

(1986) 07 BOM CK 0068

In the Bombay High Court

Case No : Criminal Writ Petition No. 335 of 1986

Sharadchandra Shripad Marathe

APPELLANT

Vs

Gurushant Gangadhar Kamble and others

RESPONDENT

Date of Decision : 24-07-1986

Acts Referred:

Central Excises and Salt Act, 1944 — Section 9AA
Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (1987) 1 BomCR 120 : (1987) 11 ECC 166 : (1986) 25 ELT 915 :
(1986) MhLj 738

Hon'ble Judges : S.W. Puranik, J

Bench : Single Bench

Judgement

1. This is a petition by original accused No. 17 Sharadchandra Marathe in Criminal Case No. 9 of 1986 from the file of the Chief Judicial Magistrate, First Class, Pune seeking quashing of process issued by the learned Magistrate against the petitioner in the complaint filed against him alongwith other accused for the offences regarding evasion of excise duty and conspiracy. The original complaint filed before the trial Court by the first respondent is at Exhibit A to the petition.

2. On perusal of the complaint allegations and without recording any verification statement of the complainant, who is a public servant, the learned Magistrate was satisfied that there was a prima facie case against the petitioner accused No. 17 and has issued process according to law. The petitioner, however, challenges issuance of process on several grounds.

3. Before I appreciate the submissions of the Counsel on either side the brief facts as alleged in the complaint may be stated as follows :

The first respondent complainant is the Assistant Collector of Central Excise, Pune. Original accused No. 1 is M/s. Kirloskar Brothers Limited, while accused No. 2 is the Chairman and accused Nos. 3 to 18 are the Directors of the said Company. According to the allegations in the complaint accused Nos. 3 to 18,

who include the petitioner, accused No. 17 are Directors of accused No. 1 and were in charge and responsible to accused No. 1 for the conduct of business at the time of the commission of the offence. Accused Nos. 19 to 30 are senior executive officers of the said Company and were in charge of and responsible to accused No. 1 for the conduct of business at the material time. Accused No. 31 is M/s. Kirloskar Proprietary Ltd. Accused Nos. 32 to 36 were the Directors of the said Company while accused No. 37 was the Secretary of accused No. 31 Company.

4. The case of the prosecution is that accused No. 1 Company deals in manufacture of hermetically sealed compressors of various categories. At all material times the day to day work of the factory was managed by the board of directors (accused Nos. 2 to 18) under the supervision of efficient and highly placed business executives (accused No. 19 and 24 to 30).

5. The complaint further alleges in para 9 that on the basis of the information received and in the reasonable belief that Company accused No. 1 was evading payment of central excise duty, the factory premises, its registered office and branch offices as well as the residence of some of the directors were searched on and after 9.12.1985. Several incriminating documents indicating under-valuation of their products and miscalculation of assessable value were seized and recovered. The records of accused No. 1 Company for the period of five years prior to 9.12.1985 were examined and it became clear to the Excise Department that accused No. 1 Company has committed the offence of evasion of Central Excise Duty to the tune of Rs. 5.4 crores. According to the complaint, accused No. 1 Company and its directors accused Nos. 2 to 18 deliberately declared lower prices during the period 1.1.1981 to 31.10.1983.

6. The complaint further alleges that three price lists were also recovered during the search two from Secunderabad and one from Madras, the two price lists from Secunderabad were to come into effect from 15.9.1984 and 1.1.1985 respectively. From the price list so recovered from madras office was to come into effect from 1.11.1983 the complaint says that accused Nos. 1 to 30 consciously declared less value for assessment of excise department, that accused Nos. 1 to 30 had worked out the cost structure of various machines, that accused Nos. 1 to 30 had hit upon this plan to suppress the aforesaid charges, which ought to have been included in the assessable value.

7. In paragraph 16 of the complaint the modus operandi for evasion of duty has been stated which relates to the acts of the directors during 1.1.1981 to 14.1.1982, 15.1.1982 to 17.10.1982 and 22.10.1983 onwards. In paragraph 18 it is summarised in the complaint that by adopting to aforesaid modus operandi accused Nos. 1 to 30 till 1.11.1983 succeeded in getting the prices which they ought to have received for sale of compressors and at the same time successfully defrauded the Central Government in payment of proper excise duty.

8. The complaint further alleges that one other resolution was passed on

14.11.1983 by accused Nos. 1 to 30 and a conference was held on 10th April 1984 comprising a record of all what transpired at the conference.

9. In para 22 of the complaint another activity of accused Nos. 1 to 30 has been alleged for the purpose of evasion of excise duty. According to the complaint the trade mark of the Company was assigned to accused No. 31 Company and the right of user of the trade mark was allotted to accused No. 1 Company. Accused No. 1 Company in turn decided to reduce the prices of the compressors relating to warranty charges and allowed accused No. 31 Company to issue warranty against the goods manufactured by accused No. 1. It is further alleged that even though such sanction was accorded by the competent authority, the same was in bona fide belief that it was a regular transaction in course of business. However, the complainant found that the moneys recovered by accused No. 31 Company were piped back to the principal Company accused No. 1.

10. In short the case of the prosecution is that accused No. 1 Company evaded the excise duty fraudulently and dishonestly and accused Nos. 2 to 30 (Directors and Executive Officers of the said Company), who were responsible to day-to-day work of the said accused No. 1 Company conspired together and aided and abetted the commission of the offence of evasion of excise duty by accused No. 1. It is further the case of the prosecution that from October 1983 the sister Company accused No. 31 through its directors and secretary accused Nos. 32 to 37 also joined in the said conspiracy and together defrauded the department in payment of excise duty.

11. The case of the petitioner accused No. 17 is that he was invited to join Petitioner No. 1 Company as a director after his retirement from the Government of India service. The Board of Directors of accused No. 1 Company by its resolution dated 10.11.1985 appointed the Petitioner as Additional Director of the said Company and on 19.11.1985 he assumed the office as such. He, however, did not participate in any of the proceedings of the Board of Directors and the first meeting that he appointed was on 23.1.1986. Prior to that the complainant's department had conducted a raid on 9.12.1985. In other words it is the case of the petitioner that he had not participated in any of the proceedings of the Board of Directors during the fortnight before the raid when he was appointed the Director of Company accused No. 1. It is pertinent to note that the fact that the petitioner joined the Company from 19.11.1985 is not stated in the complaint. But an averment made by the petitioner in this regard has not been disputed in the counter-affidavit filed by the first respondent.

12. It is further submitted by Shri P.R. Vakil, Counsel on behalf of the petitioner that even though after examination of all the company documents seized during the period the complainant had thought it necessary to issue a show cause notice why adjudication should not be proceeded with under the Excise statute, yet the complainant, without recording the statement of the petitioner and without waiting for his reply to the show cause notice, hurried to the criminal court to file the complaint on 31.1.1986 itself. Without any inquiry as to when and how the

director participated or joined in the conspiracy petitioner accused No. 17 has been dragged into criminal prosecution for no fault of his. This has caused him harassment and mental agony of facing a trial about which he knows nothing.

13. Shri S.G. Samant Counsel for the complainant, 1st respondent urged that the present petition is invoking the inherent powers of this Court u/s 482 of the Code of Criminal Procedure, and the said power is to be used sparingly and only where there is abuse of process of law or to meet the ends of justice. In the instant case as alleged in the complaint the trial Court was satisfied that there was a prima facie case for proceeding against the accused petitioner and the said order of issue of process is not liable to be quashed by either adding or subtracting from the original allegations in the complaint. He also submitted that the petitioner can at any stage apply to the trial Court for his discharge from the proceeding on the facts by him now.

14. Shri Sidhwa, advocate for the Union of India and Shri Chopda, Counsel for the State of Maharashtra supported the first respondent.

15. Since I have narrated in detail the allegations levelled in the complaint, the same need not be repeated over again. Suffice it to say that according to the prosecution during the period 1981 to 1984 accused No. 1 Company alongwith its directors and Executive Officers, accused Nos. 2 to 30 conspired together and did several acts with the unlawful object of evasion of excise duty. The charge of conspiracy signifies an agreement between accused persons to achieve a common unlawful object and also signifies their concerted action and meeting of mind during the various steps which are taken to carry out unlawful object. All the facts stated together show that the alleged overt-acts of accused No. 1 Company and its directors and officers were done during the period 1981 to 1984. The present petitioner was not a director of the accused Company till 19.11.1985, nor had he participated in any of the proceedings of the board of directors up to the date the raid was carried out on 9.12.1985. There is no averment in the complaint as to when the petitioner joined the acts of the said conspiracy. Merely a bald statement has been repeated many times over in the complaint, that all the directors of accused No. 1 Company were in charge of and responsible to accused No. 1 for the conduct of business at the time of commission of offence. Such a bald statement or allegation would even prima facie be sufficient to implicate the person such as the petitioner, accused No. 17 who was not a director till 19.11.1985. It is pertinent to note that the fact that the petitioner joined the Board of Directors from 19.11.1985 and did not participate in any of the proceedings of the Board of Directors till after the raid was executed has not been denied in the counter-affidavit of the complainant. This is a petition not merely u/s 482 of the Code of Criminal Procedure but it also invokes power of this Court under article 227 of the Constitution. An averment on oath not refuted on oath can be deemed to have been accepted and the learned Counsel for the complainant first respondent was fair enough to accept this position. However, he contended that would be an addition to the original

complaint and such an addition or a subtraction is not permissible while exercising powers u/s 482, Cr.P.C.

16. It must be noted, however, that after the examination of documents, the statements of many of the directors and officers were recorded during the investigation but the statement of the petitioner, accused No. 17 was not at all recorded. This fact is also not disputed by the 1st respondent. Further the complainant's department had issued a show cause notice on 10.1.1986 but within a fortnight thereof and without awaiting the reply of the petitioner to show cause notice the complainant has made an unholy haste in presenting the complaint before the Magistrate. Now that the fact has emerged that the petitioner was in no way connected with the alleged acts of conspiracy and that fact is not disputed, the question is whether this Court would be justified in exercising powers u/s 482 Cr.P.C. read with article 227 of the Constitution.

17. The complainant's Counsel relied on a case reported in the matter of Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, , wherein Their Lordships have observed as follows :-

"It is therefore, manifestly clear that proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is committed. In other words, 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 will be justified in quashing the proceedings in exercise of its powers u/s 482 of the present Code."

In the said case Their Lordships were concerned with a prosecution under the Prevention of Food Adulteration Act wherein there is a deeming provision for vicarious liability of the directors of a company for the acts committed by the Company. A similar provision under the Excise Act has been recently introduced by amendment and by adding Section 9AA to that Act. However, the amendment has come into effect from 27.12.1985, whereas the alleged offences have taken place during the period 1981-1984. The said deeming provision cannot act retrospectively against the directors. The prosecution will have to allege positively the acts of conspiracy done continuously by the Directors by a due agreement to commit those positive acts. In the cited case (supra) the learned Judges confirmed the quashing of the proceedings on the ground that the allegation against the directors was they were responsible to the day-to-day work of the Company as such directors and not due to any positive act on their behalf.

18. In other case relied upon by the complainant also reported in Municipal Corporation of Delhi Vs. Purshotam Dass Jhunjunwala and Others, pertaining to the Food Adulteration Act, Municipal Corporation of Delhi v. Purushottamdas they refused to quash the proceedings against the Directors inasmuch as there was a positive allegation that the accused was the Director and was in charge of and

responsible to it for the conduct of its business at the time of commission of offence. They held that such an allegation could not be said to be vague and not implicating the Director. Shri Samant, therefore, contended that ex-facie the complaint alleges that the petitioner, accused No. 17 was a director and was responsible to the affairs of the Company at the time of the commission of the offence. Hence the fact that he joined the Company only on 19.11.1985 and it is not so stated in the complaint ought not to be taken into consideration at this stage.

19. Shri Vakil for the petitioner drew my attention to a leading case on the question of exercise of inherent powers of High Court in the matter of R.P. Kapur Vs. The State of Punjab, . In para 6 of the said judgment Gajendragadkar J. (as he then was) speaking of behalf of three Judge's Bench has observed as follows :

".... The said section saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the powers of any Court or otherwise to secure the ends of justice. Ordinarily criminal proceedings initiated against an accused person must be tried under the provisions of the code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of the inherent jurisdiction. However we may indicate some rule categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, the High Court would be justified in quashing the proceeding in that ground. Absence of the requisite sanction may for instance furnish cases under this category. Cases may also arise the allegations in the First Information Report or the complaint even if they are 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; it is a matter of merely looking at the complaint or the First Information Report to decide whether the offence is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal

evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under S. 561-A the High Court would not embark upon an inquiry as to whether the evidence in question is reliable or not. That is the function of the trial Magistrate and ordinarily it would not be open to any party to invoke the High Court's jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under S. 561-A in the matter of quashing criminal proceedings and that is the effect of the judicial decisions on the point. ..."

20. In the aforesaid leading case the Supreme Court has given some of the illustrations under which the High Court can exercise its inherent jurisdiction to quash the proceedings. But certainly those illustrations cannot be said to be exhaustive. There could be cases where patently false statements may be made or where true facts available from the record have been either inadvertently or intentionally suppressed in the complaint and they are brought to the notice of this Court. Such true facts may be of grave consequence to the very maintainability of the complaint or the allegations against a particular accused. I am sure that in such a situation also if the Court finds that suppression of material fact would result in abuse of process of Court and needless harassment to a particular accused, this Court can exercise its inherent power to meet the ends of justice at an appropriate time. It may be urged as has been urged on behalf of the complainant, that the accused can approach the trial Court and apply for discharge. In any case to an admitted position as is before me the petitioner who is not shown to have and could not have participated in any of the acts of conspiracy need not be advised to go back to the trial Court and take a chance which may end in discharge or may entail further protraction to High Court or Supreme Court. It would be unjust to ask the petitioner to go back to the trial Court for further steps, particularly when the fact of his joining the Company on 19.11.1985 is not at all disputed.

21. In another case relied upon by the petitioner in the matter of State of Karnataka Vs. L. Muniswamy and Others, Chandrachud, J. (as he then was) speaking for three judges" Bench has observed in para 7 as follows :

"The second limb of Mr. Mookerjee's argument is that in any event the High Court could not take upon itself the task of assessing or appreciating the weight of material on the record in order to find whether any charges could be legitimately framed against the respondents. So long as there is some material on the record to connect the accused with the crime, says the learned Counsel, the case must go on and the High Court has no jurisdiction to put a precipitate or premature end to the proceedings on the belief that the prosecution is not likely to succeed. This, in our opinion is too broad a proposition to accept."

It is further observed while dealing with "inherent powers"

"In the exercise of this wholesome power the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers both in civil and criminal matters is designed to achieve to a salutary public which is that a Court proceeding ought not to be permitted to degenerate into a weapon of harassment or prosecution. In a criminal case the veiled object behind a lame prosecution the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to the laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provisions which seeks to have the inherent powers of the High Court to do justice between the State and its subjects it would be impossible to appreciate the width and contours of that salient jurisdiction."

22. In paragraph 9 while dealing with R.P. Kapur Vs. The State of Punjab, the Supreme Court observed.

"The three instances cited in the judgment as to when the High Court would be justified in exercising its jurisdiction are only illustrative and can in the very nature of things not be regarded as exhaustive. Considerations justifying the exercise of inherent powers for securing the ends of justice naturally vary from case to case and a jurisdiction as wholesome as the one conferred by S. 482 ought not to be encased within the strait-jacket of a rigid formula."

23. To my mind the present case is such where I would be justified in invoking the inherent powers of this Court. I am satisfied from the undisputed averments that the petitioner joined the Company as a Director only on 19th November 1985, a few days before the raid was effected and had not participated in any of the earlier proceedings leading to the conspiracy of evasion of excise duty during the period 1981 to 1984. It would be an exercise in futility to allow the prosecution to continue against petitioner accused No. 17. It would also amount to an abuse process of Court and gross injustice to the petitioner. It would also not be worthwhile to call upon the petitioner to approach the trial Court for taking steps for his discharge in the face of this admitted position. In order to meet the ends of justice, therefore I allow this petition and quash the process issued against the petitioner, original accused No. 17.

24. The petition, therefore, succeeds. Rule absolute in terms of prayers (a) and (b) of the petition.