

(2012) 06 PAT CK 0017

In the Patna High Court

Case No : Criminal Miscellaneous No. 14393 of 2007

Sutapa Chakraborty and Others

APPELLANT

Vs

State of Bihar and Another

RESPONDENT

Date of Decision : 18-06-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 482
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 17
Penal Code, 1860 (IPC) — Section 405, 406, 415, 418, 420

Citation : (2013) 1 Crimes 537 : (2012) 3 PLJR 817

Hon'ble Judges : Ashwani Kumar Singh, J

Bench : Single Bench

Advocate : Chitranjan Sinha, Sanjay Kumar Mishra, for the Appellant; A.K. Sharma for the Opp. Party No. 2 and Mr. C. Jawahar for the State, for the Respondent

Final Decision : Allowed

Judgement

Ashwani Kumar Singh, J.—The petitioners have filed the present application u/s 482 of the Code of Criminal Procedure for quashing of the order dated 25.5.2006 passed by the learned Sub. Divisional Judicial Magistrate, Patna in Complaint Case No. 948(C) of 2006 whereby finding a prima facie case to be made out under Sections 406 and 420 of the Indian Penal Code they have been summoned to face trial. The opposite party no. 2 has filed the present complaint on 12.4.2006 in the Court of the learned Chief Judicial Magistrate, Patna alleging inter alia that the petitioners claiming themselves to be the owners of M/s Welfo Pharmaceuticals Pvt. Ltd. (hereinafter referred to as "the Company") B.P. Road, Amtala South, District-24 Pargana, Calcutta, approached and called him through co-accused Kamaldeo Sinha in Hotel Apsara at Patna in the year 2004 for appointing him as an agent of the company for the State of Bihar. The accused persons at that time were staying in Hotel Apsara. When the complainant went to meet them, they told him that in order to start a business with the company he will have to deposit a sum of Rs. 2,00,000/- (two lakhs) as security money which

would be refundable on termination of the contract. They further told that apart from the security money he will have to arrange working capital for transacting business with the company. Believing upon their words the complainant deposited Rs. 2,00,000/- by way of cash and demand draft. However, after taking money from the complainant the business could not run smoothly. When the complainant raised grievance and demanded his security money back the accused persons persuaded him to continue with the business. They also got an agreement prepared between the parties. In such way the matter lingered for long. Again when the complainant demanded his security money back the accused persons in conspiracy to each other invited him in Hotel Welcome Palace at Patna where petitioner nos. 1, 2 and another co-accused were found present together with some other unknown persons. They again persuaded him not to be impatient and assured that his security money would be refunded. They took his signature on blank papers and after negotiating with him they went away. However, in spite of lapse of some time when the accused persons did not approach the complainant, he contacted them on telephone and enquired about the refund of his security money. He was shocked to hear the reply given by petitioner no. 1 who told him that the company in question would not transact its business in future with him and there is no money due with the company to be paid to the complainant. The complainant personally met the accused persons and demanded his money back but the accused persons refused to refund the money and said that there was nothing due to be paid to the complainant. It has also been alleged that when the complainant made an in depth enquiry, on 10.4.2006 he came to know that the accused persons after obtaining his signature on blank papers prepared forged documents in order to deny the refund of security money in question. Based on the aforesaid allegations the complainant instituted the complaint before the learned Chief Judicial Magistrate, Patna on 12.4.2006 making the petitioners and one another accused for committing offence under various sections of the Indian Penal Code.

2. The complainant was, thereafter, examined on solemn affirmation on 21.4.2006. In his statement on oath he has stated that the accused persons claimed themselves to be officers of the company. They assured him that if he works as an agent of the company he would make good profit. They also told him to deposit Rs. 2,00,000/- in the account of the company as security money which they promised would be returned after termination of the contract. He deposited rupees 1,40,000/- by way of draft and Rs. 60,000/- in cash. The business could not run smoothly. He demanded his security money back. The security money deposited by him was not refunded. The complainant stated that the accused persons cheated him in conspiracy to each other. In reply to court's questions he submitted that there was no written agreement between the parties.

3. In support of the complaint two witnesses, namely, Rakibuddin Ahmad Khan and Vishwa Bhusan Kumar were examined in course of enquiry u/s 202 of the Cr.P.C. on behalf of the complainant. The enquiry witness no. 1 Rakibuddin Ahmad Khan apart from stating other facts stated that since the business failed

the complainant demanded his security money back which was not refunded by the accused persons. On conclusion of enquiry by order dated 25.5.2006 the learned Sub-Divisional Judicial Magistrate, Patna, finding the prima facie case to be made out under Sections 406 and 420 of the Indian Penal Code summoned the petitioners. The aforesaid order is under challenge before this court.

4. Mr. Chitranjan Sinha, learned Senior Counsel, appearing on behalf of the petitioners, submits that the criminal complaint is misconceived in law. Even on admitted facts no offence as against the petitioners is made out. The order summoning the petitioners passed by the learned Sub-Divisional Judicial Magistrate, Patna is wholly illegal. In support of his submissions he has stated that M/s Welfo Pharmaceuticals Pvt. Ltd. is a company incorporated under the Indian Companies Act, 1956. Its registered office is at Amtala, West Bengal and petitioner no. 3, namely, Biswanath Chakraborty is husband of petitioner no. 1, who is an employee of the said company. He has nothing to do with the company in question. He submits that the opposite party no. 2 had entered into an agreement with the company for doing business as C.N.A. of the company for specific zone with headquarter at Patna with effect from 1.5.2004. The amount de-posited as security money by way of draft and cash was deposited in the name of the company. The draft prepared by the complainant was also in the name of the company and the same was deposited in the account of the company.

5. Learned Senior Counsel for the petitioners further submits that after taking the security amount as well as after execution of agreement, the complainant was given responsibility of C.N.A. of the Company with effect from 1.5.2004 and, thereafter, the company on different occasions supplied its pharmaceutical products (medicines) to opposite party no. 2 (the complainant) for the purposes of business which were duly received by the complainant. When the complainant failed to pay the bill amount with respect to the medicines supplied, the same was adjusted from the security money deposited by the complainant after a meeting with him on 11.9.2005 for the purpose of finalizing the dispute between the company and the complainant. In the said meeting dated 11.9.2005 after proper accounting it transpired that Rs. 35,000/- was still lying balance in the account of the opposite party no. 2 and, accordingly, the company further supplied medicines worth Rs. 35,000/- and, thus, it is submitted that no amount of opposite party no. 2 is left due with the company in question. He also submits that since opposite party no. 2 was not inclined to continue business with the company in question, the relationship broke.

6. Learned counsel for the petitioners also submits that even if the entire allegations are taken to be true, the petitioners, who claimed to be the office bearer of the company, cannot be held vicariously liable for any offence committed by the company specially under the circumstance when the company itself has not been made accused in the present case.

7. On the other hand, Mr. A.K. Sharma, learned counsel appearing for opposite

party no. 2, who has already filed a counter affidavit and replied to the supplementary affidavit filed on behalf of the petitioners, submits that there is no illegality either in the order taking cognizance or the order summoning the petitioners to face trial. He submits that petitioner nos. 1 and 2 are none else but the owners and beneficiaries of the company. The company deals with and drugs and pharmaceuticals. According to him their status in the company are not of an employee but they are employers. They made false assurance to the opposite party no. 2 as a result of which he associated himself with the company, The assurance given by them that if he enters into business relationship with the company he would earn huge profit proved wrong subsequently. He submits that the transactions made by the company were guided by the Area Manager appointed by them.

8. It is to be noted that the learned counsel for opposite party no. 2 in his reply to the supplementary affidavit in para-graphs-5 and 7 admits the existence of the agreement dated 15.4.2004 between the parties. However, he submits that the consignments sent to Patna by the company were not handed over to the complainant due to which the business could not be carried on. He places his reliance on the judgment of the Apex Court in the case M/s. Medchl Chemicals and Pharma P. Ltd. Vs. M/s. Biological E. Ltd. and Others, for the proposition that if the complaint on the basis of it discloses offence alleged, the same cannot be quashed merely on grounds that civil remedy is available.

9. Before examining the merit of the rival submissions of the parties it would be proper to briefly notice the scope and ambit of the jurisdiction of this court while exercising powers conferred u/s 482 of the Code of Criminal Procedure. By now it is well settled that this court would exercise its powers u/s 482 of the Code of Criminal Procedure sparingly, carefully and cautiously to do real and substantial justice and to prevent abuse of process of the court.

10. In case of G. Sagar Suri and Another Vs. State of U.P. and Others, the Apex Court has observed in paragraph 8 as under:--

8. Jurisdiction u/s 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction u/s 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice.

11. Bearing in mind the aforesaid legal position in regard to width of powers conferred u/s 482 of the Code of Criminal Procedure, I shall now advert to the facts at the hand.

12. It is manifest from the submissions advanced on behalf of the parties before this court that the amount to the extent of Rs. 2,00,000/- was deposited in the account of the company in question by way of demand draft and cash as security deposit pursuant to an agreement by the complainant. The contention of the complainant is that in spite of promise being made to refund the security amount after termination of contract, on being demanded the accused persons did not refund the security deposit. On the other hand, the petitioners submit that there was a transaction of business in which medicines worth Rs. 2,00,000/- have already been supplied to the complainant by the company for which in spite of bills being raised he failed to make payment and, thus, the security deposited by the complainant with the company has been adjusted against the bills for the goods supplied as per the terms of the agreement arrived at between the parties.

13. When I look to the complaint petition I find that the complainant has made specific averments in the complaint that transaction of business could not run smoothly and, thus, he wanted refund of the security amount so deposited with the company. When I look to the deposition of enquiry witness no. 1, I further find that in course of enquiry he has clearly stated that the business failed and, thus, the complainant wanted refund of security deposit. It appears that the court below failed to notice these important averments made in the complaint and in the statement of the witness examined in course of enquiry, If one looks to these averments carefully it leaves no room to doubt that the dispute arose between the parties during transaction of business being carried out between them.

14. In this background if I look to the provisions under which the learned Magistrate has found a prima facie case to be made out, the legal position would emerge otherwise.

15. Section 420 of the Indian Penal Code deals with cheating and dishonestly inducing delivery of property. The offence of cheating is made of two ingredients; deception of any person and fraudulently or dishonestly inducing that person to deliver any property or to any person or to consent that any person shall retain any property. To put it differently, the ingredients of the offence are that the person deceived delivers to someone a valuable security or property, that the person so deceived was induced to do so, that such persons acted on such inducement in consequence of his having been deceived by the accused acted fraudulently or dishonestly when so inducing the person.

16. The facts of the present case clearly suggest that there was a commercial transaction between the parties. The business also commenced and during transaction of business the dispute has arisen in respect of settlement of accounts. In such circumstance the dispute essentially and purely would be a dispute of civil nature. In my view, the mens rea, which is an essential ingredient to constitute an offence u/s 420 of the Indian Penal Code at the time of inducing a person deceived to deliver any property, is clearly wanting in the present case. Even in case of Medchl Chemicals (P) Ltd. (supra) relied upon by the learned

counsel for the opposite party no. 2 the Apex Court has observed that in order to attract the provisions of Section 418 and 420 of the Indian Penal Code guilty, intent, at the time of making promise is a requirement and essential ingredient thereto and subsequent failure to fulfill the promise by itself would not attract the provision of Section 418 or Section 420 of the Indian Penal Code. It has been observed in the said case that, as a matter of fact, illustration (g) to Section 415 makes the position clear enough to indicate that mere failure to deliver in breach of agreement would not amount to cheating but is liable only to a civil action for breach of contract.

17. It is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If intention of cheating has developed later on, the same cannot amount to cheating. In such circumstance, in the facts of the present case offence u/s 420 of the Indian Penal Code is not attracted.

18. The other offence under which the learned Magistrate has taken cognizance is Section 406 of the Indian Penal Code which relates to punishment for criminal breach of trust.

19. The ingredients of the offence u/s 406 of the Indian Penal Code are as follows: (i) A person should have been entrusted with the property or entrusted with dominion of the property; (ii) that a person should dishonestly misappropriate or convert to his own use that property, or dishonestly used or dispose of that property or usefully suffer any other person to do so; (iii) that such misappropriation conversion use, or disposal should be in violation of any direction of any law prescribing the mode in which such trust is to be discharged or of any legal contract which the person has made, touching the discharge of such trust.

20. Section 405 of the Indian Penal Code defines "criminal breach of trust" to mean:--

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

[Explanation 1.--A person, being an employer, [of an establishment whether exempted u/s 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not] who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so

deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

[Explanation 2.--A person, being an employer, who deducts the employee's contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

21. Admittedly, in the present case the amount in question was deposited by the complainant in the account of the Company. The Company in question is incorporated under the Indian Companies Act and, thus, it is a juristic person having right to sue with a liability to be sued. The Company has, admittedly, not been made accused in the present case. There is nothing on the basis of which it can be said that the petitioner dishonestly converted the security deposit entrusted to the Company for their own use so as to satisfy the ingredients of Section 405 of the Indian Penal Code.

22. From the averments made in the complaint as also from the materials collected in course of enquiry though there is vague and bald allegation that the accused persons with dishonest intention misappropriated the security deposit and caused monetary loss to the complainant but if I give a closure look to the material on record, I find that though the security was entrusted to the Company in 2004, the complaint was instituted in 2006 and, in the meantime, dispute arose between the complainant and the company during transaction of business. Thus, in my view, simply by saying in the complaint that there was a dishonest intention, the offence would not be constituted when the facts speak otherwise.

23. The offence of criminal breach of trust u/s 406 of the Indian Penal Code is not in respect of the property belonging to an incorporated company, but an offence committed by a person in respect of the property which has been specifically entrusted to him under special contract. Further, for constituting an offence u/s 406 of the Indian Penal Code like Section 420 of the Indian Penal Code mens rea is an essential ingredient which again is wanting in the present case.

24. The learned Magistrate, therefore, before summoning the petitioners should have posed a question as to whether any act of inducement on the part of the petitioners has been raised by the complainant and as to whether the petitioners had an intention to cheat him from the very inception. If the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the

part of the petitioners by non-refunding the amount of advance the same would neither constitute an offence of cheating nor of criminal breach of trust.

25. In Hari Prasad Chamaria Vs. Bishun Kumar Surekha and Others, the facts of the case were that the appellant before the Supreme Court intending to start business gave in full faith a large amount to the respondents-accused persons starting business in their own name and refused to render the account and return money. The Supreme Court held that even assuming prima facie all the allegations in the complaint to be true they merely amount to breach of contract and could not give rise to criminal prosecution. There was nothing in the complaint to show that the respondents had dishonest or fraudulent intention at the time the appellant parted with the money nor did the complaint indicate that the respondents had induced the appellant to pay them the amount parted with. It was held that fact that they did not abide by their commitment as to starting of the business in complainant's name as agreed to would not fasten them with criminal liability. The Supreme Court affirmed the order of this court quashing the criminal proceeding.

26. Now I shall examine as to whether the petitioners can be held vicariously liable for the aforesaid offence. As noted above, learned counsel for the petitioners has submitted that Rs. 2 lakhs was never entrusted to the petitioners either in their personal capacity or in the capacity of the office bearers of the company. The security deposit was deposited in the account of the company. In fairness of the matter, I may point out that learned counsel for opposite party No. 2 though admits that the security deposit was deposited in the account of the company but according to him petitioner nos. 1 and 2 are none else but owners and beneficiaries of the company and their status in the company is not of an employee but they are employers. So far as petitioner no. 3 is concerned, it has been contended that he too is an active sleeping partner of the company. He has also drawn my attention to the agreement dated 15.4.2004 made between the parties which has been brought on record by the petitioners as Annexure-5 to the petition and in that agreement, petitioner no. 1 has signed in the capacity of Managing Director.

27. Having noticed the aforesaid submissions, first of all, I would like to say that in case of company registered under the Companies Act, there is no concept of partnership or ownership as an incorporated company is limited by shares. There may be a Board of Directors and the Directors from amongst themselves may appoint some one as Managing Director but simply because some one acts as Managing Director of the Company he cannot be made vicariously liable for any offence by the company.

28. In R. Kalyani Vs. Janak C. Mehta and Others, the Apex Court in paragraph 41 has held as under:--

41. If a person, thus, has to be proceeded with as being variously liable for the acts of the company, the company must be made an accused. In any event, it

would a fair thing to do so, as legal fiction is raised both against the company as well as the person responsible for the acts of the company.

29. In S.K. Alagh Vs. State of U.P. and Others, in paragraph 19 the Apex Court as under:--

19. As admittedly, drafts were drawn in the name of the Company, even if the appellant was its Managing Director, he cannot be said to have committed an offence u/s 406 of the Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides, specifically therefore. In absence of any provision laid down under the statute a Director of a Company or an employee cannot be held to be vicariously liable for any offence committed by the Company itself.

30. Taking into consideration the aforesaid decisions of the Apex Court, the prosecution of the petitioners being vicariously liable for the acts of the company cannot be justified.

31. In the light of the aforesaid conclusions, I am of the considered opinion that no prima facie case is made against the petitioners in respect of the offence u/s 406 or 420 of the Indian Penal Code. In view of the aforesaid finding, I have no reason to doubt that allowing the prosecution to continue any more as against the petitioners would amount to an abuse of process of the court. The complainant was ill-advised to file the complaint instead of suit against the company to recover the amount. In the result, this application is allowed. The impugned order dated 25.5.2006 passed by learned Sub. Divisional Judicial Magistrate, Patna in Complaint Case No. 948C of 2006 is hereby quashed so far as the petitioners are concerned.