

THE HIGH COURT OF SIKKIM: GANGTOK
(Criminal Jurisdiction)

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. M.C. No.05 of 2019

1. Mr. Mohamed Yusufuddin Ahmed,
S/o Late Mohamed Sharfuddin Ahmed,
R/o No.79,
Mariamman Koil Street,
Pondicherry – 605 009.
2. Mrs. Ifroze Faizia Ahmed,
W/o Shri Mohamed Yusufuddin Ahmed,
S/o Late M. S. Ahmed,
R/o No. 79,
Mariamman Koil Street,
Pondicherry – 605 009.
3. M/s Pristine Life Science,
Represented by its Proprietor,
Mr. Mohamed Yusufuddin Ahmed,
S/o Late Mohamed Sharfuddin Ahmed,
R/o No.79,
Mariamman Koil Street,
Pondicherry – 605 009.
4. M/s Jun Sui Pharma,
Represented by its Partners,
Mr. Mohamed Yusufuddin Ahmed,
S/o Late Mohamed Sharfuddin Ahmed.

.... Petitioners

Versus

Mrs. Ruth Karthak Lepchani,
W/o Shri A. Halim,
Through her Constituted Attorney,
Shri A. Halim,
R/o Chisopani Block,
Opposite Bhanu Park,
N. H. 10 Singtam, East Sikkim.

.... Respondent

**Application under Section 482 of the
Code of Criminal Procedure, 1973.**

Appearance:

Mr. A. Thameem Mohideen and Ms. A. B. Reehana Begum,
Advocates for the Petitioners.

Mr. S. S. Hamal, Legal Aid Counsel for the Respondent
No.1.

Mr. S. K. Chettri, Assistant Public Prosecutor for the
Respondent No.2.

Date of hearing : 02.12.2019

Date of judgment : 07.12.2019

J U D G M E N T

Bhaskar Raj Pradhan, J

1. The petitioners seeks to invoke the inherent powers of this Court under Section 482 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') for quashing Private Complaint Case No.43 of 2018 (for short 'the complaint') pending before the learned Judicial Magistrate, First Class, Gangtok, East Sikkim (for short 'the learned Magistrate') for the offences under Sections 405, 420 read with 120 B, 441 read with 120 B of the Indian Penal Code, 1860 (for short 'the IPC') and also for quashing the warrants against the petitioners.

2. The petition was initially filed by Mohammed Yusufuddin Ahmed (petitioner no.1) and Ifroze Faizia Ahmed

(petitioner no. 2) who were accused nos. 2 and 4 in the complaint. On 30.11.2019 I.A. No. 04 of 2019 was allowed by this Court and M/s Pristine Life Sciences and M/s Jun Sui Pharma who were accused nos.1 and 3 in the complaint, were added as petitioner nos.3 and 4.

3. Heard Mr. A. Thameem Mohiden, learned Counsel for the petitioners, Mr. S.S. Hamal, learned Counsel for the respondent no.1 and Mr. S. K. Chettri, learned Assistant Public Prosecutor for the respondent no.2.

4. Mr. A. Thameem Mohiden submitted that the complaint does not make out any criminal liability and it is an abuse of the process of Court. He took this Court through the pleadings in the complaint and the evidence led before the learned Magistrate to demonstrate that none of the ingredients of the offences alleged has been made out. He also pointed out the order dated 18.12.2018, 23.02.2019 and 02.05.2019 passed by the learned Magistrate and submitted that the learned Magistrate has failed to apply her mind before issuing process under Section 204 Cr.P.C.

5. Mr. S. S. Hamal on the other hand submitted that the complaint read with the documents and the evidence make out the offences as alleged in the complaint. He particularly drew

the attention of this Court to the documents filed by the respondent no.1 along with the complaint to emphasize that the alleged offences were committed.

6. The law is well settled on the ambit and scope of Section 482 Cr.P.C. If the complaint does not disclose any offence or if it is frivolous, vexatious, or oppressive inherent power may be exercised. The power should be sparingly exercised to ensure that the process of the court is not abused. This Court is not to embark upon an enquiry on the probability, reliability or the genuineness of the allegations made in the complaint. At this stage meticulous analysis of the case should not be done to find out whether the case would end in conviction or acquittal. If it appears on a reading of the complaint and the statement made on oath that the ingredients of the offence are disclosed, there would be no justification for this Court to interfere¹.

7. The complaint was filed on 18.12.2018. The respondent no.1 was examined by the learned Magistrate on the same day. On 23.02.2019 cognizance was taken and summonses issued against the petitioners. On 02.05.2019 non-bailable warrants of arrest were also issued against the petitioners.

¹ *Binod Kumar v. The State of Bihar*: (2014) 10 SCC 663; *Sau. Kamal Shivaji Pokarnekar v. State of Maharashtra & Ors*: AIR 2019 SC 847.

8. As the petitioners have challenged not only the complaint but the issuance of process by the learned Magistrate under Section 204 Cr.P.C it is important to appreciate the mandate of the law pertaining to it.

9. Chapter XV of the Cr.P.C. deals with complaints to Magistrates. Section 200 relates to the examination of the complainant. Section 201 deals with procedure by Magistrate not competent to take cognizance of the case. Section 202 deals with postponement of issue of process. Section 203 deals with dismissal of complaint. The issue of process under Section 204 falls under Chapter XVI of Cr.P.C.

10. Section 202 provides that any Magistrate on receipt of the complaint of an offence in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either enquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

11. The addresses provided in the complaint by the respondent no.1 reflects that all the petitioners were from

Pondicherry and therefore, residing at a place beyond the area in which the learned Magistrate exercised her jurisdiction.

12. In re: *Birla Corporation Limited v. Adventz Investments and Holdings Limited & Ors.*² the Supreme Court held that under the amended sub-section (1) to section 202 Cr.P.C., it is obligatory upon the Magistrate that before summoning the accused residing beyond its jurisdiction, he shall inquire into the case himself or direct the investigation to be made by a police officer or by such other person as he thinks fit for finding out whether or not there is sufficient ground for proceeding against the accused. The Supreme Court also held that the order of the Magistrate must reflect that he has applied his mind to the facts of the case and the law applicable thereto. It was also held that the application of mind has to be indicated by disclosure of mind on the satisfaction and considering the duties of the magistrates for issuance of summons to accused in a complaint case there must be sufficient indication of it. The Supreme Court after referring to a catena of its previous judgments held that summons may be issued if the allegations in the complaint, the complainant statement and other materials would show that there are sufficient grounds for proceeding against the accused.

² 2019 SCC OnLine SC 682

13. The records however, does not reveal that the learned Magistrate had complied with the provisions of Section 202 Cr.P.C. and applied her mind to the facts of the case and the law applicable thereto. The order dated 23.02.2019 states that “*cognizance of the matter is taken against accused no.1, 2, 3 and 4.*” Section 190 Cr.P.C. deals with cognizance of offence by Magistrate. The said provision provides that the learned Magistrate “*may take cognizance of any offence.*” It is settled law that cognizance is taken of the offence and not the offender³. The learned Magistrate has not even mentioned which of the offences she had taken cognizance of. It is thus held that the learned Magistrate has failed to exercise her discretion to issue summons against the petitioners residing beyond her territorial jurisdiction in the manner required.

14. The respondent no.1 has given the details of the rental/lease agreement between her and the petitioners for the period 2006 till the filing of the complaint and the various negotiations and their outcome. The respondent no.1 has also complained about the failure of the petitioners to follow up their commitments with regard to the rental/lease agreements. The respondent no.1 has complained about how the petitioners have allegedly misused her property; not paid the rents on time and

³ SWIL Ltd v. State of Delhi: (2001) 6 SCC 670

therefore were liable for payment of interest; constructed illegal structures; installed heavy machinery; dismantled the premises with a promise to return it in the original condition but left it in inhabitable condition and failed to renew the agreements or register them.

15. The respondent no.1 has also given her evidence on affidavit of the constituted attorney and exhibited the various documents filed along with the complaint. The evidence on affidavit also reiterates the averments and allegations made in the complaint. The evidence on affidavit was thereafter, confirmed by the respondent no.1 through her constituted attorney on 18.12.2018.

16. The respondent no.1 had alleged commission of offence under Sections 405, 420, 441 read with 120B IPC in the complaint.

17. This Court shall now endeavor to examine whether the allegations made in the complaint and the evidence on affidavit are sufficient for proceeding against the petitioners.

The respondent no.1 allege:

***“28.** It is pertinent to mention here that the accused persons have installed heavy machines after constructing concert of 4 inches on the 1st floor without the prior permission of the complainant, as at the relevant time the complainant was undergoing treatment of her both eyes*

i.e. Macula Hole. Further the renewing of the old lease for the accused no.1 which the accused no.2 had promised to be done in the month of August, 2015 was never renewed. As such, the accused persons were illegally running their business in the premises of the complainant, through the accused no.1 and 2 entered into the property lawfully, however, they remain in the premises unlawfully after 2015 with an intention to making unauthorized use of the property belonging to the complainant, thereby caused great annoyance to the complainant, as such, the accused no. 1 and 2 are liable to be tried and punished under section 441 for committing offence of criminal Trespass into the property of the complainant.”

18. The first allegation in the complaint is with regard to alleged criminal trespass by the petitioners. Section 441 IPC is as under:

“441. Criminal trespass.—Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,
 or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence,
 is said to commit “criminal trespass”.

19. In re: **Rajinder v. State of Haryana**⁴ the Supreme Court examined Section 441 IPC and held:

“21. *It is evident from the above provision that unauthorised entry into or upon property in the possession of another or unlawfully remaining there after lawful entry can answer the definition of criminal trespass if, and only if, such entry or unlawful remaining is with the intent to commit an offence or to intimidate, insult or annoy the person in possession of the property. In other words, unless any of the intentions referred in Section 441 is proved no offence of criminal trespass can be said to have been committed.....”*

⁴ (1995) 5 SCC 187

20. The allegation made by the respondent no.1 reflects that the failure of the petitioner no.3 as promised by petitioner no.1 did annoy the respondent no.1. However, there is no allegation, leave alone any material whatsoever, to show that there was any intent on the part of the petitioners to intimidate, insult or annoy the respondent no.1, or with intent to commit an offence.

21. The second allegation is of cheating. The respondent no.1 allege:

“36 That the accused persons have cheated the complainant intentionally, firstly they dismantled the premises of the complainant with a promise they shall return the premises in the original condition i.e., 13 rooms, 13 bathrooms, 11 sanitary rooms, 14 water taps and 2 large halls in the ground floor, together with electrical fittings, concrete walls sanitary and water pipes with windows and doors to all rooms, however, the property of the complainant is not in the original condition, the accused persons have altered the property and left it in uninhabitable condition i.e., without sanitary.

37. That the accused persons have fraudulently misrepresented the complainant that they shall return the property in its original condition, thereby induce the complainant to deliver her property to the accused persons. Hence, accused persons are liable to be tried and punished under section 420 of the IPC for cheating the complainant.

22. Section 420 IPC reads as under:

“420. Cheating and dishonestly inducing delivery of property.—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

23. In re: *Prof RK Vijayasarathy & Anr. V. Sudha Seetharam & Anr.*⁵ the Supreme Court held the ingredients of the offence of cheating as under:

Section 415 IPC

“The ingredients to constitute an offence of cheating are as follows:

- i) there should be fraudulent or dishonest inducement of a person by deceiving him;*
- ii) (a) the person so induced should be intentionally induced to deliver any property to any person or to consent that any person shall retain any property, or (b) the person so induced should be intentionally induced to do or to 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) above, the act or omission should be one which caused or is likely to cause damage or harm to the person induced in body, mind, reputation or property.*

A fraudulent or dishonest inducement is an essential ingredient of the offence, a person who dishonestly induces another person to deliver any property is liable for the offence of cheating.”

Section 420 IPC

“The ingredients to constitute an offence under Section 420 are as follows:

- i) a person must commit the offence of cheating under Section 415; and*
- ii) the person cheated must be dishonestly induced to (a) deliver property to any person; or (b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security.*

Cheating is an essential ingredient for an act to constitute an offence under Section 420.”

24. The allegation made in the complaint does not contain the essential ingredients of cheating or that the petitioners had dishonestly induced the respondent no.1 to deliver the property.

⁵ 2019 SCC OnLine SC 208

25. The third allegation made in the complaint pertains to criminal breach of trust. It is alleged:

“38. That the act on the part of the accused persons to make the complainant believe that they shall return the property in its original condition, thereby the complainant in good faith entrusted the property to the accused persons, however, the accused persons misrepresented the fact to the complainant amounts to breach of trust, as the agreement was made in the name of one company and they were running the business in the name of another company without having valid lease agreement to run his business. Hence, the accused persons are liable to be tried and punished under section 405 and punishable under section 406 of the IPC, for criminal breach of trust.”

26. Section on 405 IPC reads as under:

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

Explanation 2[1].—.....

Explanation 2.—.....”

27. In re: **Prof RK Vijayasarathy (supra)** the Supreme Court held the ingredients of the offence of criminal breach of trust as under:

“i) A person should have been entrusted with property, or entrusted with dominion over property;

ii) That person should dishonestly misappropriate or convert to their own use that property, or dishonestly used or disposed of that property or wilfully suffered any other person to do so; and

iii) That such misappropriation, conversion, used or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.

Entrustment is an essential ingredient of the offence. A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is liable for a criminal breach of trust and is punishable under Section 406 of the Indian Penal Code.”

28. The allegation made in the complaint does not reflect any criminality amounting to an offence of criminal breach of trust on the part of the petitioners. There is no allegation of dishonest misappropriation or conversion of the property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract made.

29. The respondent no.1 has also invoked Section 120B IPC. Criminal conspiracy is defined in Section 120A IPC. It reads as under:

“120A. Definition of criminal conspiracy.—When two or more persons agree to do, or cause to be done,—

(1) an illegal act, or
(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.”

30. The respondent no.1 had arrayed the four petitioners as accused in the complaint. There is no allegation whatsoever that they have conspired with each other and

agreed to do, or cause to be done, any illegal act, or an act which is not illegal by illegal means. The essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence and the said ingredient is missing in the complaint.

31. This Court having examined the complaint, the evidence on affidavit of the respondent no.1 and the exhibited documents filed by the respondent no.1, is of the firm view that there is no material before the Court to proceed under the criminal jurisdiction. Resultantly, it is held that continuation of the private complaint case would amount to an abuse of the process of Court. The complaint along with the other evidence led by respondent no.1 does not make out any criminal offence. It is suggestive of a civil dispute which has been given the colour of criminality sans any material. Mere use of appropriate words is not enough. Facts asserted and materials produced must satisfy the ingredient of each of the offences alleged.

32. The Private Complaint Case No.43 of 2018 pending before the Court of Judicial Magistrate, First Class, East Sikkim at Gangtok is hereby quashed. Consequently, all orders, summons and warrants passed and issued by the learned Magistrate in P.C. Case No. 43 of 2018 are set aside. The Crl. M.C. No. 05 of 2019 is allowed.

33. Should the respondent no.1 choose to take recourse to a civil action she is at liberty to do so.

(Bhaskar Raj Pradhan)
Judge

07.12.2019

/to Approved for reporting: **yes**
 Internet: **yes**