
(2005) 05 AHC CK 0063

In the Allahabad High Court

Case No : Criminal Misc. Application No. 9942 of 2002

Shri B.M. Vyas And Others

APPELLANT

Vs

State of U.P., Chief Judicial Magistrate, Additional Session
Judge and Shri Ashok Tandon

RESPONDENT

Date of Decision : 13-05-2005

Acts Referred:

Companies Act, 1956 — Section 630
Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 203, 204, 482
Penal Code, 1860 (IPC) — Section 34, 406, 415, 418, 420

Citation : (2005) 3 ACR 2498

Hon'ble Judges : Amar Saran, J

Bench : Single Bench

Advocate : Navin Sinha and Ravi Prakash Srivastava, for the Appellant; Atul Mehra and A.G.A., for the Respondent

Final Decision : Allowed

Judgement

Amar Saran, J.—Heard Shri Navin Sinha, learned Senior Advocate for the applicants assisted by Sri Ram Prakash Srivastava, Shri Atul Mehra. learned counsel for the complainant and learned Additional Government Advocate.

2. The applicants B.M. Vyas, Dharmendra Singh, Vipul Mittal and R.S. Khanna are the Managing Director, Assistant Manager (Sales), Manager (Sales) and Assistant General Manager respectively of M/s Gujarat Co-operative Milk Marketing Federation Limited, which deals in Amul products.

3. This application has been filed for quashing the complaint filed by opposite party No. 3 dated 14.12.2000 in criminal case No. 7537 of 2000 and consequent proceedings and the order dated 7.9.2002 passed by the Additional Sessions Judge, Court No 9, Bareilly in criminal revision No. 332 of 2001 against the order passed by the C.J.M. dated 11.7.2001 summoning the applicants for facing trial u/s 406 IPC and remanding the matter to the C.J.M and directing the applicants to file a protest petition against the summoning order.

4. The allegations in the complaint were that the complainant was a wholesale dealer in Bareilly, since 1979 under the name and style of Ashoka Sales Corporation who deals in the milk products produced by the applicants. The applicants used to supply milk products to the go-down of the complainant on the complainant's depositing an advance amount. A direction was given to the complainant and other wholesale dealers by a circular letter dated 23.5.1994 issued by applicant No. 3, Manager (Sales) that they were to furnish their inventory of the expired stocks of milk to the applicants by 15.6.1994. The complainant and other wholesale dealers were also directed to destroy the expired stocks of milk with them and to furnish a bill to the applicants about the value of the expired stocks for reimbursement. According to the complainant, the value of the stock was Rs. 75,739.68. According to the complainant, he did not add Rs. 5680.47, which was 7.5% of U.P. Sales Tax on the products and if that value was added, the complainant could be entitled to payment of Rs. 81,410.15. However, the applicants only reimbursed the complainant a sum of Rs. 2366.86 and did not make payment of the complainant's full claim of Rs. 79,053.29 which included the remaining claim of Rs. 73,372.87 and Rs. 5,680.47 by way of sales tax. In that regard, the complainant made a demand to the applicant No. 1 on 9.12.1995 and thereafter on 7.12.1999 for payment of the demanded amount, but the applicants refused to pay the amount of Rs. 79,053.29 by the letter dated 27.1.2000. In this manner the applicants are said to have misappropriated the amount entrusted to them and they wanted to illegally end the complainant's dealership and supplies to him. As the complainant felt he had no option, he filed the present complaint against the applicants on 14.12.2000 under Sections 420/406/34 IPC.

5. After hearing the complainant and perusing the record, the learned Chief Judicial Magistrate summoned the applicants holding that the complainant, who is a wholesale dealer of milk and butter products etc. supplied powder milk to the tune of Rs. 73,372.82 on which there was sales tax payable to amounting to Rs. 5680.47, but the payment in respect of that amount was not made and in this manner the applicants committed criminal breach of trust by misappropriating the amount and not making payment to the complainant and prima facie a case for summoning the applicants u/s 406 IPC was made out.

6. The criminal revision bearing No. 322 of 2001 filed by Dharmendra Singh, applicant No. 2, against the summoning order dated 11.7.2001, was dismissed by the Additional Sessions Judge, Court No. 9, Bareilly on 7.9.2002 without entering into the merits of the case simply on the ground that the applicant had an alternative remedy for filing a protest petition before the concerned Magistrate, who was to pass a fresh order after hearing both the parties in the matter and thereafter, if the applicant, so desired, he could file a criminal revision against the said order.

7. It has been submitted by the learned counsel for the applicants that in a mala fide manner for what was essentially a civil dispute between the parties about

the amount of money that the applicants would be required to reimburse to the complainant, the criminal complaint has been tiled very belatedly only to put pressure on the applicants and that in any view or the matter nothing has been entrusted to the applicants which they had misappropriated causing criminal breach of trust, which caused wrongful loss to the complainant. So far as the allegations u/s 420 IPC was concerned, there was no allegation even that any fraudulent representation was made in inducing the complainant to do anything or to deliver any property which he would not have done which he has not received and that is why even the learned Chief Judicial Magistrate did not even choose to summon the applicants u/s 420 IPC.

8. I find considerable force in the submissions made by the learned counsel for the applicants. It is apparent that the applicants were taking steps for benefiting the consumers and it was in this connection that they had issued the circular letter directing their wholesale dealers to destroy the expired stocks with them and to furnish details of the amount that the dealer would be entitled for reimbursement. It does appear on the allegations that a dispute has arisen on the amount of milk products that have been destroyed by the complainant and the amount of reimbursement to which he would be entitled. In this connection it has specifically been mentioned by the applicants in paragraphs 18 and 19 of the affidavit supporting this application as follows:

"18. That after cross checking the claims of oppos to party No. 3. it was found that a sum of Rs. 20,659.37 was payable and accordingly a demand draft for a sum of Rs. 20,695.37 dated 21.11.2000 was paid in favour of opposite party No. 3. The said draft was sent vide letter dated 24.11.2000. A photocopy of the letter dated 24.11.2000 along with a photocopy of the draft dated 21.11.2000 are enclosed collectively as Annexure No. 9.

19. That the opposite party No. 3 duly received the aforesaid draft and presumably he has encashed it. In view of the aforesaid, the claims of opposite party No. 3 up to 30.3.2000 has been settled in till."

9. The reply to these two paragraphs is mentioned in paragraphs 11 and 12 of the counter affidavit filed by the opposite party No. 3, which read as follows:

1. That the averments made in paragraph No. 18 of the affidavit are not admitted as stated and are denied. In reply, it is submitted that a sum of Rs. 20,695.35 is the amount refunded to the complainant pertains to his other miscellaneous claim incurred during the period 1995-2000. The said refund amount in an) manner does not relate to the expired mill powder destroyed in the year 1994-1995. The applicants are bent upon in misleading the Hon'ble Court in giving a false affidavit and they should be penalized for the same. If required the complaint will produce the original documents of Rs. 20,680/- refund. 2. That the averments made in paragraph No. 19 of the affidavit are not admitted as stated and are denied. In reply, it is submitted that the complainant has rightly received the aforesaid draft of the miscellaneous claims for the period

after 1995-2000."

10. Thus, the applicants have specifically stated that on cross-check, they found that the opposite party No. 3 was entitled to a sum of Rs. 20,69,537 and in respect of that demand draft of that amount dated 21.11.2000 has been paid in favour of opposite party No. 3 and which was even encashed by opposite party No. 3 and the claim of opposite party No. 3 has been settled in full.

11. The reply of the opposite party No. 3 to the said averments was ambiguous and he simply mentioned that the amount of Rs. 20,695.37 pertains to some other miscellaneous claims incurred during the period 1995-2000 and did not relate to the claim for the expired milk powder destroyed in 1994-1995. Significantly, he has not cared to clarify as to what were those miscellaneous claims for the period 1995-2000 for which the aforesaid payment by the complainant was admittedly received by him. Such averments by the applicants and counter averments by the complainant do go to suggest that there is some kind of civil dispute between the parties about the amount of milk powder destroyed and the price to which the complainant would be entitled to reimbursement, which cannot properly be adjudicated by a criminal court.

12. *Medchi Chemicals v. Biological E. Ltd.* 2000(40)ACC 680(SC), has been cited by the learned counsel for the complainant for the proposition that even in matters which disclose a civil liability, if the allegations also disclose offences under Sections 415/418/420 IPC, criminal proceedings should not be allowed to be quashed at the outset.

13. The present case is clearly distinguishable on facts. The allegations in the case of *Medchi Chemicals* were that the accused had committed willful default and failed to maintain supply of raw materials for manufacturing a certain drug, (Ethambutol Hydrochloride) after making a false representation to the complainant manufacturer that he would commit no breach in supplying the said raw materials resulting in a loss of over rupees one crore. It was alleged in that case that the accused had no intention to honour his commitment as the accused himself was planning to manufacture the drug and wanted to put the complainant out of competition.

14. In the present case, however, in a bona fide manner the applicants were seeking destruction of stale milk products in the interest of consumers and were even prepared to compensate the wholesalers for any loss incurred by them and it appeared that there was some controversy on the amount of expired milk and the amount that was payable thereon to the complainant, which was thus essentially a claim to be determined in appropriate proceedings by a civil court and recourse to criminal prosecution u/s 406/420 IPC was improper under the circumstances.

15. I also find that the milk in question had been destroyed in 1995 and filing of complaint in 2000, i.e. after five years, simply because the complainant was not receiving the reimbursement amount which he was demanding, does indicate

that recourse to the criminal court has been taken for exercising undue pressure on the applicants for settling a civil claim against them and this appears to be a mala fide use of the criminal process for extraneous ends. Also the explanation, that the complainant wrote a letter raising his claim on 9.12.1995, 7.12.1999 and again on 9.5.2000 and 26.6.2000, but when the applicants refused to pay the entire amount demanded by him by his letter dated 27.1.2000, then he filed the complaint dated 14.12.2000, is not a reasonable explanation for the delay and is suggestive of a mala fide recourse to criminal proceedings.

16. On the allegations, I also find that this is not a case of entrustment of any property by the complainant to the applicants and the learned Chief Judicial Magistrate appears to have misread the allegations in the complaint in his summoning order dated 11.7.2001, but it is only a case of dispute over reimbursement of the proper amount for which the complainant would be entitled and, therefore, no offence u/s 406 IPC is at all disclosed on the facts of this case.

17. So far as the allegations of cheating are concerned, it is significant that the learned Magistrate has not even chosen to summon the applicants u/s 420 IPC. There was no question of any dishonest or fraudulent representation by the applicants, which has resulted in the complaint, delivering any property or doing something which he would not have done had he not been so deceived. The applicants had initiated action with the laudable object of getting the expired milk products destroyed and they were not taking any action to deceive the complainant to ask him to alter his position to his disadvantage for making any wrongful gain and it is for this reason that the learned Magistrate did not even summon the applicants u/s 420 IPC.

18. Likewise, another decision cited by the learned counsel for the complainant is *Maratt Rubber Ltd. v. J.K. Marattukalam* 2000(85) FLR 847 (SC). In that case an Ex-Director of the company was facing prosecution u/s 630 of the Indian Companies Act for continuing to utilize the company property after he had ceased to be a Director. In that case the Hon'ble Supreme Court held that mere pendency of civil proceedings between the parties could not by itself afford a ground for quashing of the criminal proceedings and the High Court had erred in looking at several documents filed by the accused in the civil proceedings and relying on the observations made in the proceedings before the civil court for quashing the criminal proceedings after weighing the material on the basis of the said documents and, therefore, the High Court exceeded its jurisdiction u/s 482 of Code of Criminal Procedure.

19. In the present case no such exercise is involved as from a mere perusal of the complaint and the affidavit and counter affidavit filed in this application, this Court has reached the conclusion that prima facie the allegations in the complaint have been made in a mala fide and belated manner and do not disclose the ingredients of any offence u/s 406 or Section 420 IPC because there is no allegation of embezzlement of any property entrusted nor of cheating

because there was no allegation of dishonest or fraudulent representation, which has induced the complainant to deliver some property or to do something which he would not have done otherwise, unless he was so deceived and In this view of the matter this Court is of the opinion that the case of Maratt Rubber (supra) is clearly distinguishable, and can render no assistance to the complainant.

20. I also think that the learned Additional Sessions Judge. Court No. 9, Bareilly erred in law in directing the applicants to file a protest petition before the Magistrate concerned for deciding on merits whether to issue process against the applicants or not.

21. A three Judge Bench of the Supreme Court was constituted in the case of Adalat Prasad Vs. Rooplal Jindal and Others, to consider the correctness of the law laid down by the Supreme Court in the earlier case of K.M. Mathew Vs. State of Kerala and another, which had held that it was open to the court issuing summons to recall the same after being satisfied that the issuance of summon was not in accordance with law. The three judge Bench in Adalat Prasad (Supra) expressed disagreement with the law laid down in K.M. Mathew (Supra) and has held that at the preliminary stage when summons is issued on a complaint u/s 200 and 202 Cr.P.C, there is no provision for hearing the accused and whilst it is open to the court to dismiss the complaint u/s 203 Cr.P.C, at that stage the accused has no role to play. Therefore, the question of the accused approaching the court on receipt of summons and making an application for dismissal of the complaint u/s 203 Cr.P.C for a reconsideration of the material available on record is impermissible because by then the stage of Section 203 is already over and the Magistrate has proceeded further to the stage of Section 204 Cr.P.C.

22. In such a situation, it has further been held in the aforesaid case that the only remedy for the accused lay in invoking the inherent power of the High Court u/s 482 Cr.P.C after such an order is passed, because there can be no review of an order passed by the magistrate summoning the accused.

23. In view of the aforesaid the order of the learned Additional Sessions Judge, 9, Bareilly dated 7.9.2002 remanding the case to the Magistrate and directing the applicants to file a protest petition before the Magistrate who was to decide on merits whether to issue process against the applicants is illegal and it is set aside, In the light of the facts alluded to hereinabove this Court is of the opinion that permitting criminal proceedings to continue against the applicants in pursuance of the complaint dated 14.12.2000 would amount to an abuse of the process of court. Accordingly the criminal proceedings against the applicants are quashed. The application is allowed.