

(2003) 01 AHC CK 0174**Allahabad High Court****Case No:** Criminal Misc. Application No. 4519 of 2002

Lt. Col. (Retd.) Propkar Singh and
Others

APPELLANT**Vs**

State of U.P. and Another

RESPONDENT**Date of Decision:** Jan. 27, 2003**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 420, 482

Citation: (2003) CriLJ 2734**Hon'ble Judges:** Imtiyaz Murtaza, J**Bench:** Single Bench**Advocate:** Devendra Dahma, for the Appellant; Brig. Sat Bir Singh in Person, for the Respondent**Final Decision:** Partly Allowed**Judgement****@JUDGMENTTAG-ORDER**

Imtiyaz Murtaza, J.

The present petition has been filed for quashing of the order dated 4-2-2002 passed by the Chief Judicial Magistrate, Gautam Budh Nagar in complaint case No. 5070/2000 and proceedings of corn-plaint case and also order dated 18-4-2002 passed by the Additional Sessions Judge (Fast Track Court), Gautam Budh Nagar in Criminal Revision No. 19/2002.

2. The applicants are class-AMES contractor in the name and style of M/s. Good Value Engineers. The firm is a registered partnership firm and applicants are the partners of the aforesaid firm. Opposite Party No. 2 had filed a complaint against the applicants in the Court of the Chief Judicial Magistrate, Gautam Budh Nagar, alleging therein that in September, 1997 applicants were the lowest tenderers in MES work contract No. CE(FY)/HYD/BHA/04/97-98. The said work contract was awarded to them. The applicants did not have adequate working capital to execute

the aforesaid MES work contract and they approached the opposite party No. 2 for a loan in the sum of Rs. 10.00 lacs. The opposite party No. 2 showed his inability to give such a huge amount as an unsecured loan. The accused persons/applicants then made an offer to the complainant/opposite party No. 2 to join them as a second party in the execution of the aforesaid MES contract work. The partnership between the accused persons/applicants and complainant/opposite party came in existence from 30-10-1997 by an oral agreement. The oral agreement was reduced in writing and a written agreement was entered into between the parties. It is alleged in the complaint that this agreement was denied by the accused.

3. It is further alleged in the complaint that complainant/opposite party No. 2 was not a partner in the partnership firm M/s. Good Value Engineers. The accused persons had executed a General Power of Attorney On 6-11-1997 in favour of complainant/opposite party No. 2 so as to enable him to operate the project account and deal with the government departments for the execution of the aforesaid MES work contract.

4. It is further alleged that on 4-8-1998 the accused persons revoked the aforesaid General Power of Attorney on the pretext of replacing it by a Special Power of Attorney, which was never executed.

5. It is alleged that the sole motive of the accused persons in revoking the aforesaid General Power of Attorney was to keep the complainant away from the operation of the accounts, management of the project during the second half of the execution of MES work contract. The complainant was a Project Manager and did not receive any remuneration except free accommodation, food and transport as he was sharing the profit as a partner. As per mutual agreed terms and conditions of the agreement both parties were expected to invest in the ratio of 50:50 for the execution of the aforesaid MES work contract, but complainant had made 75% of the investment and the accused persons did not invest their full share of the investment and committed a breach of trust.

6. It is further alleged in the complaint that the accused persons on one hand did not invest their full share of the investment and on the other during first half of the execution of MES work contract withdrew fraudulently a sum of Rs. 7.50 lacs as an advance for building material, which was never purchased.

7. It is further alleged in the complaint that during second half of the execution the accused persons dishonestly misappropriated huge amount by withdrawing Rs. 3497152/- through pay orders from the project account in State Bank of India Jawahar Nagar (Bhandara) and thereafter encashed the pay order in their accounts in Vijaya Bank, Noida.

8. It is further alleged that the accused persons right from the beginning wanted to cheat the complainant in a total violation of agreed terms and conditions. The accused persons avoided to invest their full share of investment and withdrew Rs.

7.50 lacs as an advance for building material, which was never purchased and subsequently accused persons revoked the General Power of Attorney of the complainant with the sole aim of taking full control of accounts and management of the project so as to withdraw fraudulently Rs. 3497152/- from the project account.

9. That in support of the complaint, complainant examined himself u/s 200 Cr.P.C. Sunil Arora and Col. Y.P. Bhatiya were examined u/s 202 Cr.P.C.

10. Learned C.J.M. through order dated 4-2-2002 summoned the petitioners u/s 420 IPC.

10. The petitioners had filed a criminal revision before the Sessions Judge and said revision was dismissed on 18-4-2002 by the Additional Sessions Judge (Fast Track), Gautam Budh Nagar. The petitioners have filed petition u/s 482 CPC for quashing of the proceedings dated 4-2-2002 passed by the Chief Judicial Magistrate and order dated 18-4-2002 passed by the Additional Sessions Judge, Gautam Budh Nagar and proceedings of complaint case No. 5070 of 2000.

11. I have heard learned counsel for the petitioners and the opposite party, in person.

12. The contention of the petitioners' counsel is that no offence u/s 420 IPC is made out on the basis of allegations of the complaint and it was essentially a civil dispute for which opposite party No. 2 had already filed a Civil Suit No. 332/2000 in the Court of Civil Judge (Sr. Division) Gautam Budha Nagar with regard to the same dispute,

13. Learned counsel for the applicants has submitted that the allegations of the complainant and the statements of complainant and the witness disclose only a civil dispute and the proper remedy for the respondents lies only in the Civil Court and the proceedings on the basis of complaint are nothing but abuse of the process of Court. He has further submitted that complainant and the statement of witness do not make out a *prima-facie* case punishable u/s 420 IPC. In support of his argument learned counsel relied upon a decision of Supreme Court in the case of *Ganga Sagar Suri v. State of U.P.* JT (2000) (SC) 360 : 2000 All LJ 496, (Para 8) wherein it has been held that:

"Jurisdiction u/s 482 of the Code has to be exercised with a great care. In exercise of its jurisdiction High Court is not to examine the matter superficially. It is to be seen if a matter which is essentially of 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."

14. Another decision relied upon by the learned counsel in support of his contention is S.W. Palanitkar and others Vs. State of Bihar and another, wherein it has been observed that (Para 23) :

"Many a times, complaints are filed u/s 200 Cr.P.C. by the parties with an oblique motive or for collateral purposes to harass, to wreck vengeance, to pressurize the accused to bring them to their own terms or to enforce the obligations arising out of breach of contract touching commercial transactions instead of approaching civil Courts with a view to realize money at the earliest. It is also to be kept in mind that when parties commit a wrongful act constituting a criminal offence satisfying necessary ingredients of an offence, they cannot be allowed to walk away with an impression that no action could be taken against them on the criminal side. A wrongful or illegal" act such as criminal breach of trust, misappropriation, cheating or defamation may give rise to action both on civil as well as on the criminal side when it is clear from the complaint and wrong statements that necessary ingredients of constituting an offence are made out. May be parties are entitled to proceed on civil side only in a given situation in the absence of an act constituting an offence but not to proceed against the accused in a criminal prosecution. Hence before issuing a process a Magistrate has to essentially keep in mind the scheme contained in the provisions of Sections 200-203 Cr.P.C. keeping in mind the position of law stated above and pass an order judiciously and not mechanically or in a routine manner."

15. Another decision cited by learned counsel is [Alpic Finance Ltd. Vs. P. Sadasivan and Another](#) :

"The facts in the present case have to be appreciated in the light of the various decisions of this Court. When somebody suffers injury to his person, property or reputation, he may have remedies both under civil and criminal law. The injury alleged may form basis of civil claim and may also constitute the ingredients of some crime punishable under criminal law. When there is dispute between the parties arising out of a transaction involving passing of valuable properties between them, the aggrieved person may have right to sue for damages or compensation and at the same time, law permits the victim to proceed against the wrongdoer for having committed an offence of criminal breach of trust or cheating. Here the main offence alleged by the appellant is that the respondents committed the offence u/s 420 IPC and the case of the appellant is that the respondents have cheated him and thereby dishonestly induced him to deliver property. To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false it must also be shown that there existed a fraudulent and dishonest intention at the time of commission of offence,"

16. Another decision relied upon by learned counsel is [Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others](#) :

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused

must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is *prima facie* committed by all or any of the accused."

17. Respondent No. 2 submitted that the allegations in the complaint and the statement u/s 200 and 202 Cr.P.C. clearly makes out an offence u/s 420 IPC. He has further submitted that in exercising the jurisdiction u/s 482 Cr.P.C. the Court would not embark upon an inquiry whether the allegations in the complaint are likely to be established by evidence or not and the proceedings against the accused in the initial stages cannot be quashed if on the facts of the complaint or the papers accompanying the same, offence is constituted. He has further submitted that as to what would be the evidence against the accused is not a matter to be considered at this stage and would have to be proved at the trial. Respondent No. 2 further submitted that the allegations in the complaint make out a criminal offence against the accused persons. He has pointed out that specific allegations have been made in the complaint and in the statements of witnesses which clearly make out an offence u/s 420 IPC. A perusal of the complaint indicates that respondent No, 2 had invested huge amount of money on the ground that accused persons did not have adequate working capital to execute the MES work contract. It is further alleged in the complaint that accused had approached the complainant for a loan in the sum of Rs. 10 lacs only. The complainant regretted his inability to give such a huge amount as an unsecured loan. The accused persons have made an offer to the complainant to join them as a second party in the execution of the MES work contract and in order to give a legal shape to the aforesaid partnership an oral agreement was reduced in writing and in lieu thereof a written agreement was entered between the accused persons and the complainant. In spite of the aforesaid instrument of the partnership being in writing the accused persons denied its existence in order to cheat the complainant of his investment. He has further mentioned in the complaint that the MES contract was awarded to the accused persons and they executed the general power of attorney in favour of the complainant so as to enable him to operate the project account and deal with the execution of the MES work contract. The said general power of attorney was revoked by the accused persons. In the complaint he has specifically mentioned that "right from the beginning accused persons wanted to cheat the complainant in a total violation of the agreed terms and conditions. The accused persons on one hand avoided to invest their full share of the investment and on the other hand they withdrew Rs. 75,0000/- as an advance

for building material which was never purchased. In his statement u/s 200 Cr.P.C. he has clearly stated that applicant No. 1 Lt. Col. Propkar Singh (Retd.) and appellant No. 3, Lt. Col. Harendra Singh (Retd.) had demanded money and they have induced him in obtaining cash for making F.D. towards security of contract work.

18. After hearing learned counsel for the parties and as regard the scope of 482 Cr.P.C. and as held by various decisions of the Supreme Court that the Jurisdiction under the inherent powers of the High Court as envisaged u/s 482 Cr.P.C. to make such orders as may be necessary to prevent abuse of the process of Court or otherwise to secure the ends of justice, has to be exercised sparingly and with circumspection. In exercising that Jurisdiction the Court: should not embark upon an inquiry whether the allegations in the complaint are likely to be established by the evidence or not, that is the function of the trial Magistrate when the evidence comes before him. The Court is called upon to exercise its jurisdiction to quash a proceedings at the stage of the Magistrate taking cognizance of an offence, the Court is guided by the allegations whether those allegations, set out in the complaint do not in law constitute or spell out any offence and that resort to criminal proceedings would amount to abuse of process of the Court or not.

19. The power of quashing a criminal proceedings should be exercised very sparingly and with circumspection and that too in the rarest of rare cases. From a perusal of the complaint and statement u/s 200 and 202 Cr.P.C. it cannot be said that no offence is at all made out on the basis of allegations. As regard the contention of the learned counsel for the applicants that the dispute between the parties is essentially of civil in nature. It has been held in the various decisions of the Supreme Court that merely because a civil claim is maintainable it does not mean that the criminal complaint cannot be maintained. In the case of Kamaladevi Agarwal Vs. State of West Bengal and Others, it was observed that the High Court was not justified in quashing the proceedings initiated by the appellant against the respondent. Criminal prosecution cannot be thwarted at the initial stage merely because civil proceedings are also pending. There is no substance in the argument that as the civil suit was pending in the High Court, the Magistrate was not justified to proceed with the criminal case either in law or on the basis of propriety. Criminal cases have to be proceeded with in accordance with the procedure as prescribed under the Code of Criminal Procedure and the pendency of a civil action in a different Court even though higher in status and authority, cannot be made a basis for quashing of the proceedings. The nature and scope of civil and criminal proceedings and the standard of proof required in both matters is different and distinct. Whereas in civil proceedings the matter can be decided on the basis of probabilities, the criminal case has to be decided by adopting the standard of proof of "beyond reasonable doubt". The revisional or inherent powers of quashing the proceedings at the initial stage should be exercised sparingly and only where the allegations made in the complaint or the F.I.R., even if taken at their face value and accepted in entirety, do not *prima facie* disclose the commission of an offence.

Disputed and controversial facts cannot be made the basis for the exercise of the jurisdiction.

20. In view of the above it cannot be said that no offence u/s 420 IPC is made out on the basis of the allegations in the complaint and statement of witnesses recorded u/s 200-202 Cr.P.C.

21. Now the question arises that out of the four accused persons who have committed the offence u/s 420 IPC. A perusal of the statement of complainant recorded u/s 200 Cr.P.C. indicates that only applicant No. 1 Lt. Col. Propkar Singh and appellant No. 3, Lt. Col. Harendra Singh had induced the complainant to invest the money and there is no specific allegations against applicant Nos. 2 and 4. Respondent No. 2 had stated that they are also partners of the Firm M/s. Good Value Engineer. Respondent No. 2 had made them accused only because they are partners of the Firm. Merely because a person is a partner in a firm, he is not liable for all the criminal acts of the managing partner unless he was aware of them or in some way has concerned with them but there is no such allegation in the complaint or in the statement u/s 200 or 202 Cr.P.C. There is no vicarious liability in the criminal law unless the statutes which takes that also within its folds. The opposite party No. 2 had also not made any allegations that they are also responsible for inducting the complainant at the initial stage for making payment of money.

22. In view of the above, the petition is partly allowed and the proceedings against applicant No. 2, Mrs. Kusum Chaudhari and applicant No. 4, Sri Raj Kumar are hereby quashed and as regard applicant No. 1, Lt. Col. Propkar Singh (Retd.) and applicant No. 3, Lt. Col. Harendra Singh (Retd.), petition is dismissed.

23. Learned counsel for the applicant has also submitted that applicant No. 1, Lt. Col. Propkar Singh and applicant No. 3, Lt. Col. Harendra Singh, are retired responsible army officers and they undertake to cooperate with the trial.

24. In view of the above it will be in the ends of justice that as applicant No. 1, Lt. Col. Propkar Singh (Retd.) and applicant No. 3, Ltd. Col. Harendra Singh (Retd.) are ready to appear before the Magistrate, the C.J.M. concerned is directed to accept their bail bonds for appearance and in case applicant No. 1, Lt. Col. Propkar Singh (Retd.) and applicant No. 3, Lt. Col. Harendra Singh. (Retd.) move an application for exemption of their personal appearance, the Magistrate shall exempt the personal appearance unless specifically required for any particular purpose.

25. In case of any non co-operation in the trial the Magistrate shall be free to take coercive steps permissible under the law for appearance of applicant No. 1, Lt. Col. Propkar Singh (Retd.) and applicant No. 3, Lt. Col. Harendra Singh (Retd.).