of Rajasthan and Madhya Pradesh. In the case of Mangharam Vs. State and Others, , the Single Judge of the Rajasthan High Court held that it would be open to the accused even at the stage of Section 202 of the Code to take preliminary objection to the maintainability of the prosecution on the ground of want of sanction because upon that decision will depend the question of the court's jurisdiction to take further proceedings in the matter. However, it has been made clear in the same judgment that while deciding the question about sanction the court does not enquire about truth or falsehood of the complaint but examines the question whether the condition necessary for its taking cognizance of the case is satisfied or not and such enquiry cannot be said to be in the nature of the trial because it does not involve any decision on the merits of the case. The above judgment of the Rajasthan High Court was relied on by the Single Judge of the Madhya Pradesh High Court in the case of Babulal v. Shri Aditya Birla and anr., 1986 (1) Crimes 249, where in similar question about written sanction of the Boards was raised in the prosecution lodged against the accused.

10. Relying on the aforesaid decisions, it is contended on behalf of the respondents-accused that in this case the respondents wanted to point out to the Magistrate that the complaint as such was not maintainable. It is sought to be contended that if the facts do no warrant the issue of process the point relates to

the jurisdiction of the court, which the respondents-accused were entitled to raise even before the issue of process. Reliance is place on Dr.Khanna's case decided by Supreme Court (supra), wherein, it has been observed that even if the accused participates in the proceedings u/s 202 of the Code, he does so not as an accused but as a member of the public and the accused was allowed to participate in the proceedings before the process was issued. In my considered opinion the Supreme Court in the said judgment has not held that the accused has a right to participate in the proceedings u/s 202 of the Code. On the contrary, it has clearly observed that an enquiry u/s 202 of the Code is not in the nature of a trial and the same can commence after the process is issued to the accused, holding further that such a person i.e. the proposed accused cannot even be legally called upon to participate in the proceedings u/s 202 of the Code, relying on the earlier decisions of the Supreme Court. That was the case where in the course of the trial, the Magistrate was of the opinion that the person against who the process was not issued and the complaint was dismissed could be made an accused on the basis of evidence which was led before the trial court in the trial against other accused and, therefore, the trial court had issued notice to the accused was heard before he was made an accused. It was in that context, the Apex Court observed that any such participation by the proposed accused was as a member of the public and not as an accused. There is nothing in the above judgment of the Apex Court which upheld the right of the accused to be heard before the process is issued against him as contended. On the contrary, the observations of the Apex Court in the said judgment, relying on it earlier judgments, negative the right of the accused to be heard before the issue of process against him.

11. The brief facts, narrated, above, go to show that considerable delay was caused in the process of justice, even before the issue of process, due to the intervention of the respondents-accused before the trial court in the complaint filed by the petitioners. As held by the Apex Court, u/s 202 of Cr.P.C., before issue of process, it is open for the Magistrate to either enquire into the case himself or direct investigation to be made by the police officer or by such other person as he thinks fit for the purpose of deciding whether there is sufficient ground for proceeding and when he is satisfied then only process can be issued. There is no third course open to the Magistrate under the law. So far as the point of jurisdiction is concerned, the proviso to Section 202 of Cr.P.C. itself provides the procedure to be adopted by the Magistrate. Section 202, as interpreted by the Apex Court, does not give any scope to the accused participate in the proceedings before the issue of process.

12. A perusal of the application dated 28th June 1999 made on behalf of the Respondents-accused would show that the respondents were trying to raise their defence at the stage when they were not even made an accused. After perusal of the complaint and the evidence that may be led by or on behalf of the complainant, the Magistrate may not even choose to issue process against the respondents. If the accused are allowed to intervene even at the stage of issue

of process, there is every hazard of many accused trying to intervene at that stage and prolong and delay the proceedings even before they are made an accused. Once the accused are allowed to intervene at this stage, the matter may be taken right upto the highest court on the ground that the Magistrate has wrongly exercised jurisdiction by issuing process. After the process is issued the accused are entitled to either apply to the court, which issued process, for recall of that process or apply for quashing the process before the Sessions Court in revision or before the High Court in its writ or supervisory jurisdiction. The points raised in the application dated 28th June 1999 by the respondents-accused are a matter of defence but otherwise also the Magistrate cannot consider them in view of the above clear dicta of the Supreme Court.

13. In the case of Krishnan and another Vs. Krishnaveni and another, , the Supreme Court has held that when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure or if sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior Criminal Court in its juridical process. In my view this is the case of the kind where this court should exercise inherent powers and supervisory jurisdiction to prevent the miscarriage of justice caused due to unreasonable delay which has occurred at the stage of issue of process because of the unwarranted and illegal intervention by the respondent-accused.

14. In my view, this is a fit case to exercise the inherent powers of this court u/s 482 and Supervisory jurisdiction u/s 483 of Cr.P.C. so also under Article 227 of the Constitution of India and direct the trial court to proceed in accordance with the provisions of Section 202 of Cr.P.C. without allowing the respondents-accused to be heard in the matter.

15. The petition is accordingly allowed and the rule is made absolute. In view of the delay which has already taken place, the trial court is directed to proceed in the matter with utmost expedition and without further delay. The oral application for stay of this order for a period of eight weeks is rejected.

On the application of the learned counsel for the respondents-accused issue of certified copy is expedited.

On the application of the Petitioners' counsel, the petitioners are allowed to take a copy of this order duly authenticated by the Stenographer of this Court.