

(2011) 12 CAL CK 0011

Calcutta High Court

Case No: C.R.R. No. 3351 of 2009

Kallol Kumar Bysak

APPELLANT

Vs

Krishan Prakash Bhargava

RESPONDENT

Date of Decision: Dec. 1, 2011

Acts Referred:

- Companies Act, 1956 - Section 630
- Constitution of India, 1950 - Article 21
- Criminal Procedure Code, 1973 (CrPC) - Section 195, 199(1), 200, 202, 204
- Mines Act, 1952 - Section 66
- Negotiable Instruments Act, 1881 (NI) - Section 138
- Penal Code, 1860 (IPC) - Section 34, 403, 405, 406, 468

Citation: (2012) 1 CHN 482

Hon'ble Judges: Kanchan Chakraborty, J

Bench: Single Bench

Advocate: Sekhar Basu, Tapandeb Nandi, Saryati Dutta and Sujesh Mukherjee, for the Appellant; Susanta Pal for the O.P.s., for the Respondent

Final Decision: Allowed

Judgement

Kanchan Chakraborty, J.

This application u/s 482 of the code of Criminal procedure has been filed by Kalloл Kumar Bysak and Jagadish Prasad Choudhury, who are made accused in C/14918 of 2007 pending in the Court of learned Metropolitan Magistrate, 6th Court at Calcutta u/s 406/34 praying for quashing of the proceeding, mainly, on the following grounds:

- a. that the aggrieved person did not come forward to lodge the complaint personally but through his representative, the holder of power of attorney which was not placed before the Court in original and admitted into evidence;

- b. that the said representative i.e., the complainant had no personal knowledge about the official transactions of the person aggrieved and made statement on S/A before the Court without having any knowledge about the alleged offence;
- c. that the learned Court failed to appreciate that in a judicial proceeding evidence is supposed to be legal and valid evidence and a document placed before the Court is to be admitted into evidence on proof;
- d. that the prosecution was barred by limitation in view of the fact that request of Mr. Bhargava the person effected dated 7.3.2002 was turned down by the petitioners and the offence, in fact and in substance, if any, had taken place on that date when the petitioners replied him that he was not entitled to get the money deducted from his salary and deposited with the trustees of Titagarh Paper Mills. The prosecution was lunched in the year 2007. Therefore, it is barred by limitation; and
- e) that the learned Magistrate was supposed to issue process after being satisfied with the evidence, oral and written, placed before it but, in this case that was done resulting in gross miscarriage of justice;

In order to appreciate the entire matter properly, a short reference to the factual background is given below.

2. On 3.9.2007 a petition of complaint was filed by Krishan Prakash Bhargava, the opposite party herein, against the petitioner praying for their prosecution u/s 406 of I.P.C. on the ground that the petitioners failed to release his superannuation fund benefits lying with the Titagarh paper mill superannuation fund upon cessation of his employment despite several request and advocate's letter dated 7.3.2002. The petitioner No. 1 looks after the function of the trust while the petitioner No. 2 is a Managing Director of the Company. They inconnivance with each other, converted the superannuation fund benefit of the complainant and thereby committed breach of trust.

3. Mr. Bhargava personally did not come forward to file the complainant but sent another person being authorized by a power of attorney executed by him, to lodge the complaint and initiate the proceeding against the petitioner. The learned Court upon perusal of the complainant and upon examination of the complainant Maloy Bikash Mukherjee who represented Mr. Bhargava as his constituted attorney and upon perusal of the original documents, had taken cognizance of offence against the petitioners u/s 406 of IPC. The petitioners have come up with this application and prayed for quashing of the proceeding on the grounds already stated.

4. Mr. Basu, learned Counsel appearing on behalf of the petitioner contended that since the learned Magistrate did not judge authenticity of the power of attorney on the basis of which the criminal action was initiated by Maloy Bikash Mukherjee and that Maloy Bikash Mukherjee was having no personal knowledge about the alleged

function of the trust, Titagarh paper mill superannuation trust, the cognizance can not be said to have been taken by the Magistrate applying judicial mind. According to Mr. Basu, in a judicial proceeding, document which was the basis of the case, is to be admitted into evidence in order to consider the same as a piece of evidence. It has not been done in the instant case. Mr. Basu has taken this Court to the orders passed by the learned Magistrate and drew attention of the Court that no where it has been mentioned that the Court verified the power of attorney before taking cognizance.

5. Mr. Susanta Pal, learned Counsel appearing on behalf of the opposite party submitted that the orders passed by the learned Magistrate indicate clearly that the learned Magistrate asked the complainant Maloy Bikas Mukherjee to cause production of the original documents and that upon perusal of the original documents, the learned Magistrate to ok cognizance of the offence. It might be that the learned Magistrate failed to mention the nature of document filed in original but, that does not necessarily imply that the learned Magistrate did not at all perused the power of attorney.

6. I do not concede to the prosecution of Mr. Basu as well as Mr. Pal. Ordinarily any one can set the law in motion for prosecuting an offender and therefore any one can make a complainant irrespective of the question whether the offence has been committed against the complainant or whether any injury or loss is sustained by or caused to him. However, in some cases, the law restricts the right to make a complainant only in favour of specified person and where such restriction is placed, it is not open to anybody and everybody to file the complainant in respect of any such matter like attention u/s 195 Cr. PC as well as section 199(1) Cr. PC. It has been specified who would be the complainant. So in a case u/s 138 of the N.I. Act. There is no such restriction to set a criminal action into motion for an offence u/s 406 of IPC by any person. It is immaterial whether he is the person effected or not. Therefore, it is not understood why this question has been raised at the bar. It might be that Maloy Bikas Mukherjee failed to file the original power of attorney but that does not necessarily take away the right of Mr. Bhargava to lodge a complainant through him or for that matter, Maloy Bikas Mukherjee can not initiate the Criminal proceeding for an offence u/s 406 of IPC allegedly committed by the petitioner wherein Bhargava was the aggrieved person. I think that the question raised hardly calls for consider action because the learned Magistrate has taken cognizance of offence upon perusal of the contents of the petition of complainant and statement recorded on S/A.

7. The proposition that in a judicial proceeding, a document is to be admitted into evidence and marked Ex. for the purpose of fetching probative value therefrom is not in dispute. It is also true that taking cognizance of an offence and for that purpose, making enquiry u/s 200 is a judicial proceeding. But, it can not be accepted that the statement made by the complainant or his agent and his witnesses on S/A

in course of enquiry held by the learned Magistrate upon receiving of a complainant for the purpose of taking action u/s 204 of Cr. PC can possibly be said or categorized as "evidence" because, firstly, the maker of statement is not subjected to cross-examination and secondly, the trial is not commenced. The entire purpose of such an enquiry is for the satisfaction of the Magistrate whether or not to proceed u/s 204 of Cr. PC. The Magistrate may make further enquiry u/s 202 of the Cr. PC for his satisfaction. In a judicial actions, statement recorded by the Magistrate in course of such an enquiry can not be said to be evidence in ordinary sense. If Magistrate finds himself satisfied with the materials collected by him in course of enquiry, he may proceed u/s 204 Cr. PC. When trial is not commenced and the maker of statement was not subjected to cross-examination, his statement recorded by the learned Magistrate in course of a judicial enquiry can not said to be "evidence" in strict sense and it is not mandatory for Court to admit any document into evidence and marked ex. during such enquiry for ascertaining his satisfaction.

8. Mr. Basu, however, contended that the prosecution is barred by limitation. According to the petition of complainant, the complainant Mr. Bhargava sent registered letter on 7.3.2002 for releasing his superannuation fund benefit lying with the Titagarh paper mill superannuation fund but, no action was taken on behalf of the petitioners. He had taken five more years to get superannuation fund benefit and lastly, 10.5.2007 again approached the petitioners for releasing his superannuation fund benefit which has also not taken care of by the petitioners. According to Mr. Basu, offence u/s 406 IPC is not continuing offence. The cause of action in the instant case had arisen on 7.3.2002 when Mr. Bhargava sent registered letter through his advocate claiming release of his superannuation fund benefits. In view of section 468 the period of limitation in relation to an offence, it commences from the first date on which such offence comes to the knowledge of the complainant. The offence u/s 406 is punishable with imprisonment for a term not exceeding three years. Again, the limitation period of filing complainant in such a case would be three years from the first date on which commencement of offence comes to the knowledge of the complainant. In the instant case, Mr. Basu contended, the offence alleged came to the knowledge of the complainant on 7.3.2002 or soon thereafter, no prosecution was lodged against the Titagarh paper mill for releasing his superannuation fund benefits despite receiving the lawyer's letter. But, the petition of complainant was filed in the year 2007, long 5 years thereafter. The offence u/s 406 IPC not being a continuing offence by its nature. The cause of action can not arise more than once. Therefore, the learned Magistrate ought not have taken cognizance of offence as the petition of complainant was barred by limitation.

9. Mr. Basu, in support of his contention, referred to the decision of Apex Court in [State of Punjab Vs. Sarwan Singh](#), Arun Vayas & Anr. vs. Anita Vayas, (1999) C. Cr.L.R. (SC) 297 and a decision of this Court in [Dinobondhu Banerjee vs. Nandi Mukherjee](#), reported in 1993 (11) CHN 292.

10. In State of Punjab vs. Saran Singh (supra) the Hon'ble Court observed "The object of Criminal P.C. in putting a bar of limitation on prosecutions was clearly to prevent the parties from fiving cases after a long time, as a result of which material evidence may disappear and also to prevent abuse of the process of the Court by filing vexatious and belated prosecutions long after the date of the offence. The object which the statute seeks to subserve is clearly in consonance with the concept of fairness of trial as enshrined in Art. 21 of the Constitution. It is, therefore, of the utmost importance that any prosecution, whether by the State or a private complainant must abide by the letter of law or take the risk of the prosecution failing on the ground of limitation.

11. In Arun Vyas & Anr. (supra) the Hon'ble Court observed any finding recorded by a Magistrate holding that the complaint to be barred by limitation without considering the provisions of section 473, Cr. PC will be a deficient and defective finding vulnerable to challenge by the aggrieved party. In this case the complaint was clearly barred by limitation and no explanation was offered for inordinate delay, this is what the learned Magistrate took note of and concluded that the complaint was barred by limitation. This is correct insofar as the offence u/s 406 is concerned.

12. Therefore the issue as to whether in a appropriate case, Court can dismiss a prosecution u/s 406 of IPC being barred by limitation is no longer res integra.

13. In Dinabandhu Banerjee (supra) this Court held the Hon'ble Single Judge of this Court observed

i) The next question is whether the offence of dishonest misappropriation or for that matter, criminal breach of trust in respect of which the complaint against the accused persons has been filed in this case is a continuing offence, because in case the offence is a continuing offence a fresh period of limitation begins to run at every moment of the time during which the offence continues as provided in section 472 Cr. PC. In this connection the learned Advocate for the opposite party relied upon the decision of the Suprme Court in [State of Bihar Vs. Deokaran Nenshi and Another](#), Paragraph - 5 of the said decision runs thus :-

A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involved a penalty, the liability for which continues until the rules or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance, of the offence which is absent in the case of an offence which takes

place when an act or omission is committed once and for all.

In the said case the question arose whether the failure to furnish annual return for the preceding year by the prescribed date namely, the 21st of January is a continuing offence or not u/s 66 of the Mines Act read with Regulation. 3. The Supreme Court held that the infringement consists in the failure to furnish return on or before the 21st January and the infringement, therefore, occurs on 21st January of the relevant year and is complete on the owner failing to furnish the annual return by that date. Accordingly the Supreme Court held that the said offence was not a continuing offence. It was however clarified by the Supreme Court in the later decision of [Bhagirath Kanoria and Others Vs. State of M. P.](#), that the decision in State of Bihar vs. Deokaran Nenshi (supra) to the effect that failure to furnish return before the due date is not a continuing offence unable u/s must be confined to cases of failure to furnish return and it cannot be ex-appropriate" intended to cases where the contravention is not of a procedural or formal nature and goes against the very grain of the statute under consideration of the word. The question involved in the case of Bhagirath Kanoria vs. State of M.P. to take to one (supra) was whether non-payment of contribution to the provident Fund use will not within the prescribed date in compliance with the provisions of the marks the employee's provident Fund and Family pension Act, 1952 and the scheme control framed thereunder constituted a continuing offence. The Supreme Court it is this trans after considering some English and Indian decisions on the point held that converts the such offence constituted a continuing offence. The Supreme Court in paragraph - 19 in Bhagirath Kanoria (supra) observed thus :

The question whether a particular offence is a continuing offence must necessarily depend upon the language of the statute which creates that offence, the nature of the offence and above all the purpose which is intended to be achieved by constituting the particular act as an offence. The appellants were unquestionably liable to pay their contribution to the Provided Fund before the due date and it was within their power to pay it as soon after the due date had expired as they willed. The late payment could not have absolved them of their original guilt but it would snapped the recurrence. Each day that they failed to comply with the obligation to pay their contribution to the fund, they committed a fresh offence. Such offences must be regarded as continuing offences, to which the law of limitation cannot apply.

ii) The subsequent Supreme Court decision in [Gokak Patel Volkart Ltd. Vs. Dundayya Gurushiddaiah Hiremath and Others](#), also took note of the fact that State of Bihar vs. Deokaran Nenshi (supra) was explained by the Supreme Court in Bhagirath Kanoria vs. State of M.P. (supra). The Supreme Court in G. Patel Volcart Ltd. (supra) held that an offence u/s 630 of the Companies Act was a continuing offence. u/s 630 of the Companies Act it is an offence to wrongfully obtain possession of any property of company and it also an offence to wrongfully withhold it or to knowingly

apply it to purposes other than the authorised purposes. It is therefore evident that the very language of the Act makes the offence a continuing one, and the Supreme Court in the said decision also observed that the offence continues until the property wrongfully obtained wrongfully withheld or knowingly misappropriated is delivered up or refunded to the company. It was accordingly held that the offence u/s 630 of the Companies Act was a continuing offence.

iii) Now let us look to the language of the relevant parts of section 403 and section 405 of the Indian Penal Code for ascertaining whether the offence of dishonest misappropriation or for that matter, criminal breach of trust a continuing offence. Dishonest misappropriation or conversion to one own use is the crux of the offence of dishonest misappropriation punishable u/s 403 IPC. Now, the dictionary meaning of the word "misappropriate" is to put to awrong use; to take dishonestly for oneself (vide, Chambers Twentieth Century Dictionary). The dictionary meaning of the word "a"ppropriate" "s to make to be the private property of anyone, to take to oneself as one"s"own (ibid). It is thus evident that every wrong use will not necessarily be misappropriation. Misappropriation rather marks the point where the transition takes place from non-offending posession, control or use to offending or dishonest possession, control or use. It is this transitional phenomenon, that is, the process of transformation is complete and dishonest misappropriation takes place the subsequent wrong user of the property or the continuance of such wrong user is not a part of the phenomenon of misappropriation although such continuance of user or repetition of suer or continuance of wrong user or retention of the property wrongfully will not be a continuance or repetition of the offence of dishonest misappropriation as defined in section 403. The same feature of transitional phenomenon of converting the complexion of the possession or user marks the precipitation and completion of the offence of criminal breach of trust as defined in section 405. By definition the offence of dishonest misappropriation or for that matter, criminal breach of trust must be tainted at the point of its commission by a process of transformation, by a transitional phenomenon converting the complexion of the possession, user or dealing of the property and once that transitional phenomenon is over and the conversion is complete by answering at that moment the definition of dishonest misappropriation or criminal breach of trust as contained in the relevant section of the Indian Penal Code, the subsequent continuance of the possession, user or dealing of the property even if it is morally wrong and legally untenable will be lacking the transitional factor of contemporaneous conversion of the complexion of the user from one type to a different type and therefore it cannot be said that the subsequent user is a continuing offence of the same type which was initially committed in changing the complexion of user. In order to constitute a continuing offence the acts complained of must at every moment of continuance reflect all the ingredients necessary for constituting the offence. As we have seen conversion or transitional phenomenon of complexional change of the user being one of the salient ingredients of the offence

of dishonest misappropriation or for that matter, criminal breach of trust, such transitional phenomenon obviously cannot recur or endure after the conversion or change of complexion of the user is complete. In the circumstances it can not be said that retention or subsequent dealing of the misappropriated property, although wrong, will constitute any such offence as stated above because the definition of such offence does not make such wrongful subsequent use a continued part or a repetition of the offence. I have therefore no hesitation to hold that the offence of dishonest misappropriation defined in section 403 or the offence of Criminal breach of trust defined in section 405 IPC is not a continuing offence because such offence, by definition, takes place where an act is committed once and for all.

14. At this juncture, it would be expedient to turn to the averments of the petition of complainant by which the Criminal prosecution in question was set in motion. The paragraph 5 of the petition unequivocally shows that the complainant Mr. Bhargava had to send a registered letter through his advocate on 7.3.2002 to the trustees, the Titagarh paper mill to release his superannuation fund benefits which he was entitled to but not given upon his retirement from the service which was supposed to take place on 6.2.1987. However, Mr. Bhargava was terminated from the service prior to that. Therefore, it can well be understood that Mr. Bhargava after his termination wrongful or legal, made all efforts for superannuation fund benefits. So, on his failure he had to serve a lawyer's notice on 7.3.2002 to the trustees for releasing that benefit. That no response was received by him from the trustees of the Titagarh paper mill within a reasonable period of time. He sat over the matter for five more years then again renewed his claim by filing another registered letter on 10.5.2007. That letter was not also answered by the trustees. Mr. Bhargava thereafter lodged the complaint.

15. Undoubtedly, under the background of facts and circumstances disclosed in the petition of complainant and inaction on the part of the trustees upon the registered letter dated 7.3.2002 had given rise to the cause of action in favour of the Bhargava for initiating a criminal prosecution u/s 406 of IPC against the trustees. But he sat over the matter till 2007 and in fact, he tried to renew his cause of action by sending another letter in the year 2007. The legal principle relating to a continuing offence has been thoroughly discussed by this Court in *Dino Bandhu Banerjee* (supra). Offence under 406 can not be said to be a continuing offence and cause of action arises for such kind of offence. The petition of complaint was filed long after expiry of three years from 7.3.2002. The cause of action which was barred by a limitation can not be renewed by the complainant by sending another letter in the year 2007 and thereby to protect his case. Period of limitation to file the prosecution started on and from 7.3.2002 for the offence 406 IPC because the alleged offence of breach of trust was complete on 7.3.2002 or soon thereafter. The bar u/s 468 read with section 469 of the Code of Criminal Procedure can not be defeated in the manner the complaint acted. It has already been found he sat over the matter for long five

years and knocking at the doors of different Courts for different reliefs for the same issue. He even approached this Court and City Civil Court. Obviously he had that right but that does not necessarily imply that the provisions of limitation as envisaged u/s 468 and 469 of the Cr. PC can not be made applicable for his non-action during this long five years in the matter of initiating criminal proceeding for the offence which committed a completed on 7.3.2002 or soon thereafter.

16. The learned Magistrate had taken cognizance of the offence which was barred by limitation. In State of Haryana and others Vs. Ch. Bhajan Lal and others, the Hon'ble Court while setting out or formulating the exhaustive list of myriad kinds of cases wherein High Court can exercise its extraordinary power u/s 482 of the Code of Criminal procedure for the purpose of quashing a proceeding, *inter alia*, held that where there is an express legal bar engrafted in any of the provision of the Court or the concerned act (under which a Criminal proceeding is instituted) to the institution and continuance of the proceeding and/or where there is a specific provision in the code or the concerned act, providing efficacious redress for the grievances of the aggrieved party, Court can quash a proceeding by exercising its power u/s 482 of the Code of Criminal Procedure.

17. It is found that the learned Court has taken cognizance of an offence which is expressly barred by limitation in view of section 468 of the Code of Criminal Procedure and therefore continuance of such a proceeding should not be allowed. Accordingly I quash the proceeding since cognizance of the offence taken by the Magistrate against the petitioner beyond the period of limitation. The revision application is, thus, allowed and disposed of without any order of costs.