
(2012) 02 GAU CK 0015
In the Gauhati High Court
Case No : Criminal Petition No. 352 of 2008

Sri Rajib Baruah

APPELLANT

Vs

Majibuddin Ahmed and Another

RESPONDENT

Date of Decision : 22-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 190, 192, 2(d)
Penal Code, 1860 (IPC) — Section 206, 23, 406, 415, 420

Citation : (2012) 2 GLD 454

Hon'ble Judges : Iqbal Ahmed Ansari, J

Bench : Single Bench

Advocate : A. Sharma, for the Appellant; D. Buragohain and Mr. D. Das, Addl. PP, Assam, for the Respondent

Final Decision : Dismissed

Judgement

I.A. Ansari, J.—With the help of this application, made u/s 482, Cr PC, the petitioner, who is accused in Complaint Case No. A 64 C/2008, pending in the Court of learned Sub-Divisional Judicial Magistrate, Rangiya, has sought for setting aside and quashing the order, dated 27.11.2008, whereby the learned Magistrate has, upon taking the view that a prima facie case, u/s 420, IPC, has been made out, directed to issue summons against the accused for his appearance. The case of the complainant is, in brief, thus :

The complainant is a wholesale dealer of potatoes and carries on his business under the name and style of M/s. Assam Traders, Rangiya. The complainant was required to store potatoes in cold storage. For that purpose, the complainant approached the accused-petitioner for keeping his potato in the cold storage of the accused-petitioner, the cold storage being located at Changsari, Kamrup. Accordingly, an unregistered agreement was executed between the complainant, on the one hand, and the accused-petitioner, on the other, on 24.03.2008, and, as per the agreement, the accused-petitioner had promised to take utmost care to maintain the temperature at zero degree centigrade, in the chamber, with a

fluctuation of (+,-) 4 degree centigrade within the period from 25.03.2008 to 05.04.2008; but, on 19.08.2008 and 20.08.2008, when the complainant went to take delivery of his potatoes, stored in the cold storage of the complainant found the potatoes in perishable condition. The complainant, therefore, lodged a complaint, in writing, alleging that the petitioner had not kept the complainant's potatoes safely in terms of the agreement, which the parties had agreed into, and violated thereby the terms of the contract. The complainant has further alleged that the value of the potatoes was approximately Rs. 2,60,000/-, the accused had deliberately caused damage to the complainant's potatoes and shown contributory negligence towards storage of potato. The accused has, thus, according to the complainant, committed, inter alia, mischief, criminal breach of trust and cheating.

2. I have heard Mr. A. Sharma, Learned Counsel, for the accused-petitioner, and Ms. D. Buragohain, Learned Counsel, for the complainant-opposite party. I have also heard Mr. D. Das, learned Addl. Public Prosecutor, Assam.

3. While considering the present application, made u/s 482, Cr PC, it needs to be borne in mind that cognizance of offence is taken u/s 190 Cr PC and it is only upon taking of cognizance of offence that Section 200, Cr PC comes into play, which makes it mandatory for the Magistrate, who takes cognizance of an offence, on a complaint, to examine, on oath, the complainant and the complainant's witnesses present, if any, and also to reduce, into writing, the substance of such examination except where the complaint is made by a Court or by a public servant in discharge of his official duties or in purported exercise of his official duties or if the Magistrate makes over the case for inquiry or trial to another Magistrate u/s 192, Cr PC.

4. If one keeps the provisions of Section 200, Cr PC in mind, it becomes abundantly clear that the purpose of examination of the complainant and his witnesses present, if any, is obviously to determine not the veracity or otherwise of the allegations made in the complaint, but to determine as to how far the allegations, made in the complaint, are supported by the statements, which may be recorded u/s 200, Cr PC. If the Magistrate finds that the statements, so made, are sufficient to issue process against one or more accused, there is no impediment, on his part, in issuing process in exercise of his power u/s 204, Cr PC, which provides that if in the opinion of the Magistrate taking cognizance of offence, there is sufficient ground for proceeding and the case appears to be a summons case, he shall issue summons for attendance of the accused or, if the case appears to be a warrant case, he may issue a warrant or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or, if he has no jurisdiction himself, some other Magistrate having jurisdiction.

5. Where, however, on the basis of the allegations made in the complaint, the complainant's statement recorded u/s 200, Cr PC, and also the statements of the witnesses present, if any, the Magistrate is unable to make up his mind if

process shall be issued or not or if the Magistrate is of the view that further enquiry is required to be made before he decides to issue process, he has to postpone issuance of process in terms of the provisions of Section 202, Cr PC and he may either enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether there is sufficient ground for proceeding subject to the rider that where it appears to the Magistrate that the offence, complained of, is triable exclusively by the Court of Session, then, the Magistrate is required to direct the complainant to produce all his witnesses and, upon production of the complainant's witnesses, the Magistrate shall examine the witnesses on oath and, then, commit the case, in accordance with the provisions of Section 209 Cr PC, to the Court of Session; but, before doing so, the Magistrate shall, in exercise of his powers u/s 204, Cr PC, (i) issue process against the accused, (ii) obtain his presence, (iii) supply to him the copies of the statements recorded u/s 200 or 202, Cr PC or statements of all the witnesses, who may have been examined by the Magistrate, (iv) the statements and confessions, if any, recorded u/s 161 or Section 164 and (v) any documents produced before the Magistrate on which the prosecution proposes to rely.

6. I may pause here to point out that Section 203, Cr PC makes it clear that if, upon considering the complainant's statement and also the statements, if any, of the complainant's witnesses, the Magistrate is of the opinion that there is no sufficient ground for proceeding, he is obliged to dismiss the complaint. However, in order to enable him to dismiss the complaint, he must record, though in brief, his reasons for so doing. A complaint cannot, thus, be dismissed without recording the reasons as to why the Magistrate has taken the view that there is no sufficient ground for proceeding with the complaint.

7. What is, now, required to be taken note of is that a complaint has been defined in Section 2(d) of the Code of Criminal Procedure. In the light of its definition embodied in Section 2(d), a complaint means any allegation made, orally or in writing, to a Magistrate, with a view to his taking action under the Code of Criminal Procedure, that some person, whether known or unknown, has committed an offence, but does not include a police report. Nothing can be a complaint, within the meaning of Section 2(d), if there is no allegation made by the complainant that a person, known or unknown, has committed an offence. The question, now, is this: When allegation has been made in a complaint, but the allegation is not supported by the statement of the complainant, what is the implication?

8. While considering the question posed above, it is pertinent to note that the recording of the complainant's statement is not a mere formality. It has a purpose and the purpose, as already pointed out above, is to determine as to how far the complainant has, on oath, stood by the allegations, which has been made by him in his complaint. It is extremely important to take note of the fact that a complaint is not required to be made on oath. Hence, if an allegation,

which has been made in a complaint, is not supported by the complainant in his statement recorded on oath u/s 200, Cr PC, the allegation, so made in the complaint, but not supported by the complainant's own statement, made on oath, u/s 200, Cr PC, cannot become the basis for issuance of process in exercise of the Magistrate's power u/s 204, Cr PC. For example, a complainant may make allegation of theft having been committed by an accused; but in the statement, recorded u/s 200, Cr PC, the complainant may not support such an allegation. In such circumstances, the Magistrate cannot issue process against the accused, for, in such a case, the Magistrate has no reason to form the opinion that there is sufficient ground for proceeding. Similarly, if an allegation has been made, in a complaint, of commission of theft by X and, in his statement, made on oath, the complainant makes accusation of theft having been committed by Y, it becomes obvious that the complainant has not stood by his allegation made against X as a person, who had committed the offence of theft. In such circumstances, there is no question of issuing process by the Magistrate in exercise of his powers u/s 204, Cr PC, against X as an accused.

9. Thus, if I may reiterate, examination of a complainant, u/s 200, Cr PC, has a definite objective and the objective is to determine as to how far the complainant has supported his complaint, If the complainant does not support the complaint or any specific allegation made therein, it logically follows that he does not stand by, and support, the allegation made by him in the complaint. In such a case, it is not possible to issue process against the accused named in the complaint as regards the allegation, which remains unsupported by the complainant in his statement, made on oath, u/s 200, Cr PC.

10. In the case at hand, though the complainant has alleged, in the complaint, that the accused-petitioner had threatened him with dire consequences the fact of the matter remains that this allegation, made in the complaint, was not supported at all by the complainant, when he was examined on oath, u/s 200, Cr PC. This position is not in dispute. In such circumstances, the question of issuing of process u/s 206, IPC against the petitioner could not have arisen, because the complainant has not stood by his allegation made in the complaint that the accused had threatened him with dire consequences. Situated thus, it becomes clear, contrary to what is submitted on behalf of the complainant-opposite party, the learned Magistrate did not commit any illegality in not issuing process against the petitioner for his having allegedly committed offence u/s 406, IPC.

11. It is time to remember that taking of cognizance of an offence is wholly distinct and different from issuing of process against an accused in respect of an offence of which cognizance has been taken. A Magistrate cannot record a complainant's statement u/s 200, Cr PC without taking cognizance; but if he has taken cognizance and recorded statement of the complainant u/s 200, Cr PC, it is not mandatory for him to issue process against the accused unless the complainant supports the allegations, made in the complaint, by his statement, recorded, on oath, u/s 200, Cr PC, too.

12. One of the objects behind the provisions of Section 202, Cr PC is to enable the Magistrate to scrutinize carefully the allegations made in the complaint with a view to prevent a person named therein as an accused from being called upon to face an obviously frivolous complaint. Yet another object of Section 202, Cr PC is to find out what materials are there to support the allegations made in the complaint. It is the bounden duty of the Magistrate, while making an enquiry u/s 202, Cr PC to elicit all facts not merely with a view to protect the interest of an absent accused, but also with a view to bring to book the persons against whom the allegations are made. What the Magistrate has to satisfy himself is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. It is, in this light, that one has to read the provisions embodied in Sections 200, 202 and 204, Cr PC.

13. To put it a little differently, the enquiry as contemplated by Section 202, Cr PC, is for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process and commencement of the proceedings against the person concerned. The enquiry, u/s 202, Cr PC, is not to be equated with regular trial, which is held for adjudging the guilt or otherwise of the person complained against. (See S.W. Palanitkar and others Vs. State of Bihar and another,).

14. In case of a complaint, a Magistrate can take cognizance of the offence or offences made out by the complaint assuming that the allegations are true and, then, the Magistrate has to examine, on oath, the complainant, u/s 200, Cr PC, and also his witnesses present, if any, to ascertain whether a prima facie case has been made out against the accused to issue process so that the issue of process is prevented on a complaint, which is either false or vexatious or intended only to harass. The examination and recording of statements as provided by Section 200, Cr PC is aimed at finding out whether there is or there is not sufficient ground for proceeding. The words "sufficient ground", appearing in Section 203, have to be construed to mean the satisfaction that a prima facie case is made out against the accused and not sufficient ground for the purpose of conviction. [See Chandra Deo Singh Vs. Prokash Chandra Bose and Another,].

15. Coming to the offence of cheating, which, according to the complaint, the accused has committed, it needs to be noted that in order to commit the offence of cheating, the intention of the accused to deceive is of great relevance. No less, however, is the requirement that the intention must be in existence from the beginning or commencement of the transaction, though the question as to what was the intention of the accused, at the commencement of the transaction, can be ascertained and determined even by his subsequent conduct. An accused person's subsequent conduct is, therefore, relevant in order to determine his original intention and it naturally depends on the facts of a given case as to whether the allegations, made in the complaint, reflect as to what the intention of the accused was.

16. In the present case, it is the complainant's own statement, in the complaint,

that it is he, who had approached the accused-petitioner seeking to keep his potatoes in the cold storage of the accused-petitioner. The complainant also alleges that the accused undertook to maintain the cold storage at a given temperature. According to the complaint, having promised to maintain the temperature of the cold storage at a given temperature, the accused neglected to do so. Negligence means that the duty, which is cast by law on a person, is not discharged by him. Negligence cannot be equated with intention to deceive nor can negligence amount to dishonesty or fraud as contemplated by Section 415, IPC, which defines cheating.

17. In the light of the contents of the complaint, what, at best, can be said is that the complainant had the duty to maintain the temperature of the cold storage at the promised temperature, but he did not keep his promise. The complainant's failure to keep to his promise would not make his act, or make his omission to maintain the temperature of the cold storage as per the promise, which he had allegedly made, an act of cheating, because, in such a case, it would be nothing, but a mere breach of contract, which would, if the complainant can establish negligence on the part of the accused, entitle the complainant to be compensated for the loss, which he may have sustained. But by no stretch of imagination, the omission to take care, in the manner as had been promised by the accused-petitioner, would constitute an offence of cheating.

18. The complaint, read as a whole, does not, in the present case, thus, make out a case of commission of an offence u/s 420, IPC, because the complaint lacks the ingredients of the offence of cheating as defined by Section 415, IPC. At the same time, though the complaint does make the allegations constituting an offence u/s 506, IPC, but the complainant, having not supported, in his statement, recorded, on oath, u/s 200, Cr PC., his allegation made in the complaint about criminal intimidation, the learned Court below could neither have issued process against the accused-petitioner u/s 420, IPC nor could he have issued process against the accused-petitioner u/s 506, IPC.

19. As far as the complainant's allegation in respect of offence of mischief, defined u/s 425, IPC and punishable u/s 426, IPC, is concerned, the same can, by no means, be said to be attracted to the facts of the present case inasmuch as there is nothing, in the complaint, to show that the accused did not maintain the temperature as allegedly promised by him and caused damage to the potatoes with intention to cause, or knowing that he is likely to cause wrongful loss or damage to the complainant, because wrongful loss or damage would mean loss or damage by unlawful means. Furthermore, mere breach of promise does not amount to causing of loss or damage by any wrongful means.

20. The gist of the offence of mischief lies in causing wrongful loss or damage to the public or any person. Such loss or damage must be driven either by an intention to cause wrongful loss or damage or with the knowledge that such act is likely to cause wrongful loss or damage. Thus, if there be no intention or knowledge, the offence of mischief cannot be made out.

21. Coupled with the above, Section 23 of the IPC defines wrongful loss as follows :

"Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

22. Thus, in an offence of mischief the means employed to cause loss or damage must be unlawful. If, therefore, the means employed by the accused, which result in loss or damage to the aggrieved, are not unlawful by itself, the loss or damage cannot be termed as wrongful and, hence, no offence of mischief can be said to have been made out.

23. In the present case, the complainant has alleged that damage has been caused by the accused-petitioner due to his negligence. Thus, it is negligence, which is attributed by the complainant to the petitioner. The loss sustained by the complainant because of the alleged negligence of the accused cannot be equated to, or construed as, wrongful loss, because no wrongful means alleged to have been employed by the accused-petitioner to cause the loss.

24. In *Sashi Bhusan Chakraborty Vs. Birendra Kumar Sil*, , the convicted accused along with two others were alleged to have allowed their cattle to stray on to the complainant's field causing damage to the "Hali seedlings" to the extent of Rs. 100/-. The defence was that the cattle had strayed without the knowledge of the accused. The learned Magistrate found the accused guilty on the assumption that he did not take proper steps to guard his cattle. It was held that mere neglect or carelessness, on the part of the person in charge of the cattle to keep them from straying into the field of others, is not sufficient to bring home the offence of mischief against him if it is not proved that he willfully and actually caused the cattle to enter knowing that by so doing, he was likely to cause damage to the complainant.

25. In short, the allegations, made in the complaint, do not constitute an offence of mischief.

26. What crystallizes from the above discussion is that the learned Magistrate could not have issued and ought not to have issued, in the face of the materials on record, process against the accused-petitioner for his having allegedly committed offence u/s 420, IPC

27. Because of what have been discussed and pointed out above, this criminal petition succeeds. The impugned order, whereby the learned Magistrate has taken cognizance of offence, is hereby set aside and the complaint, in question, is, as a whole, hereby quashed. Send back the LCR.