

Gopal Rawat Vs State of U.P. and Atul Bagla, General Manager (Finance) J.K. Cement Limited Company

Court: Allahabad High Court

Date of Decision: Aug. 21, 2006

Acts Referred: Constitution of India, 1950 " Article 227

Criminal Procedure Code, 1973 (CrPC) " Section 188, 200, 245, 482

Penal Code, 1860 (IPC) " Section 120B, 406, 409, 420

Sick Industrial Companies (Special Provisions) Act, 1985 " Section 2(13)

Hon'ble Judges: S.S. Kulshrestha, J

Bench: Single Bench

Advocate: Sushil Shukla, for the Appellant; V.C. Tiwary, Manish Tiwary, Ashwini Kumar Awasthi and Praboth Gaur and A.G.A., for the Respondent

Final Decision: Dismissed

Judgement

S.S. Kulshrestha, J.

These both the cases are taken together as they arise from the same complaint case and involve common questions of law.

2. Both the applications have been brought u/s 482 of the Code of Criminal Procedure (the Code) for quashing the proceedings of the complaint

case No. 7188/05, under Sections 420, 406, 409, 120B IPC, P.S. Pheelkhana, District Kanpur Nagar pending in the court of Addl. Chief

Metropolitan Magistrate-V, Kanpur Nagar. In CrI. Misc. Application No. 3397 of 2006 it is said that Sri Gopal Rawat, who has been arraigned

as accused No. 12 (in short A-12) is a practicing Chartered Accountant, providing professional services in the name of "G. Rawat & Co.,

Chartered Accountants" and he is also standing member of the Institute of Accounting for the last about 12 years. The area of his professional

services is limited to accounting, auditing, income tax/sales tax matters/ analysis of financial/annual reports, dealing with the Registrar of Companies

in India. He has falsely been involved in this case and without any substance the cognizance of the offences was taken by the learned Magistrate. It

is said that the contents of FIR do not reveal the involvement of the accused (A-12) in the alleged offences. He is sought to be made vicariously

liable for the offences of which the principal accused is the company "M/s Wellbred Asset Management (Bahama) Ltd." (A-1), having its office at

Suite 101, Saffrey Square Office, Bank Lane, Nassau (Bahamas) though he had no role to play in relation to the alleged incriminating act.

3. In CrI. Misc. Application No. 8056 of 2005 it is contended that the applicants (A-9 and A-10) are the management counselors and facilitators.

They and their Company "IFCM Counsellors Private Limited (A-11)" have nothing to do with any business agreement between the parties or that

any of the monetary transactions. They charge their professional fees for providing services to their clients. M/s J.K. Synthetic Ltd. (the complainant

firm) became financially weak and was in dire need of the funds. They engaged the applicants (A-9 and A-10) as counselors and facilitators for

managing funds. An agreement to that effect was also executed in between them on 23.5.2000. The accused (A-9 to A-11) also charged fees for

rendering the services to the complainant company. The complainant company developed close relations with accused (A-1) and offered 20000

equity shares of Rs. 10/- each at par. Even time and again the accused (A-9 to A-11) were giving caution to the complainant company that due

diligence was to be adopted before making any financial commitment to funding institution. Even it was also counseled to them that M/s B.L.

Securities Ltd. was not a fit company to enter in the business with it. Instead of all such warnings Sri Sarogi, the representative of the complainant

company continued to keep dealing with Mr. Naresh Rajya, who has been shown as accused No. 6 in the complaint (now referred as A-6). There

was no occasion for the accused applicants to have played fraud with the complainant company.

4. Preliminary objection about the maintainability of these applications has been raised on behalf of the complainant that the accused applicants

may claim their discharge at the appropriate stage u/s 245 of the Code and this Court should not interfere in the criminal proceedings which are at

the threshold. I do not think that for avoiding tremendous harassment if one files application u/s 482 of the Code, it cannot be entertained because

of the availability of alternative forum. In this connection reference may also be made to the decision of the Apex Court in the cases of (i) Pepsi

Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, and (ii) Ashok Chaturvedi and Others Vs. Shitulh Chanchani and Another,

wherein it has been specifically held that the Magistrate trying a case has jurisdiction to discharge the accused at any state of the trial if he considers

the charge to be groundless but that does not mean that the accused cannot approach the High Court u/s 482 of the code or Article 227 of the

Constitution to have the proceedings quashed against them when no offence has been made out against them and still why must they undergo the

agony of a criminal trial. Jurisdiction u/s 482 of the code has to be exercised with a great care. In exercise of its jurisdiction this Court is not

required to examine the matter superficially. A great deal of caution is required and jurisdiction can be exercised to prevent the abuse of process of

any court or otherwise to secure the ends of justice. Reliance may also be placed in the cases of (i) State of Karnataka Vs. L. Muniswamy and

Others, , (ii) Kurukshetra University and Another Vs. State of Haryana and Another, , (iii) State of Haryana and others Vs. Ch. Bhajan Lal and

others, , (iv) Ajay Mitra Vs. State of M.P. and Others, and (v) Union of India (UOI) Vs. Prakash P. Hinduja and Another,

5. The contents of the complaint transpire that in the year 1999-2000 the complainant company M/s J.K. Cement Ltd. was in need of immediate

financial funds so as to acquire the assets of its sister concern namely ""M/s J.K. Synthetics Ltd."" , whose case was referred to BIFR under the

provision of "Sick Industrial Companies (Special Provision) Act 1985 (SICA)". Ascertaining the need of the complainant company S/Sri V.R.

Tibrewala and R.K. Tibrewala (A-9 and A-10) approached to the complainant company and assured that M/s IFCM Counsellor Private Ltd. (A-

11) shall manage funds from foreign company i.e. M/s Wellbred Asset Management (Bahamas) Ltd. (A-1). A series of negotiations for procuring

foreign loan took place between the complainant company and the aforesaid persons who further brought the services of B.L. Securities Ltd.

Bahmas (A-3) and its officers. The complainant company during negotiations was made to part with huge amount in the form of professional fees

to the aforesaid accused companies and their officers. After the foreign loan agreements were executed between the complainant company and

accused foreign companies, the complainant company, in terms of loan agreement, had to raise and deposit U.S. \$ 1291875 (amounting to

approximately Rs. 6 Crores) with Sri Shiv Potayya (A-2), who was acting as Escrow Agent between the parties. It is further alleged that due to

the act and omission on the part of the accused companies and their agents loan transaction could not be materialized and the complainant

company was deceived. Sri Gopal Rawat (A-12) was one of the directors of the company (A-1) at the relevant time as was communicated by M/s

Dum & Bradstreet through their letter dated 17.1.2005.

6. It is contended from the side of Sri Gopal Rawat that his name has been referred on the basis of unverified report from M/s Dum & Bradstreet.

Further from the averments made in paragraphs 27 and 43 of the complaint the participation of the accused (A-12) in the meetings would not

construe his position to be of the director/principal officer of the company. His participation was in the capacity of the chartered accountant

engaged by the accused applicant No. 1. This fact was also well within the knowledge of the complainant company and its officers/agents including

Sri Atul Bagla through whom the impugned complaint had been brought. The applicant Sri Gopal Rawat was only rendering professional services

to accused applicant No. 1 merely for the purpose of assessing the balance sheets of the cement unit of J.K. Synthetic Ltd. i.e. complainant

company before granting the huge foreign loan sought by it through accused company (A-1). It is said that the accused never represented or

played fraud in the alleged negotiations. It is further said that the payment was made to the applicant by accused company (A-1) by cheques for

the professional services rendered by him and it was also made clear by the accused company (A-1) in their letter dated 3.10.2005 (Annexure-6)

that the name of the applicant does not reflect any position in that company and in the records of the Registrar of the Companies. Along with this

communication the copy of the statement dated 26.9.2005 sent by Lloyd C. Johnson and Company duly acknowledged by the Registrar

General's Department, Nassau, Bahamas was also enclosed. It is said that from these documents and other communications made and which also

form part of the complaint, the position of the accused (A-12) was there only that of the chartered accountant rendering professional services to

the accused No. 1.

7. These applications have been resisted by the complainant. It is said that the true facts have not been brought into these applications. The

accused Sri Gopal Rawat (A-12) actively participated in the affairs of the accused (A-1). It is also said that the company being a juristic person, all

its deeds and functions are result of acts of others. The accused (A-12) represented that company and correspondence had also taken place with

him. He also participated in various meetings representing himself to be director/principal officer of the said company. Therefore, he is also

personally liable for the act, which results into criminal action being taken against the company. It is also said that every person, who was

representing himself to be the principal officer of the company and participating in the meetings for the conduct of business of the company, is also

liable for the offenses. In that regard some of the paragraphs which relate about the involvement of the accused (A-12) may be referred from the

complaint. It reads as under;

12. THAT, therefore, again various meetings were held in between the Complainant-Company and Accused No. 1, 3 to 6 and 9 & 10 in London

and Mauritius for negotiating the terms of the Foreign Loan. Besides, Accused No. 2 was also present in meeting held in the month of May 2003

in Mauritius. Accused No. 12 (Mr. Gopal Rawat, the director/Principal Officer of Accused No. 1, had also attended earlier meeting on behalf of

Accused No. 1 A report dated 17.01.2005 from M/s Dun & Breadstreet (A world renowned credit rating agency) mentions (on page 5 of report)

that Accused No. 12 is a director/principal officer of the Accused No. 6, (A true copy of the said report is annexed to List of Documents is

marked as Annexure - 7). During the said meetings Accused Nos. 1, 3, 4, 5 and 6 represented themselves as genuine foreign lenders/arrangers

whom the Applicant-company could trust. At all such meetings Accused No. 9 & 10 also assured the Complainant-Company that they were

constantly discussing the matter with the accused No. 6 over phone (Accused No. 9, 10, 11 had been charging Rs. 25,000/- per month from the

Complainant Company towards communication cost) and were confident that Accused No. 1 & 3 would provide/arrange the Foreign Loan. Since

the Accused No. 9 & 10 were the only Indian persons with whom the Complainant Company had direct interaction and had in fact been the

initiator for the Foreign Loan process, the Complainant-Company took comfort from and relied upon Accused No. 9 & 10 fully for ensuring that

its interest was protected in the negotiations for the Foreign Loan. Finally on 19th August 2003, arrangements were executed for the proposed

foreign loan (A True copy of the agreements is annexed to List of Documents and is marked Annexure - 8) with Accused No. 3 (B.L. Securities)

for the Foreign Loan.

27. THAT in this interregnum not having received any reply or comment on the said documents submitted on 08.03.2004 by the Complainant

Company / its Bank, the Complainant Company started having apprehensions whether the transaction could be implemented within the time

available for the same as per the Loan Agreement. Accordingly, vide its letter dated 15.03.2004, the Complainant-Company asked Accused No.

1 to extend the time available under the Transaction Commitment Notice so that there was sufficient time to meet and finalize the draft of the

Payment Instrument and also hold an urgent meeting of all concerned to resolve the issues. (A True Copy of the said letter dated 15.03.2004 is

annexed to List of Documents and is marked Annexure-28). In response to this letter the Accused No. 1 vide its letter of 15.03.2004 wrote that

they are working with the founders, their compliances and legal departments to resolve the said matters to everyone's satisfaction. They further

stated that the Accused No. 6 was diligently working on with the Complainant-Company to resolve these matters. (A True Copy of the said letter

dated 15.03.2004 is annexed to List of Documents and is marked Annexure-29). The letter dated 15.03.2004 clearly showed that even after one

week of submission of all the documents Accused No. 1 was still working on the draft of the payment Instrument while as per Clause 7B of the

Escrow Agreement, they should have approved the Payment Instrument within 72 hours of the receipt of the draft. This was clear default of

Accused No. 1 in terms of the Escrow Agreement. It was done by them intentionally and purposely for delaying the said documents apparently in a

fraudulent attempt not only to frustrate the transaction of the foreign Loan but also to keep the Complainant-Company in dark by assuring that they

are still working for the transaction without having any intention to do so. Not only this, Accused No. 6 and 12 (Mr. Copal Rawat) held meeting in

Mumbai on 15.03.2004 to resolve the pending issue which was only a smoke screen to gain time so that the Accused could misappropriate the

PCC without giving the Complainant-Company any reason to have suspicion about the malafide intention of the Accused.

43. THAT at this time to cover up the conspiracy hatched and implemented by the Accused and with the ulterior motive to delay any action by the

Complainant-Company, the Accused No. 4 informed the Complainant-Company that Accused No. 4 had indicated to him positive response to

resolve the various issues. Accordingly, discussions of providing the Foreign funds again re-started with the Complainant-Company in which

Accused No. 4, 5, 6, 9, 10 and 12 participated. By this time the Complainant-Company was in immediate and pressing need of the funds for

completing the OTS and acquisition of the cement undertaking as per the AAIFR Order. Further since it had already been deprived of the amount

of US \$ 1.29 million, it participated in discussions with Accused No. 1 and a series of meetings and discussions were held between the parties

again on completing the funding. The Accused No. 9 & 10 being the persons who had introduced the other Accused persons to the Complainant-

Company once again arranged the meetings. Accused No. 12, the director/principal officer of Accused No. 1 was also present in the meetings

held in London on 4th May and 6th May, 2004. In such meetings Accused No. 6 (Naresh Rajya) for and on behalf of Accused No. 1

(Wellbread), assured the Complainant-Company once again that the funds would be provided.

8. These allegations do make out the prima facie involvement of the accused (A-12) in the said offences, in the capacity of his being the principal

officer of the company accused (A-1). In the context of these allegations it is urged by the learned Counsel for the accused (A-12) that even if the

allegations made in the complaint and whatever the documents have been furnished by the complainant are accepted to be true on its face value,

the position of the accused applicant would be only that of the chartered accountant and not as the director or principal officer of the company.

There are no such specific allegations against accused (A-12) that he was incharge and responsible to the company (A-1) in the conduct of its

business at the material time when the offence was committed. There appears no dispute that it is the primary responsibility of the complainant to

make necessary averments so as to show the involvement of the accused (A-12). Further mere presence of the accused (A-12) in the meeting

would not draw any presumption of his being one of the directors. Such arguments were contraverted by the learned Counsel for the complainant

referring paragraph 12 of the complaint that there are specific allegations that Sri Gopal Rawat (A-12) had attended the meetings on behalf of the

accused No. 1 in the capacity of his being the director/principal officer of that company. In that regard a report dated 17.1.2005 from M/S Dum

& Bradstreet (a world renowned credit rating agency) has been referred quoting Sri Gopal Rawat (A-12) as a director/principal officer of the

accused (A-1). However, there is a disclaimer endorsement at the bottom of the letter sent by M/s Dum & Broadstreet that the company would

not be liable for any error or omission in the information if found. This document though not authenticated at this stage conveys Sri Gopal Rawat

(A-12) to be one of the directors and principal officer of the company (A-1). Its further verification would be a matter of evidence. It is further said

from the side of accused (A-12) that whatever the resolutions/decisions had taken place, their communication was not made to the accused (A-

12) as is also clear from papers relied upon by the complainant. Even in the suit brought before in Supreme Court of Mauritius there too the

position of the accused (A-12) was shown to be as the chartered accountant and so it cannot be construed that he was the director or principal

officer of the company. In this regard it may be mentioned that the averments made in the complaint and the annexures thereto assume importance

at the stage of taking cognizance by the learned Magistrate. Even otherwise it is a question of fact depending upon the particular circumstances of

each case. However, at this stage it may be mentioned that the officer responsible for conducting the affairs of the company is generally referred to

as director, manager, secretary, managing director etc. The word director is defined in Section 2(13) of the Companies Act as under:

"Director includes any person occupying the position of the director by whatever name called"

The powers of board of directors have been spelt out in Chapter II of the Companies Act. It is just possible that a person may be director in a

company but he may not know anything about day-to-day function of the company. The board of directors may appoint a third person as director,

who may be made responsible for day-to-day function of the company. From this it also emerges that the role of a director or the officer in a

company is a question of fact depending on the particular facts in each case. Even otherwise the liability may also be cast on a person who has

simply to do with the transaction complained of. There are specific allegations in paragraphs 12, 27 and 43 of the complaint about the participation

of the accused (A-12) as the director or principal officer of the company (A-1)

9. Allegations have also been made that Sri Gopal Rawat with connivance of other persons, referred in paragraph 52 of the complaint, have

committed offences. Even the notice was also given to him attributing allegations with regard to his committing offences but he kept silence. It is

said that from such act or omission on the part of the accused (A-12) the conclusion is inevitable that he is also involved in the offences. There are

sufficient materials on record to show a prima facie case against the accused applicant and so the complaint cannot be jettisoned merely on the

denial of the accused (A-12) at this stage. That denial or the factual aspects is to be evaluated by the trial court.

10. The learned Counsel appearing from the side of the accused (A-9 to A-11) vehemently argued that the allegations made in the complaint do not

disclose any cognizable offence against the accused and so this Court would be justified in interfering with the proceedings of the complaint case

brought by M/s J.K. Cement Ltd. in the court of Chief Metropolitan Magistrate, Kanpur Nagar, To the contrary it is urged by the learned Counsel

for the complainant that there are several documents (Annexures 1 to 46) having direct bearing with regard to the involvement of the accused (A-9

to A-11) in the aforesaid offences. It is also submitted that the role of the accused (A-9 to A-11) did not remain confined to that of the facilitators or

counselors and they exceeded their powers in connivance with the other accused and played fraud with the complainant company. It is the settled

legal position [see State of West Bengal and Ors. v. Swapan Kumar Guha and Ors. 1982 1 SCC 56] whether an offence is made out or is

disclosed in the complaint depends on the facts and circumstances of each case and in considering the question the court has to take into

consideration the relevant materials to arrive at the conclusion as to whether a prima facie case is made out or not. There are specific allegations

against the accused (A-9 and A-10) that they gave assurance that they would make the arrangement of the foreign loan. They have also charged

huge amount from the complainant and never disclosed the name of the company which would actually be providing funds to the complainant

company. They were also party in that transaction. It shall be useful to refer the allegations in particular appearing against the accused (A-9 and A-

10) in paragraphs 6 and 8 of the complaint, which read as under:

6. That at this state in 1999-2000, Accused No. 9 & 10 came to know that JKSL and the Complainant Company were in search of funds for the

payment of OTS dues. Seeing this as an opportunity for extracting monies from the Complainant-Company, they approached the management of

the Complainant-Company JKSL verbally and also through several letters/Faxes sent to the complainant-Company's Registered Office at Kanpur

(A true copy of one of such fax dated 01.03.2000 is annexed to List of Documents and is marked Annexure-3) and assured it that they would be

able to arrange the necessary funds through their Company Accused No. 11. For this purpose Accused No. 9 & 10 made various representations

to the management of the Complainant-Company that theirs" is a well-established Management Counselling Company and that their area of

expertise covers all management areas, such as financial, marketing, commercial & general Management, It was also informed that they act as

facilitators for foreign currency loans and know some established international arrangers. A true copy of their profile sent by Accused No. 9 to the

Complainant- Company's Registered Office at Kanpur under cover of letter dated 28.12.1999 is annexed to List of Documents and is marked

Annexure-4.

8. THAT Accused No. 9 & 10 assured that Accused No. 11 was a reputed Management Consultancy firm and would be in a position to arrange

the Foreign Loan. A series of meetings of the complainant-Company with the Accused No. 11 were organized by Accused No. 9 & 10 at London

and in India, ostensibly for discussing the terms of the Foreign Loan, During all such meetings, Accused No. 9 & 10 were not only present but they

also ensured that they meet Accused No. 11 in private before the Complainant-Company could have any discussion with the Accused No. 11,

Further, accused No. 9 & 10 also impressed upon the complainant-Company to get all the letters to any other Accused No. 11 first approved by

them. The Accused No. 11 also issued several letters to the Complainant-Company affirming its commitment to raising the Foreign Loan. The

Accused No. 9 & 10 through Accused No. 11 on all such occasions took huge fees and expenses from the Complainant- Company on the excuse

that they were making sure that the Accused No. 11 provides the Foreign Loan to the Complainant Company and issues necessary letters to the

company for the same. Therefore realizing the Complainant-Company's dire need for funds, the Accused No. 9 & 10 were also taking

unreasonably huge monetary benefit from the Management of the complainant-Company to obtain the Foreign Loan. Further they were also

charging hefty monthly communication cost on the pretext that they are keeping regular touch with the Accused No. 11 over telephone to take care

of all the matters related to the transaction.

These allegations have also been substantiated in the statement of Sri Atul Bagla, General Manager, J.K. Cements Ltd Company recorded u/s 200

of the Code. Making out prima facie involvement of the accused (A-9 and A-10) for the offences indicated above. However, it is argued from the

side of the learned Counsel for the accused (A-9 and A-10) that such facts are incomplete and hazy and would not be sufficient ground for

dragging them into this case. It is further said that the offences so shown against the accused (A-9 and A-10) should be clear and unambiguous and

on doubtful assertions the accused cannot be penalized. It may be mentioned that from the averments made in the complaint, documentary

evidence and the statement of the witness u/s 200 of the Code prima facie case is appearing showing the involvement of the accused applicants. It

would not be proper for this Court to analyze the case of the complainant in the light of all probabilities in order to determine whether a conviction

would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. In the proceedings instituted on

complaint exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence

or is frivolous or oppressive. Allegations set up in the complaint do construe the commission of the offences and involvement of the accused (A-9

and A-10) of which the cognizance had been taken by the learned Magistrate.

11. Much thrust has been laid by the learned Counsel for the accused (A-9 and A-10) that the role of the accused was confined to that of the

facilitators and counselors and their participation at different level would not construe offence. Whatever they were doing it was on the basis of

their engagement as facilitators. As has already been mentioned there are allegations appearing against the accused applicants. It is not necessary at

this stage to make meticulous analysis of the case. From the allegations made in the complaint and the statement of the witness on oath discloses

the ingredients of the offences indicated above and there is no material to show that the complaint as set up is malafied. Reliance may also be

placed in the case of Zandu Pharmaceutical Works Ltd. and Others Vs. Md. Sharaful Haque and Others, . Ultimately the acceptability of the

materials to fasten the culpability on the accused person is a matter of trial. It is not a case where the complaint is not disclosing any offence against

accused applicants and so no interference need be made. Reliance may also be placed in the cases of (i) R.P. Kapur Vs. The State of Punjab, and

(ii) State of Haryana and others Vs. Ch. Bhajan Lal and others,

12. It has next been urged by the learned Counsel for the accused (A-9 and A-10) that the authority of the court exists for advancement of justice

and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent such abuse. The role of the accused

(A-9 and A-10) was that of the facilitators and whatever the services they rendered it was in the capacity of their engagement for the purpose and

if the transaction failed, they cannot be held liable. Here from the allegations in the complaint about the engagement of the accused (A-9 and A-10)

as facilitators did not remain confine for the purpose but they in connivance with the other accused defrauded to the complainant as alleged. From

the allegations made in the complaint and in particular from the paragraphs referred to above, prima facie culpability of the accused (A-9 to A-11)

is appearing.

13. It has further been argued that the Chief Metropolitan Magistrate, Kanpur Nagar had no jurisdiction to entertain the complaint. Whatever the

fraud has been alleged that took place in the foreign countries and so the the learned Magistrate was not competent to take cognizance of the

offences. The jurisdiction of the court is to be determined on the basis of integral facts pleaded in support of the cause of action so as to empower

the court to decide the entire dispute or a part of it. In other words for determination of the question of jurisdiction undoubtedly the court has to

take all the facts pleaded in support of the cause of action into consideration without embarking upon any enquiry with regard to the correctness or

otherwise of such facts. From the allegations the complainant company was also misrepresented or defrauded there at Kanpur Nagar and so the

learned Addl. Chief Metropolitan Magistrate, Kanpur Nagar has jurisdiction. Even otherwise if the offence has been committed in any other

country, the offence can be inquired into and tried by any court that may be approached by the victim. In view of the arrangement u/s 188 of the

Code, the complaint may be filed in the court where the accused appears voluntarily pursuant to the process or is brought before it involuntarily in

execution of warrant. Reliance may be placed in the case of Om Hemrajani Vs. State of U.P. and Another,

14. In view of the aforesaid discussion I do not find any justified and justifiable ground to quash the proceedings of the complaint case No.

7188/05, under Sections 420, 406, 409, 120B IPC, P.S. Pheelkhana, District Kanpur Nagar pending in the court of Addl. Chief Metropolitan

Magistrate-V, Kanpur Nagar. In the result both the applications are dismissed.