

## **S.W. Palanitkar And Ors vs State Of Bihar And Anr on 18 October, 2001**

**Equivalent citations: AIR 2001 SUPREME COURT 2960, 2002 (1) SCC 241, 2001 AIR SCW 4435, 2001 AIR - JHAR. H. C. R. 547, 2001 (7) SCALE 430, (2001) 9 JT 151 (SC), 2002 SCC(CRI) 129, 2002 (1) ARBI LR 353, 2001 CRILR(SC&MP) 751, 2001 (9) JT 151, 2001 CRILR(SC MAH GUJ) 751, 2002 (1) BLJR 119, (2002) 2 ALLCRIR 1992, (2002) 1 UC 65, (2001) 4 ALLCRILR 657, 2002 CHANDLR(CIV&CRI) 196, (2002) 1 UC 67, (2002) 2 ALLCRIR 1991, (2001) 43 ALLCRIC 1128, (2002) 1 EASTCRIC 11, (2002) 1 PAT LJR 247, (2002) 1 RAJ CRI C 236, (2001) 4 RECCRIR 572, (2001) 4 CURCRIR 204, (2002) 1 ARBILR 353, (2001) 8 SUPREME 216, (2002) 1 ALLCRIR 219, (2001) 7 SCALE 430, (2002) 44 ALLCRIC 168, (2002) 1 BLJ 587, (2002) 1 CRIMES 146**

**Bench: D.P. Mohapatra, Shivaraj V. Patil**

CASE NO.:

Appeal (crl.) 1072 of 2001

PETITIONER:

S.W. PALANITKAR AND ORS.

RESPONDENT:

STATE OF BIHAR AND ANR.

DATE OF JUDGMENT: 18/10/2001

BENCH:

D.P. MOHAPATRA & SHIVARAJ V. PATIL

JUDGMENT:

JUDGMENT 2001 ( 4 ) Suppl. SCR 397 The Judgment of the Court was delivered by SHIVARAJ V. PAUL, J.

Leave granted.

This appeal is by the accused in Complaint Case No. 1388 of 1997 in the Court of Chief Judicial Magistrate, Patna, aggrieved by the order dated 20.12.2000 passed by the High Court of Patna in Criminal Misc. No. 6232 of 1998.

In brief the facts to the extent relevant and necessary for disposal of this appeal are as under :-

There was an agreement dated 21.2.1995 between the appellant No. 1 (the company) and the respondent no. 2 under which he was appointed as a consignment stockist of the company subject to certain terms and conditions.

The said agreement was valid till 20.2.1996. By a subsequent agreement dated S.S.1997 the same arrangement was extended up to 31.3.1997 on the same terms and conditions. On 3.10.1997 respondent No. 2 (complainant) served a notice on the Manager Marketing and Regional Manager of the company requesting them to make payment of Rs. 15.00 lacs to it within 15 days or in the alternative refer the disputes and differences to arbitration as per clause 29 of the agreement. Thereafter the parties met and the company offered to supply Ammonium Sulphate to the respondent for the period 1997-98 on certain terms. The respondent rejected the offer finding the terms unreasonable. It is thereafter the respondent filed a complaint on 8.12.1997 alleging offences under sections 406 and 420 read with Section 120B of the Indian Penal Code (IPC) inter alia stating "that the accused persons in collusion and connivance of each other with wrongful objects and motive to wrongfully squeeze money/ gratification from the complainant and in their own benefit used the complain-ant wrongly and have cheated the complainant by practising fraud and have acted fraudulently against the complainant and by doing such acts they have committed criminal breach of trust and put the complainant to wrongful loss and have gained wrongfully. The accused persons have also cheated the com-plainant by using the office and godown premises of the complainant on the basis of false assurances given to the complainant and without making any farthing for such costly and valuable premises and thus committed criminal breach of trust, fraud and cheating which caused loss of rupees fifteen lacs".

The learned Chief Judicial Magistrate, Patna by his order dated 6.1.1998 issued summons against the appellants. The appellants approached the High Court by filing a petition under Section 482 Cr.P.C. for quashing the aforementioned order of the learned Magistrate. The High Court by the impugned order dismissed the said petition. In these circumstances the appellants are before this Court in appeal.

Shri Dushyant Dave, learned Senior Counsel for the appellants urged that the High Court failed to exercise its power under Section 482 Cr.P.C. having regard to the facts and circumstances of the case in order to prevent abuse of process of the court and/or to secure the ends of justice; that the disputes between the appellants and respondent no. 2 were purely of civil nature arising out of contractual relationship relating to commercial transac-tion; even looking to the sworn statements, terms of the agreement and the notice dated 3.10.1997, no case is made out to proceed against the appellants on criminal side, that the essential ingredient of the offence under Section 405 IPC is not made out as the appellants were not entrusted with any property or with domain over property; similarly the ingredients of the offence under Section 415 & 120-B IPC also were not satisfied. According to him, the learned Magistrate committed a serious error in issuing the process; unfortunately, the High Court, also

failed to correct the same, exercising jurisdiction under Section 482 of the Cr.P.C. Alternatively and lastly, he submitted that at any rate no case is made out against the appellants 1-6 and 8. Hence, issuing a process against them is patently illegal and untenable. Shri L.K. Bajla, learned counsel for respondent No. 2 made submissions supporting the impugned judgment of the High Court and justifying the order passed by the learned Magistrate in issuing the process. More or less, he reiterated the submissions that were made before the High Court.

Before examining respective contentions on their relative merits, we think it is appropriate to notice the legal position. Every breach of trust may not result in a penal offence of criminal breach of trust unless there is evidence of a mental act of fraudulent misappropriation. An act of breach of trust involves a civil wrong in respect of which the person wronged may seek his redress for damages in a civil court but a breach of trust with mens rea gives rise to a criminal prosecution as well.

The ingredients in order to constitute a criminal breach of trust are: (1) entrusting a person with property or with any dominion over property (ii) that person entrusted (a) dishonestly misappropriating or converting that property to his own use; or (b) dishonestly using or disposing of that property or willfully suffering any other person so to do in violation (i) of any direction of law prescribing the mode in which such trust is to be discharged (ii) of any legal contract made touching the discharge of such trust.

The ingredients of the offence of cheating are: (i) there should be fraudulent or dishonest inducement of a person by deceiving him, (ii) (a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or (b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) in cases covered by (ii) (b), the act of omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property.

One of us (D.P. Mohapatra J.) speaking for the Bench, in *Hridaya Ranjan Prasad Verma & Ors. v. State of Bihar & Anr*, [2000] 4 SCC 168, on facts of that case, has expressed thus :

"In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention

which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

[emphasis supplied] Finding that ingredients of the offence of cheating and its allied offences had not been made out, this Court interfered with the order of the High Court and quashed the criminal proceedings.

In G.V. Rao v. L.H.V. Prasad & Ors., [2000] 3 SCC 693, this Court in para 7 has stated thus :-

"As mentioned above, Section 415 has two parts. While in the first part, the person must "dishonestly" or "fraudulently" induce the complainant to deliver any property; in the second part; the person should intentionally induce the complainant to do or omit to do a thing. That is to say, in the first part, inducement must be dishonest or fraudulent. In the second part, the inducement should be intentional. As observed by this Court in *Jaswantrao Manilal Akhaney v. State of Bombay*, AIR (1956) SC 575 a guilty intention is an essential ingredient of the offence of cheating. In order, therefore, to secure conviction of a person for the offence of cheating, "mens rea" on the part of that person, must be established. It was also observed in *Mahadeo Prasad v. State of W.B.*, AIR (1954) SC 724 that in order to constitute the offence of cheating, the intention to deceive should be in existence at the time when the inducement was offered"

[emphasis supplied] In *Irisuns Chemical Industry v. Rajesh Agarwal & Ors.*, [1999] 8 SCC 686 dealing with the effect of existence of arbitration clause in the agreement on criminal prosecution on the ground that civil proceedings are also maintainable, this Court has held that quashing of F.I.R. or a complaint exercising power under Section 482 Cr.P.C. should be limited to a very extreme exception; merely because an act has a civil profile is not enough to stop action on the criminal side. It is further held that a provision made in the agreement for referring the disputes to arbitration is not an effective substitute for a criminal prosecution when the disputed act constitutes a criminal offence.

In case of a complaint under Section 200 Cr.P.C. or IPC a Magistrate can take cognizance of the offence made out and then has to examine the complainant and his witnesses; if any, to ascertain whether a prima facie case is made out against the accused to issue process so that the issue of process is prevented on a complaint which is either false or vexatious or intended only to harass. Such examination is provided in order to find out whether there is or not sufficient ground for proceeding. The words 'sufficient ground', used under Section 203 have to be construed to mean the satisfaction that a prima facie case is made out against the accused and not sufficient ground for the purpose of conviction.

This Court in *Nirmaljit Singh Hoon v. The State of West Bengal & Anr.*, [1973] 3 SCC 753, in para 22, referring to scheme of Sections 200-203 of Cr. P.C. has explained that "The section does not say that a regular trial of adjudging truth or otherwise of the person complained against should take place at that stage, for, such a person can be called upon to answer the accusation made against him only when a process has been issued and he is on trial. Section 203 consists of two parts. The first part lays down the materials which the Magistrate must consider, and the second part says that if after considering those materials there is in his judgment no sufficient ground for proceeding, he may dismiss the complaint. In *Chandra Deo Singh v. Prakash Chandra Base*, [1964] 1 SCR 639, where dismissal of a complaint by the Magistrate at the stage of Section 202 inquiry was set aside, this Court laid down that the test was whether there was sufficient ground for proceeding and not whether there was sufficient ground for conviction, and observed (p. 653) that where there was prima facie evidence, even though the person charged of an offence in the complaint might have a defence, the matter had to be left to be decided by the appropriate forum at the appropriate stage and issue of a process could not be refused. Unless, therefore, the Magistrate finds that the evidence led before him is self-contradictory, or intrinsically untrustworthy, process cannot be refused if that evidence makes out a prima facie case" In *Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi & Ors.*, [1976] 3 SCC 736 this Court dealing with the scope of inquiry under Section 202 has stated that it is extremely limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint (a) on the materials placed by the complainant before the court; (b) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; (c) for deciding the question purely from the point of view of the complainant without at all advert to any defence that the accused may have. It is also indicated by way of illustration in which cases an order of the Magistrate issuing process can be quashed on such case being "where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused".

Cautioning against issuing of process so that it should not be an instrument in the hands of the private complainant as vendetta to harass the person needlessly, this Court in *Punjab National Bank & Ors. v. Surendra Prasad Sinha*, [1993] Supp. (1) SCC 499 has this to say in para 6 :-

"It is also salutary to note that judicial process should not be an instrument of oppression or needless harassment. The complaint was laid impleading the Chairman, the Managing Director of the Bank by name and a host of officers. There lies responsibility and duty on the magistracy to find whether the concerned accused should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued. At that stage the court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance. Considered from any angle we find that the respondent

had abused the process and laid complaint "against the appellants without any prima facie case to harass them from vendetta." Similarly in *Madhavrao Jiwajirao Scindia & Ors. v. Sambhajirao Chandrojirao Angre & Ors.*, [1988] 1 SCC 692, this Court has stated that "The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilized for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

Turning to the facts of the case, there is nothing either in the complaint and/or in the sworn statements of the complainant and the three witnesses that any property was entrusted to any of the appellants at all or the appellants had domain over any of the properties of respondent no. 2 which they dishonestly converted to their own use so as to satisfy the ingredients of Section 405 IPC punishable under Section 406 IPC. Further the agreement also did not require entrustment of any property to the appellants. Taking the complaint and the statements of the witnesses as they are, it cannot be said even prima facie, that the appellants committed any offence punishable under Section 406 IPC, since the ingredients of that offence were not satisfied. Hence the learned Magistrate committed a serious error in issuing process against the appellants for the said offence. Unfortunately, the High Court also failed to correct this manifest error. It is clear from the allegations made in the complaint and the sworn statements that the appellant no. 1 company entered into an agreement with the respondent no. 2 on certain terms and conditions. It is alleged that the appellant no. 7 went to Patna and contracted respondent no. 2 and induced him to enter into an agreement assuring him of huge profit. At the time of arriving at such an agreement, none of the other appellants either met the respondent no. 2 or induced him to enter into any agreement with a view to cheat him. The agreement was further renewed for a period of one year. It is not the case that there was no supply of goods at all as it has come on record that there was supply of 400 ton of fertilizer, may be it was far less than the required quantity. The allegations made against the appellants other than the appellant no. 7 are very vague and bald. From the material that was placed before the Magistrate, even prima facie, it cannot be said that there was conspiracy or connivance between the other appellants and the appellant No. 7. If the appellants have committed breach of agreement, it is open to respondent no. 2 to seek redressal in a competent court or forum to recover damages, if permissible in law in case he had sustained any loss. In order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be pre-sumed as an act leading to cheating.

Looking to the complaint and the grievances made by the complainant therein and having regard to the agreement, it is clear that the dispute and grievances arise out of the said agreement. Clause 29 of the agreement provides for reference to arbitration in case of disputes or controversy between the parties and the said clause is wide enough to cover almost all sorts of disputes arising out of the agreement. As a matter of fact, it is also brought to our notice that the complainant issued a notice dated 3.10.1997 to the appellants invoking this arbitration clause claiming Rs.

15. lacs. It is thereafter the present complaint was filed. For the alleged breach of the agreement in relation to commercial transaction, it is open to the respondent no. 2 to proceed against the appellants for his redressal for recovery of money by way of damages for the loss caused, if any. Merely because there is an arbitration clause in the agreement, that cannot prevent criminal prosecution against the accused if an act constituting a criminal offence is made out even *prima facie*.

Many a times, complaints are filed under Section 200 Cr.P.C. by the parties with an oblique motive or for collateral purposes to harass, to wreck vengeance, 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 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 criminal side when it is clear from the complaint and sworn 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 Section 200-203 of Cr.P.C. keeping in mind the position of law stated above and pass an order judiciously and not mechanically or in routine manner.

The learned Magistrate, in our view, having regard to the facts stated and the legal position explained above, committed a serious error in issuing the process against the appellants 1 to 6 and 8 for offences under Sections 406, 420 and 120-B IPC when the acts alleged against them did not constitute these offences satisfying their ingredients even *prima facie*. In the light of the material brought on record at that stage process could have been issued only as against the appellant no. 7 that too for an offence under Section 420 IPC only.

The High Court dismissed the petition filed under Section 482 Cr.P.C. by the impugned order placing reliance, in particular, on two decisions of this Court, one *Trisuns Chemical Industry (supra)* and *Medchi Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. & Ors.*, [2000] 3 SCC 269. In the first case, this Court held that the exercise of inherent power should be limited to very extreme exceptions. Further it was held that referring the disputes to arbitration is not an effective substitute for a criminal prosecution when the disputed act is an offence. It may be noted that the said judgment gets attracted only when the disputed act is an offence, which the High Court has filed to

notice. No doubt, exercise of inherent power under Section 482 Cr.P.C. by High Court should be limited to very extreme exceptions but in a case where ingredients of alleged offences are not satisfied even prima facie, it cannot be said that power under Section 482 Cr.P.C. should not be exercised to quash the process issued by a Magistrate. In the case of Smt. Nagawwa (supra), it is laid down that in such a case, power under section 482 Cr.P.C. can be exercised to quash the process issued by a Magistrate.

In the second case also, this Court has expressed that "exercise of jurisdiction under the inherent power as envisaged under Section 482 Cr.P.C. to have the complaint or the charge-sheet quashed is an exception rather than a rule and the case for quashing at the initial stage must have to be treated as rarest of rare so as not to scuttle the prosecution.....In the event, however, the court on perusal of the complaint comes to a conclusion that the allegations leveled in the complaint or charge-sheet on the face of it does not constitute or disclose any offence as alleged, there ought not to be any hesi-tation to rise up to the expectation of the people and deal with the situation as is required under the law." Even from this case also, it is clear that if no offence is made out from the allegations made in the complaint, there should be no hesitation in exercising power under Section 482 Cr.P.C. to pass appropriate order.

In the case on hand, we have already stated above that except against the appellant no. 7, no offence was made out against the remaining appellants as the ingredients of offences alleged against them were not satisfied. Unfortu-nately, the High Court failed to exercise jurisdiction under Section 482 Cr.P.C. to correct manifest error committed by the learned Magistrate in issuing proc-ess against the appellants 1-6 and 8 when the alleged acts against them did not constitute offences for want of satisfying the ingredients of the offences. The approach and considerations while exercising power and jurisdiction by a Magistrate at the time of issuing process are to be in terms of Sections 200 to 203 under Chapter XV of Cr.P.C., having due regard to the position of law explained in various decisions of this Court, and whereas while exercising power under Section 482 of Cr.P.C. the High Court has to look at the object and purpose for which such power is conferred on it under the said provision. Exercise of inherent power is available to the High Court to give effect to any order under the Cr.P.C., or to prevent about of the process of any court or otherwise to secure the ends of justice. This being the position, exercise of power under Section 482 Cr.P.C. should be consistent with the scope and ambit of the same in the light of the decisions aforementioned. In appropriate cases, to prevent judicial process from being an instrument of oppression or harass-ment in the hands of frustrated or vindictive litigants, exercise of inherent power is not only desirable but necessary also, so that the judicial forum of court may not be allowed to be utilized for any oblique motive. When a person approaches the High Court under Section 482 Cr.P.C. to quash the very issue of process, the High Court on the facts and circumstances of a case has to exercise the powers with circumspection as stated above to really serve the purpose and object for which they are conferred.

Thus having regard to facts and circumstances stated and discussion made above, the issue of process against appellant nos. 1-6 and 8 is set aside and the process issued against appellant no. 7 namely, Amrit Lal Desai @ A.B. Desai for offences under Sections 406 and 120-B is also set aside. However, the issue of process against him under Section 420 IPC is maintained. The order of the learned Magistrate and the impugned order are modified to this extent. Thus, this appeal is partly



allowed and stands disposed of in the above terms.