SUPREME COURT OF INDIA

Amar Chand Agarwala

Vs.

Shanti Bose

Crl.A.Nos.101 to 103 of 1970

(A. Alagiriswami, I. D. Dua and C. A. Vaidialingam, JJ.)

22.12.1972

JUDGEMENT

VAIDIALINGAM, J.:-

1. These three appeals by the complainant, by special leave, are against the common judgment and order dated August 10, 1969, of the Calcutta High Court in Criminal Revisions Nos. 288, 289 and 290 of 1969, setting aside the charge under Section 120B read with S. 409 I.P.C. framed against all the four accused and the charge under S. 409 I.P.C. framed against accused Nos. 1 to 3. The High Court by the same judgment quashed the proceedings based upon the said charges, which were pending before the Presidency Magistrate, 7th Court, Calcutta in case No. C/3443 of 1967.

2. The appellant in all these three appeals, Amar Chand Agarwalla, filed a complaint before the Chief Presidency Magistrate, Calcutta, on November 21, 1967, on the basis of which the four accused persons, namely, Paremananda Agarwalla, Madan Mohan Gour, Jhumermal Agarwalla and Shanti Bose, were required to answer charges under Sections 120B/409 and 409, IPC. These persons will be referred to as accused Nos. 1, 2, 3 and 4 respectively. The case was later on transferred to the

Presidency Magistrate, 7th Court, Calcutta for disposal. The 7th Presidency Magistrate, after recording the evidence of ten prosecution witnesses, framed a charge on September 7, 1968, under S. 120B/409 against all the four accused and a charge under Section 409 I.P.C. against accused Nos. 1 to 3. The allegations in the complaint were briefly as follows :

3. The complainant was a partner of M/s Kalinga Bakery Biscuit Confectionary and Mineral Water Company of Rourkela in Orissa and was granted actual users' import licence on November 18, 1966, by the Joint Chief Controller of Imports and Exports, Calcutta, for import of Skimmed Milk Powder and other commodities upto the value of Rs. 60,000/-. This commodity was for the purpose of being used in the licencee's factory. The complainant appointed M/s. Arun Importer (P) Ltd., owned, managed and controlled by accused Nos. 1 to 3 as his agents to import 525 bags of milk powder from New Zealand. The first accused wrote a letter dated July 25, 1967, informing the complainant that the goods had already been shipped and that they would be arriving very shortly. Accused Nos. 1 to 3 also offered to assist the complainant with a loan of Rs. 25,000/- to enable him to clear the shipping documents from the Bank. The 4th accused was introduced by the other accused as a Customs Clearning Agent and on their suggestion, the complainant appointed him as his clearing agent. After clearing the shipping documents with the assistance of the loan provided by the accused, the complainant however, was not informed about the actual arrival of the ship. The complainant addressed a letter dated August 19, 1967, to accused No. 4 asking for information about the arrival of the goods. None of the accused gave any intimation about the arrival of the goods. However, to this surprise, the complainant read in the newspaper a report on August 23, 1967, about the police having recovered from the various parts of Calcutta several bags of milk powder stated to have been imported on his account. The complainant rushed to Calcutta and contacted the accused but was not able to get any information. Accused No. 4 flatly declined to even recognise the complainant or talk to him; accused Nos. 1 to 3, however, professed ignorance about the whole thing and hinted that accused No. 4 might have diverted the goods to other persons. On August 26, 1967, an application was filed before the Chief Presidency Magistrate to direct the police to make an investigation under Section 156 (3) of the Criminal Procedure Code regarding the missing quantity of milk powder. In the said application, however, only Shanti Bose (the present accused No. 4) was cited as an accused, as the complainant did not have any reason to suspect the other accused. The milk powder seized by the police was later on directed to be returned to the complainant by the High Court on his furnishing security. Accused Nos. 1 to 3, coming to know about this proceeding, instituted on September 25, 1967, a suit against the complainant in the High Court (Suit No. 2283 of 1967) praying for a declaration that the plaintiff was the pledgee of 316 bags of milk powder of the defendant and prayed for a decree in the sum of Rs. 26,744.87. They also asked for various interim reliefs. The complainant, during the pendency of the proceedings before the Chief Presidency Magistrate came to know that all the accused persons had taken away on August 19, 1967, the entire quantity of 525 bags of milk powder, which had been imported on his account without his knowledge, consent or instructions and that they had also mis-appropriated about 200 bags before the police could raid their premises. On an ascertainment of these facts, the complainant withdrew his original complaint with the permission of the Court and instituted the present complaint against all the accused.

4. On receipt of the complaint, the Chief Presidency Magistrate ordered a judicial enquiry to be held by the 9th Presidency Magistrate. In the judicial enquiry held by the latter, the complainant had

brought on record various documents to substantiate his allegations. As a result of the enquiry the Chief Presidency Magistrate on December 26, 1967, summoned all the four accused persons under Ss. 120B/409 and 409 and transferred the case for disposal to the 7th Presidency Magistrate. The learned Magistrate, after a consideration of the materials placed before him by the complainant, framed on September 7, 1968 charges against all the accused under Ss. 120B/409, IPC and a charge under S. 409, IPC against accused Nos. 1 to 3.

5. None of the accused persons moved the High Court against the order of the Magistrate issuing process or against the order dated 7-9-1968 framing charges against them. It is seen from the records that a large volume of oral and documentary evidence had already been let in and the trial itself had almost come to the closing stage. That remained was only to examine two more witnesses on the side of the prosecution, as per order dated 24-2-1969 and also to examine one Durga Dutt Chowdhury as a Court witness under Section 540, Criminal Procedure Code, as per order dated 7-3-1969. The witnesses examined so far by the prosecution had also been cross-examined by the defence. While matters stood thus, the 4th accused moved the High Court in Criminal Revision No. 238 of 1969 for quashing the charges and the entire proceedings that had taken place before the Magistrate. There was also a prayer in the alternative for stay of the criminal proceedings till the disposal of Civil Suit No. 2283 of 1967. Accused No. 2 filed a similar Revision No. 289 of 1969, followed by accused Nos. 1 and 3, who were the petitioners in Criminal Revision No. 290 of 1969.

6. All the three Criminal Revisions were heard together by the High Court and have been dealt with in its common judgment. On behalf of the accused, five contentions were urged before the High Court for quashing the charges as well as the entire proceedings pending before the Presidency Magistrate. The first contention related to the maintainability of the present proceedings by the complainant, when he himself was an accused in a case under Section 5 of the Imports and Exports (Control) Act 1947, started by the Central Bureau of Investigation, Economic Offences Wing, Calcutta, in B. C. case No. 23/W/67. It was urged before the High Court that though he had been discharged, he is, nevertheless, an interested complainant. The High Court rejected this contention and held that, on that account, the present proceedings cannot be quashed.

7. The second contention of the accused related to the effect of the order of withdrawal of the earlier complaint on the present proceedings. It was pleaded that the dismissal of the first complaint operates as a bar to these proceedings. However, this contention also was rejected by the High Court on the ground that an order of dismissal under Section 203, Criminal Procedure Code, is no bar to the entertainment of a second complaint on the similar facts, though such a complaint can be entertained only under exceptional circumstances. The High Court ultimately held that the present proceedings are not unwarranted or untenable in view of the first order of discharge in the circumstances of the present case.

8. The third contention that was taken before the High Court by the accused was that the factum of entrustment has not been established by clear and cogent evidence and as such, there cannot be any

breach of trust, far less any dishonest conversion leading to a conspiracy. The learned Judge held that it is difficult, at that stage, on the evidence adduced, to hold that there had not been any entrustment, especially as the whole case depends upon an appreciation of the entire evidence for coming to a conclusion one way or the other. On this reasoning, this contention also was rejected.

9. It must be noted that the third contention was an invitation to the High Court to consider the evidence already adduced before the Magistrate and to come to a conclusion that no entrustment had been established. The High Court, in our opinion, quite rightly, declined at that stage, to go into that question of fact and left it to the Magistrate to assess and appreciate the evidence and come to a conclusion one way or the other. We are particularly referring to this aspect because, as will be seen later, the High Court adopted different criteria when it dealt with the fifth contention of the accused.

10. The fourth contention of the accused was that both the first and the second complaints suppressed material facts, vitiating the present proceedings. The fifth contention, as the High Court itself observes, related to the merits, namely, that the evidence on record does not establish the offences with which the accused are charged. These two contentions have found favour with the High Court. It is on the basis of the acceptance of these contentions that the entire proceedings have been quashed.

11. The fourth contention of the accused was that the complainant had suppressed material facts, which were within his knowledge, in the first complaint filed on August 16, 1967. Particularly, it was stressed that the complainant had not even referred to the Civil Suit No. 2283 of 1967 instituted against him. The said complaint also does not refer to the complainant having taken a loan of Rs. 25,000/- from the accused. The learned Judge has accepted this criticism as justified. It is not necessary for us to refer to, what according to the learned Judge were, certain omissions made by the complainant in his original complaint filed on August 26, 1967. But it is enough to state that the view of the learned Judge that even the suit instituted against the complainant had not been referred to, is not justified. The complaint was filed on August 26, 1967, whereas the suit against the complainant was filed on September 25, 1967. It is also the view of the learned Judge that the present complaint also does not refer to certain matters, which were within the knowledge of the complainant. We do not propose even to advert to these matters.

12. According to the High Court, there has been a suppression of some material facts in the two petitions of complaint and, therefore, the present proceedings must be held to be bad and repugnant effecting their maintainability. The High Court has referred in this case to a decision of the Calcutta High Court which, in our opinion, has no bearing. The decision is in Sunder Das v. Farun Rustom Irani, AIR 1939 Cal 329. That was a case of discharge of the accused under Section 253 (2) of the Criminal Procedure Code, as the Magistrate was of the opinion that the complainant had deliberately suppressed several facts and that the complaint was a thoroughly dishonest one. In the end the High Court has held that the present proceedings are bad and improper and, therefore, they have to be quashed.

13. The fifth and the last contention taken on behalf of the accused relates, as the High Court itself states, to the merits of the case and is based upon the evidence on record, both oral and documentary. After a consideration of certain items of evidence, the learned Judge has held that the evidence on record rules out any offence of breach of trust, or a conspiracy to commit the same, by the accused persons and, therefore, the present proceedings are not maintainable and have to be quashed.

14. A representation appears to have been made on behalf of the complainant that a large volume of evidence, oral and documentary, has already been adduced and the trial has gone on for a long time and that only two more prosecution witnesses and a Court witness remain to be examined. On this basis it was pressed before the High Court by the complainant that the High Court should allow the proceedings to go on and to come to its logical conclusion and that the High Court should not interfere at that stage. The learned Judge, however, considered this representation and held that the two remaining prosecution witnesses should not be allowed to be examined 'in the facts and circumstances of the case, as they cannot possibly have any material effect on the merits of the case'. The High Court further held that even the proposed examination of the Court witness is not necessary, as it will only prejudice the accused and undo the effect of their cross-examination. On this basis, the representation made on behalf of the complainant was rejected.

15. On behalf of the appellant, Mr. D. Mookerjee very streneously attacked the reasoning of the High Court for quashing the charges framed against the accused and the entire proceedings that hhad taken place before the Presidency Magistrate. On the other hand, Mr. A. H. Mulla, learned counsel on behalf of the accused, urged that the High Court was justified, in the circumstances, in quashing the charges as well as the entire proceedings so far taken place before the Presidency Magistrate. The learned counsel appearing for the State supported the appellant and urged that the High Court was not justified in interfering with the proceedings when the trial had gone on for a considerably long time and was due to close.

16. We have already referred to the 4th and the 5th contentions urged on behalf of the accused which have found favour with the High Court. We have already pointed out that the learned Judge quite rightly declined, when dealing with the third contention, to consider, on an appreciation of evidence, whether an entrustment has been proved. This the High Court has properly left to be decided by the Magistrate after the entire evidence is closed. But when dealing with the fifth contention, which the High Court itself says, relates to the merits of the case, and has to be decided on the basis of the evidence on record, both oral and documentary, the High Court instead of adopting the same test, as did when dealing with the third contention embarked upon a fairly elaborate appreciation of the evidence on record and ultimately came to the conclusion that the evidence on record does not establish any breach of trust, or a conspiracy to commit the same, by the accused persons. Regarding the fourth contention, which also has found acceptance at the hands of the High Court, it relates to what according to the accused was, suppression of certain material facts by the complainant in his two complaints.

17. In our opinion, the High Court was not justified, in the particular circumstances of this case, in quashing the charge, as well as the entire proceedings that had taken place before the Magistrate. It is not as if the accused had moved the High Court at the earliest stage when the Presidency Magistrate issued sommons to them. Nor had they approached the High Court when charges were framed against them. The accused had been summoned, after a judicial enquiry by the Chief Presidency Magistrate on December 26, 1967, under Ss. 120B/409 and 409, IPC. Before the Magistrate, the evidence, oral and documentary, was adduced by the complainant in the presence of the accused. On a consideration of such materials, the Presidency Magistrate framed charges against all the four accused as early as September 7, 1968. If the case of the accused was that the allegations in the complaint do not constitute the offence complained of or that the complaint has to be quashed for any ground available in law, they should have approached the High Court, at any rate, immediately after the charges were framed. The records disclose that it was the fourth accused, who moved the High Court to quash the proceeding in March 17, 1969, earlier than the other accused. Even by that date, several prosecution witnesses had been examined and they had also been cross-examined by the accused. Several items of documentary evidence had already been let in during the trial. Only two prosecution witnesses and a Court witness remained to be examined. The proper course at that state to be adopted by the High Court was to allow the proceedings to go on and to come to its logical conclusion, one way or the other, and decline to interfere with those proceedings. The fourth contention related to the suppression of certain materials in the complaint. We do not propose to express any opinion on that aspect because, even assuming that there has been suppression, that it is a matter to be considered by the Trial Magistrate. Similarly, as to whether the evidence on record establishes that an offence of breach of trust has been committed, or not, is again a matter for the Trial Court to come to a conclusion, one way or the other, after an appraisal of the entire evidence that is let in by the prosecution and by the defence, if any. The High Court was not justified at that stage to have embarked upon an appreciation of the evidence. Here again, we do not express any opinion an merits, as the matter is to be considered by the Trial Magistrate.

18. The High Court was also equally not justified in holding that the two prosecution witnesses should not be examined on the ground that their evidence will not have any material effect on the merits. The further view of the High Court that the examination of the Court witness will prejudice the accused, is also without any basis. In fact, the High Court's decision on the question of these witnesses is really on a representation made on behalf of the complainant that the trial is almost coming to a close and that only two more prosecution witnesses and one Court witness remain to be examsined. So far as we could see the accused have not challenged the order of the Magistrate dated February 24, 1969, allowing the prosecution to examine Satanarayan Agarwalla and an officer of the Directorate of Industries, Government of Orissa; nor have they challenged the order dated March 7, 1969, of the Magistrate allowing the prayer of the prosecution for examining Durga Dutt Chowdhury as a Court witness under Section 540. In holding that the proposed examination of Durga Dutt Chowdhury, as a Court witness, will prejudice the accused, the High Court has not given due consideration to the decision of this Court in Jamatraj Kewalji Govani v. State of Maharashtra, AIR 1968 SC 178.

19. It is not clear whether the High Court passed the order in question under S. 561-A or under S.

439 of the Code of Criminal Procedure. This Court has laid down the principles, in R. P. Kapur v. State of Punjab, (1960) 3 SCR 388 = (AIR 1960 SC 866) which have to be borne in mind by the High Court when its inherent jurisdiction under Section 561-A is invoked for quashing the proceeding pending before a subordinate Court. It has been emphasised that the inherent jurisdiction could be exercised to quash proceedings in a proper case, either to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. This Court has also indicated some of the categories of cases where the inherent jurisdiction could and should be exercised to quash proceedings. However the exercise of the power by the High Court in the case before us, does not come-within the ambit of the principles laid down by this Court in the above decision. For instance, the second contention taken before the High Court by the accused related to the maintainability of the second complaint when the first complaint had been withdrawn and the accused had been discharged. If the High Court had accepted the contention of the accused in that regard it may be that the High Court was justified in quashing the proceedings though at a very late stage. But on that point, the High Court's decision is in favour of the complainant. The other points taken into account by the High Court do not justify the exercise of its power under Section 561-A and that too at a very late stage of the proceedings.

20. Even assuming that the High Court was exercising jurisdiction under Section 439, in our opinion, the present was not a case for interference by the High Court. The Jurisdiction of the High Court is to be exercised normally under Section 439, Criminal Procedure Code, only in exceptional cases, when there is a glaring defect in the procedure or there is a manifest error of point of law and consequently there has been a flagrant miscarriage of the justice. The High Court has not found any of these circumstances to exist in the case before us for quashing the charge and the further proceedings.

21. The judgment and order of the High Court quashing the charges framed against the accused as well as the other proceedings based thereon pending in case No. C/3443 of 1967, are set aside. The learned Presidency Magistrate will proceed with the further trial and give it a very expeditious disposal. We make it clear that the direction given by the Chief Presidency Magistrate regarding the examination of two more prosecution witnesses and the Court witness will stand subject to any modifications that may be made by that Court in regard to the directions already given by it. In the result, the appeals are allowed.

Appeals allowed.