

REPORTABLE

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRIMINAL M.C. NOS. 2683 OF 2007 AND 2136 OF 2008

Reserved on: 8th April, 2010
Date of decision: 30th April, 2010

MANISH MITTAL & OTHERS Petitioners in 2683/2007
Through Mr. Vijay Aggarwal & Mr. Rakesh
Mukhija, Advocates.

P.K.SHARMA Petitioner in 2136/2008
Through Mr. Udyan Jain, Advocate.

versus

STATE & OTHERS Respondents
Through Dr. Mahesh Chand Jain,
respondent No. 2 in person.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest ?

SANJIV KHANNA, J.:

1. Mr. P.K. Sharma, Assistant General Manager, State Bank of India, (C&I Division), Chandni Chowk, Delhi and Mr. Manish Mittal have filed the present petitions under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code, for short) for quashing of Order dated 2nd June, 2007 passed by the learned Metropolitan Magistrate taking cognizance and summoning them as accused to stand trial for offences under

Section 425/427 of the Indian Penal Code, 1860 (hereinafter referred to as IPC, for short). The impugned order dated 2nd June, 2007 reads as under:-

“Counsel for the Complainant
Arguments on summoning order heard.
Record perused.
I found sufficient material on record to
summon the accused for the offence
U/s.425/427 IPC, as prima facie case is
made out against the accused.
Issued summons to the accused on
PF/RC for 18/09/07”

2. Dr. Mahesh Chand Jain, the respondent No. 2 has filed a criminal complaint in his individual capacity as a partner and on behalf of partnership firm M/s Biopolymer Systems. From the complaint, pre summoning evidence and documents relied upon by Dr. Mahesh Chand Jain, the following facts are apparent -

- (i) Dr. Mahesh Chand Jain and Mr. Manish Mittal are partners of the partnership firm and are bound by the terms of the partnership deed dated 15th July, 1994. The said partnership firm has two current accounts with State Bank of India, (C&I Division), Chandni Chowk, Delhi, which could be operated jointly by both the partners for the purpose of withdrawal. It is stated in the complaint that arbitration applications are pending before the Additional District Judge for dissolution, settlement of accounts and disputes of the partnership firm.
- (ii) The complainant by letter dated 5th September, 2002 had called upon Mr. Manish Mittal to arrange for conversion

of balance lying in the current account into a fixed deposit receipt (FDR, for short) till dissolution, settlement of accounts and disputes of the partnership firm by the arbitrator. It is stated in the complaint that this was pragmatic and prudent to prevent loss of value and utility of firm's property and was in accord with Section 12(b) of the Partnership Act, 1932 (Partnership Act, for short) which requires that every partner is bound to attend diligently to his duties in conduct of business. It is stated that Mr. Manish Mittal by his letter dated 12th September, 2002 called upon Dr. Mahesh Chand Jain to first deposit Rs.4,50,000/- along with the interest accrued on it in the said bank account. This amount received from Haryana Financial Corporation was deposited in the Union Bank of India, Model Town, Delhi, a new proprietary account in the name of the firm opened by Dr. Mahesh Chand Jain. It was stated that only after the deposit he i.e. Mr. Manish Mittal, shall take a prudent decision. It was further alleged in the letter that Dr. Mahesh Chand Jain was trying to cover up his illegalities and misdeeds.

- (iii) By letter dated 17th September, 2002, Dr. Mahesh Chand Jain called upon The Chief Manager, State Bank of India, (C&I Division), Chandni Chowk, Delhi to convert the credit balance in the account into FDR. This was followed by letter dated 10th October, 2002 to Mr. Manish Mittal stating that non-conversion of the credit balance in the current account into FDR was causing loss of Rs.170/- approximately per day on account of loss of interest. It was also stated that the State Bank of India

had informed that till both the partners agreed, FDR cannot be issued by transferring the amount from the current account. By another letter dated 10th October, 2002, Mr. P.K. Sharma, AGM, State Bank of India (C&I Division), Chandni Chowk was reminded about an earlier letter dated 17th September, 2002 and asked to issue an FDR. Copy of the correspondence exchanged between Dr. Mahesh Chand Jain and Mr. Manish Mittal was enclosed.

- (iv) It is stated in the complaint that Mr. Manish Mittal and Mr. P.K. Sharma, AGM, State Bank of India (C&I Division), Chandni Chowk, Delhi had deliberately omitted to convert the credit balance into an FDR which resulted in diminishing the value and utility of property of the partnership firm and affected the firm's property as interest could not be earned. Thus, both Mr. Manish Mittal and Mr. P.K. Sharma have intentionally and deliberately caused loss or damage to the property of the partnership firm and Dr. Mahesh Chand Jain, the partner and were liable to be prosecuted under Sections 425 and 427 of the IPC. It is stated that till the date of filing of complaint on 31st October, 2002, loss of Rs.6,800/- on account of interest was caused.

3. Dr. Mahesh Chand Jain in his statement recorded on 22nd March, 2005 has, inter alia, stated that in spite of letters, credit balance standing in the current account was not converted into

FDR, thus, causing loss and this amounts to an offence under Section 425/427 of the IPC.

4. Sections 425 of the IPC reads as under:-

“425. Mischief.-- Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits" mischief".

Explanation 1.- It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2.- Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Illustrations

(a) A voluntarily burns a valuable security belonging to Z intending to cause wrongful loss to Z. A has committed mischief.

(b) A introduces water in to an ice- house belonging to Z and thus causes the ice to melt, intending wrongful loss to Z. A has committed mischief.

(c) A voluntarily throws into a river a ring belonging to Z, with the intention of thereby causing wrongful loss to Z. A has committed mischief.

(d) A, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to Z, destroys those effects, with the intention of thereby preventing Z from obtaining satisfaction of the debt, and of thus causing damage to Z. A has committed mischief.

(e) A having insured a ship, voluntarily causes the same to be cast away, with the intention of causing damage to the under-writers. A has committed mischief.

(f) A causes a ship to be cast away, intending thereby to cause damage to Z who has lent money on bottomry on the ship. A has committed mischief.

(g) A, having joint property with Z in a horse, shoots the horse, intending thereby to cause wrongful loss to Z. A has committed mischief.

(h) A causes cattle to enter upon a field belonging to Z, intending to cause and knowing that he is likely to cause damage to Z's crop. A has committed mischief."

5. The first part of the Section 425 of the IPC sets out *mensrea* or the guilty mind which is the intention or knowledge that he is likely to cause wrongful loss or damage to public or any other person. The second part of the Section pertains to the *actus reus* i.e. to say the criminal act. Thus the ingredients of Section 425 of the

IPC are as under:-

“(1) Intention or knowledge of likelihood to cause wrongful loss or damage to the public or to any person.

(2) Causes destruction of some property or any such change in any property or in the situation thereof; and

(3) Such changes must result in destroying or diminishing the value or utility of any property or ‘affecting it injuriously’.”

(emphasis supplied)

6. Ingredient No. 2 requires destruction or change in the property or situation thereof. Destruction can be of a property, which was already in existence and change is with reference to a property or the situation prevailing at a particular time. There is no allegation in the complaint of destruction of existing property or change in any existing property or situation. In fact, the allegation made in the complaint is that Mr. Manish Mittal by his inaction had prevented change in the property or situation by not agreeing to conversion of the amount lying in the current account into an FDR. The allegation is not that any property has been destroyed but the allegation is that Mr. Manish Mittal by not signing and agreeing to conversion of the credit balance lying in the current account into an FDR had prevented accrual of interest, i.e., the property which may have come into existence in future but has not come into

existence. However, I need not examine this aspect in detail as the allegations in the complaint, the statement of Dr. Mahesh Chand Jain and documents filed by him do not establish and satisfy the requirements of ingredient No. 1.

7. Ingredient No. 1 as quoted above requires intent or knowledge on the part of a person to cause wrongful loss or damage. The term “wrongful loss” as defined in Section 23 of the IPC requires loss by unlawful means of a property to which a person is legally entitled to. The loss should be caused by unlawful means adopted by the accused. A person who has lost property because of unlawful means adopted by another person is said to have suffered wrongfully. Mischief as defined in Section 425 of the IPC is not confined to cases of ‘wrongful loss’ but engulfs cases of “wrongful damages” i.e. damage by unlawful means. The word “damage” is not limited in scope by definition and is to be given natural meaning but the word “wrongful” will also qualify the requirement “damages”. Loss or damage must be caused by unlawful means to come within the purview of section 425 of the IPC. This ensures difference between an act which is criminal wrong and an act which can be categorized as a morally wrong act. What is morally wrong is subjective depending upon custom, habit and social milieu to which a person belongs. These

wrongs are uncertain and difficult to prove.

8. Word 'unlawful' has not been defined in the IPC but word 'illegal' has been broadly defined in Section 43 of the IPC as anything which is prohibited by law, which constitutes an offence and which furnishes basis for a civil suit, ending in damages. These provisions were examined in ***Punjaji Bapuji Bagul versus Emperor***, AIR 1935 Bom 164. The Court discussed Explanation I to the Section and the meaning of 'wrongful loss'. It held 'Wrongful loss is defined in Section 23 of the IPC as being 'loss by unlawful means of property to which the person losing it is legally entitled,' and the expression in Section 425 of the IPC, 'wrongful loss or damage' must mean loss or damage by unlawful means.' With respect to the contention of the complainant who relied on the definition of 'illegal' in Section 43 of the IPC, the Court observed as under:

“ That definition includes anything which is an offence or which is prohibited by law, or which furnishes ground for a civil action, and it is argued that the word 'unlawful' in the definition of 'wrongful loss' must have the same meaning as the word 'illegal'. Generally speaking, I should say that there is no difference in meaning between the word 'unlawful' and 'illegal', but it does not follow that if one of those words is specially defined in the statute, and the other is not the two words must necessarily have the meaning given to the one word by the definition.....***The word 'illegal' has been defined as covering everything which gives rise to a civil suit, but I am not***

prepared to say that in the Penal Code the word 'unlawful', which is not been so defined, must be taken throughout as having the very wide meaning"

(emphasis supplied)

9. Similar view has been taken in ***Shippaliar Singh versus Krishna*** AIR 1957 All. 405 , ***Babu Krishna Ghose versus State*** AIR 1957 Cal. 385 and ***Arjuno Gondo & others versus State & others*** AIR 1969 Orissa 200. In Dr. Hari Singh Gour's "Penal Law of India", 11th Edition at page 219 it has been explained that the term 'unlawful' when used in criminal jurisdiction is limited to convey an act which may be prohibited as well as punishable but the said term in a given case can be interpreted flexibly.

10. Applying the said principles it can be said that Section 425/427 of the IPC even applies when there is a wrongful loss or damage to one's own property but no loss or damage is wrongful if it is caused by bonafide exercise of right which a person has over one's own property. Even if the claim of the party is ill-founded he will not be guilty if his claim or dispute is bonafide. Right to bonafide claims or dispute may give rise to a civil cause but will not give rise to or create a criminal act under Section 425/427 of the IPC.

11. Learned Metropolitan Magistrate while taking cognizance

and summoning petitioners by the impugned order dated 2nd June, 2007 has not given any reasons as to why and how the ingredients of Section 425/427 of the IPC are satisfied. As noticed above, even the Assistant General Manager of State Bank of India, Chandni Chowk, Delhi, Mr. P.K. Sharma has been summoned. A bank Manager or a bank is bound by the rules and regulations and Reserve Bank of India guidelines for opening or conversion of credit balance lying in a current account into an FDR. As per the complaint itself, the admitted position is that the current accounts require joint signatures of both parties. Admittedly, Mr. Manish Mittal has not signed any of the letters or authorized withdrawal or conversion from the current account into FDR. Therefore, as per the terms of operation given to the bank, the current bank account could not be operated and debited. No case whatsoever is made out against Mr. P.K. Sharma, Assistant General Manager of the bank.

12. Dr. Mahesh Chand Jain in the complaint and the pre-summoning evidence has stated that Mr. Manish Mittal had not acted prudently when he did not join and accept the petitioner's request for conversion of the amount lying in the current account into an FDR. Failure to act prudently does not constitute an offence under Section 425/427 of the IPC. As stated above, the

first ingredient of Section 425 of the IPC is wrongful loss or damage and not failure to act prudently. It is admitted in the complaint that disputes between Dr. Mahesh Chand Jain and Mr. Manish Mittal were subject matter of proceedings under the Arbitration and Conciliation Act, 1996, which was pending before the learned Additional District Judge and with the Arbitrator. It was always open to Dr. Mahesh Chand Jain to move an application before the court or before the Arbitrator for directions to convert and transfer the amount lying in the current account into an FDR.

13. During the course of hearing, Dr. Mahesh Chand Jain, who appears in person had stated that he had filed an application with the same prayer before the learned Additional District Judge but was forced to withdraw the said application. This does not make the case of Dr. Mahesh Chand Jain any better. On the other hand, it shows that the civil court did not accept the contention that Dr. Mahesh Chand Jain can compel Mr. Manish Mittal to convert the amount lying in the current account into an FDR. It may be relevant to state here that Dr. Mahesh Chand Jain had filed a petition under the Arbitration and Conciliation Act, 1996 before the District Judge on 8th August, 2002, which is before letters dated 17th September, 2002 and 10th October, 2002 were

written.

14. Mr. Manish Mittal has filed on record copy of court orders passed in Writ Petition (Criminal) No. 1868/2005 dated 7th February, 2006 and LPA No. 394/2006 dated 3rd March, 2006. By the first order, petition filed by Dr. Mahesh Chand Jain for quashing of FIR No. 101/2002 under Section 406/420 of the IPC, Police Station Model Town and the consequential proceedings was dismissed. By order dated 3rd March, 2006, LPA No. 394/2006 filed by the appellant was dismissed. Special Leave Petition filed by the petitioner against the said order has also been dismissed. Dr. Mahesh Chand Jain is, therefore, facing prosecution under Section 406/420 of the IPC in respect of Rs.4,50,000/-, which was remitted to the said firm but was received by Dr. Mahesh Chand Jain and deposited in a new bank account. Letter dated 12th September, 2002 written by Mr. Manish Mittal and filed by Dr. Mahesh Chand Jain before the learned Metropolitan Magistrate states that this amount should be deposited in the account of the partnership firm and thereafter Mr. Manish Mittal would take a prudent decision. The aforesaid stand of Mr. Manish Mittal cannot be regarded as an action/inaction which is “wrongful” and, so as to satisfy the first ingredient of Section 425.

15. Under Section 12(b) of the Partnership Act, a partner is duty bound to diligently attend to his duties in conduct of business but degree of liability is not widely interpreted and extended. A loss sustained by a firm may be imputed to conduct of one partner more than another, still if the former has acted bonafidely and without culpable negligence, loss must be borne equally by all. A partner's liability to indemnify the firm arises only when the loss is due to his fraud, culpable negligence or willful default. The said strict parameters have to be kept in mind to bring an act of a partner within 'mischief' under Section 425 of the IPC.

16. The learned Metropolitan Magistrate has clearly erred in taking cognizance of an offence under Section 425/427 of the IPC and erred in summoning the petitioners. Thus the allegations made in the complaint, pre-summoning evidence and the documents filed by the complainant do not establish any offence under Section 425/427 of the IPC. The present case is duly covered under para 102 of the judgment in ***State of Haryana versus Bhajan Lal & Others*** 1992 Supp. (1) SCC 335, in which the Supreme Court has observed that a summoning order can be interfered with and quashed when allegations or complaint made, on face value ex facie does not establish commission of any offence.

17. In view of the aforesaid discussion, the present petitions are allowed and the summoning order and the order taking cognizance dated 2nd June, 2007 passed by the learned Metropolitan Magistrate is quashed. No costs.

SANJIV KHANNA, J.

**APRIL 30, 2010
VKR**