

**(2008) 02 AHC CK 0291**  
**In the Allahabad High Court**  
**Case No : Criminal M. A. No. 840 of 2008**

Sushil Kumar Budhiya

APPELLANT

Vs

Sushil Kumar Singh and Others

RESPONDENT

**Date of Decision :** 12-02-2008

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 482  
Negotiable Instruments Act, 1881 (NI) — Section 138, 141  
Penal Code, 1860 (IPC) — Section 406, 415, 420, 71  
Reserve Bank of India Act, 1934 — Section 45QA, 58E

**Citation :** (2008) 2 ACR 2297

**Hon'ble Judges :** Amar Saran, J

**Bench :** Single Bench

**Advocate :** R.S. Chauhan and Kannan Kapoor, for the Appellant; Vinod Kumar Mishra and A.G.A., for the Respondent

## Judgement

Amar Saran, J.—Heard learned Counsel for the applicant and Shri Vinod Kumar Mishra, learned Additional Government Advocate representing the State.

2. An application u/s 156(3) of the Code of Criminal Procedure (hereinafter referred to as the Code) dated 24.8.2002, which was treated as a complaint after the statements of the witnesses under Sections 200 and 202 of the Code were recorded, the summoning order dated 23.9.2002 and the order dated 12.10.2006, passed by the Additional Chief Judicial Magistrate, Court No. 1, Varanasi in Case No. 9051 of 2004, Sushil Kumar v. Budhia Roadways and Ors. rejecting the objections and refusing to discharge the applicant u/s 406, I.P.C. have been challenged by means of this application.

3. The allegations in the application u/s 156(3), Cr. P.C. filed by the complainant Sushil Kumar Singh, Manager of Harish Chandra Krishna Vitran Kendra were that the complainant was running a petrol pump, which used to supply fuel to the firm of the applicant namely Budhia Roadways Private Limited and in a fraudulent manner the applicant and the other directors of the said firm had obtained fuel,

whose outstanding bills for payment rose to the tune of Rs. 3,25,000 (rupees three lacs twenty five thousand) for which a cheque was given, which was dishonoured on account of the fact that there was no money in the applicant's firm account. When the complainant received information from the bank on 27.5.2007, then on enquiry he learnt that Om Prakash Budhia, Sushil Budhia and the other directors had fraudulently taken fuel from the complainant's firm, not made payment for the same and had even closed their business and vanished and that they had fraudulently misappropriated the diesel supplied by the complainant's firm.

4. Firstly, it was argued by learned Counsel for the applicant that essentially the proceedings between the parties are civil in nature and no criminal proceedings would lie on the said allegations. In support of this contention reliance has been placed on the decision of the Apex Court in the case of *G. Sagar Suri and Another Vs. State of U.P. and Others*, Specifically reliance has been placed on paragraphs 8 and 14 of the aforesaid judgment for the proposition that the entire family members of the firm ought not to have been roped in and that there is misuse of law by resorting to criminal process for prosecuting the applicant especially when another complaint u/s 138 of the Negotiable Instruments Act had been filed.

5. It may be noted that in the case of *G. Sagar Suri (supra)*, where the complainant was a finance company and the applicants were automobile dealers it had been found in the investigation that the applicants were not the directors of the accused's company, but they were only the parents of the directors. This fact had been admitted in the counter-affidavit filed by the complainant.

6. Furthermore, the Apex Court expressed its disapproval of the fact that although proceedings u/s 138 of the Negotiable Instruments Act were pending, yet for some inexplicable reason a separate case u/s 406/420, I.P.C. had also been filed. Also there did not appear to be any direct misrepresentation on the part of the Appellants in the case before the Apex Court and there was no explanation why the other directors were not proceeded against and were left out or the investigation was still pending against them, and only the applicants had been prosecuted. It was in the totality of those circumstances, that the Apex Court observed that criminal proceedings should not be used as a lever for putting pressure in a civil dispute between the parties and quashed the same.

7. In *Trisuns Chemical Industry Vs. Rajesh Agarwal and others*, it has been held that merely because an act involves civil liability, is not sufficient to denude it of its criminal outfit if the circumstances also suggest the commission of a criminal offence. The following lines from paragraphs 6 and 7 of the aforesaid case are relevant:

6. Time and again this Court has been pointing out that quashment of F.I.R. or a complaint in exercise of inherent powers of the High Court should be limited to very extreme exceptions (vide *State of Haryana and others Vs. Ch. Bhajan Lal*

and others, and Rajesh Bajaj Vs. State NCT of Delhi and Others,

In the last referred case this Court also pointed out that merely because an act has a civil profile is not sufficient to denude it of its criminal outfit. We quote the following observations (para 10 of AIR, Cri LJ):

It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions.

7. We are unable to appreciate the reasoning that the provision incorporated in the agreement for referring the disputes to arbitration is an effective substitute for a criminal prosecution when the disputed act is an offence. Arbitration is a remedy for affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the agreement. Hence, those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases as indicated in State of Haryana and others Vs. Ch. Bhajan Lal and others,

8. Furthermore, in Indian Oil Corporation Vs. NEPC India Ltd. and Others, , the case of G. Sagar Suri was considered and the tendency to utilize criminal prosecution for settling civil disputes was deprecated. However, the proceedings were allowed to continue and it was observed in the said case that an offence u/s 420, I.P.C. as defined u/s 415, I.P.C. appeared to have been made out as the N.E.P.C. company had removed the engines and other parts of the hypothecated aircrafts, although no case of criminal breach of trust was made out.

9. It was also clarified in the case of Indian Oil Corporation (supra), that in the event, the prosecution is found to be malicious, the remedy is available to the accused to initiate proceedings for compensation u/s 250 of the Code.

10. It should be noted that it has not been clarified anywhere in the original application or in the supplementary-affidavit filed by the applicant whether the prosecution against the applicant under the Negotiable Instruments Act is still pending and whether the applicant and other co-accused are co-operating with the same.

11. It is also the intent of Section 220 of the Code, wherein if one series of act connected together as to form the same transaction, constitutes more offences than one, an accused can be charged and tried even in one trial for several such offences. This section has of course been made subject to the limitation contained u/s 71 of the I.P.C., that where anything which is an offence is made

up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment for more than one of such offences, unless it be so expressly provided. The illustration to the section is self-explanatory. It reads thus:

Illustration.-A gives Z fifty strokes with a stick. Here accused may have committed the offence of voluntarily causing hurt to victim by the whole beating and also by each of the blows which make up the whole beating, but he would be liable for only one punishment for the whole beating.

12. But in a case like the present, where the offence could be both under the Negotiable Instruments Act as well as for certain provisions of the Penal Code, I see no bar for the prosecution of the applicant for both the offences.

13. In *Prudential Capital Market v. State of Bihar* (2000) SCC 539: 2000 (3) ACR 2111, it has been clarified that simply because the prosecution was pending under Sections 45QA and 58E of the Reserve Bank of India Act, the prosecution u/s 138 of the Negotiable Instruments Act and Section 420, I.P.C. could not be barred on that score.

14. Another contention which was stressed by the learned Counsel for the applicant was that the applicant was a chartered accountant, who was working in Mumbai and he had no concern with the instant firm as he was only a son of one of the accused. The applicant has even filed a copy of the Memorandum of Association and Articles of Association of Budhia Roadways Private Limited and in paragraph 15I) a. of the Grounds in his application he has stated that a certificate had been granted by Mr. V. Sundaram, the company secretary to the effect that "applicant is not holding any share or structure in the accused company".

15. I think these are matters, which can properly be appreciated at the appropriate stage during the trial and cannot be allowed to be raised in an application u/s 482 of the Code by means of such averments in an application or affidavit.

16. In *S.V. Muzumdar and Others Vs. Gujarat State Fertilizer Co. Ltd. and Another*, it has been observed by the Apex Court that whether a particular accused (who was lawyer in that case) was in-charge of the business and liable to be proceeded with in view of Section 141 of the Negotiable Instruments Act was a matter which could only be adjudicated during trial and an opinion on the matter could not be formed at the initial stage.

17. There also appears to be undue unexplained delay in the applicant's approaching this Court disentitling him from any relief also on account of laches as admittedly the initial application u/s 156(3) was moved on 24.8.2002, the summoning order was passed on 23.9.2003 by the Additional Chief Judicial Magistrate, Varanasi. Even the application for setting aside the summoning order was rejected by the A.C.J.M. as far as back on 13.9.2006 and the applicant

appears to have been sleeping over the matter thereafter.

18. Significantly, in the said order dated 13.9.2006, it has been observed that the other principal accused Om Prakash Budhia, the father of the applicant has still not appeared and the other accused Pradeep Budhia has died in the meantime. It was also noted in the said order that the application has been moved for challenging the summoning order dated 23.9.2002. I think that in view of the decision of the Apex Court in *Adalat Prasad v. Roop Lal Jindal* AIR 2004 SC 4674, such a summoning order could not have been challenged before the learned Magistrate.

19. However, so far as the observations in the order dated 13.9.2006, are concerned that on perusal of the record it appears that when the learned Magistrate passed the order dated 23.9.2002 summoning the applicant and other accused u/s 406, I.P.C., only the statement of Sushil Kumar Singh, the complainant appeared to have been recorded and that the statements of the other witnesses Rajesh Kumar and Sunil Kumar Singh were not recorded u/s 202 of the Code, but the same appear to have been recorded in Complaint Case No. 1564 of 2002, *Sushil Kumar Singh v. Budhia Roadways*, u/s 138 of the Negotiable Instruments Act. In my view, there is no legal bar in summoning the accused even after recording the statement of the complainant u/s 200 of the Code and it is only incumbent in a case, which is exclusively triable by a Court of Sessions that evidence of the complainant and the witnesses (present if any) be also examined on oath before passing the summoning order, but the present is not such a case.

20. One further submission has been raised by the learned Counsel for the applicant that no offence u/s 406, I.P.C. appears to be disclosed as the property (fuel) had been sold to the applicant and other accused and it had not been entrusted to them for a particular purpose. There may be some merit in this contention, but criminal proceedings can only be quashed if no offence whatsoever is disclosed. In *S.M. Datta Vs. State of Gujarat and Another*, it has been observed that the practice of the High Court in scuttling criminal proceedings at the initial stage was improper, and that the High Court must not interfere except in the rarest cases where the same amounted to abuse of the process of law. Only broad allegations were to be seen as to whether any offence was disclosed and the F.I.R. was not to be looked at with mathematical exactitude at this stage as to whether the offence alleged is made out. Even if some other offence is made out, different from what has been alleged the charge-sheet cannot be quashed. The relevant passage in page 666, in *S. M. Datta* reads as follows:

Criminal proceedings, in the normal course of events ought not to be scuttled at the initial stage, unless the same amounts to an abuse of the process of law. In the normal course of events thus, quashing of a complaint should rather be an exception and a rarity than an ordinary rule. The genuineness of the averments in the F.I.R. cannot possibly be gone into and the document shall have to be read

as a whole so as to decipher the intent of the maker thereof. It is not a document which requires decision with exactitude, neither is it a document which requires mathematical accuracy and nicety, but the same should be able to communicate or indicative of disclosure of an offence broadly and in the event the said test stands satisfied, the question relating to the quashing of a complaint would not arise. (Emphasis added)

However it will be open for the trial court to consider when framing the charges or at any other appropriate stage u/s 215 of the Code as to whether a charge ought to be framed against the accused persons under Sections 406 or 420, I.P.C. because the allegations were that the accused persons continued to take fuel from the petrol pump of the complainant and the bills ran up to Rs. 3,25,000, thereafter the firm of the accused persons and the accused persons themselves vanished without making the due payments and even the cheques issued by them were dishonoured. Prima facie on these allegations it could at least be said that there was an intention to cheat from the very inception as defined u/s 415, I.P.C., although perhaps strictly a case u/s 406, I.P.C. may not be disclosed. If the Magistrate is so satisfied upon exercise of his independent discretion after considering the materials and documents of this case, he may refrain from framing a charge u/s 406, I.P.C. or by substituting it with a charge u/s 420, I.P.C. if he deems appropriate at the proper stage.

21. In view of what has been indicated hereinabove, I find no ground for quashing the criminal proceedings against the applicant and the application is accordingly rejected.

22. However, in the circumstances of the case, it is provided that if the applicant appears before the Court concerned and applies for bail, his prayer for bail within a month, the application shall be considered expeditiously in accordance with law.

23. The observations, made hereinabove, were only for the purpose of disposal of this application and should not be taken into account by the Magistrate concerned while deciding the bail application or the trial.