IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 3727 OF 2000

1. The Stock Exchange, Mumbai
   P.J.Towers, Dalal Street,
   Mumbai 400 001

2. M.G.Damani (Former President) -(deceased)
   The Stock Exchange, Mumbai.

3. R.C.Mathur (Former Executive Director)
   The Stock Exchange, Mumbai.

4. J.J.Bhatt, The Director-
   Investor Services Cell & Listing
   The Stock Exchange, Mubai.

5. A.A.Tirodkar, The Director-
   Finance & Secretary,
   The Stock Exchange, Mumbai .. Applicant

v/s.

1. The State of Maharashtra . ..Respondent No.1

2. Yogesh Babulal Mehta,
   Age 50 years, having office at
   Calcot House, 8/10 Tamarind Lane,
   Fort, Mumbai 400 001.
   and res. at 1/6, Padma Society,
   S.V.Road, Vile Parle (West),
   Mumbai 400 056 ..Respondent No.2.
   (Org. Complainant)

Mr. Amit Desai a/w. Sanjog Parab for the Applicant.
None for the Respondent.
Mrs. R.M.Gadhvi APP for the State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
RESERVED ON : 23rd JUNE, 2016.
DATED : 02nd AUGUST, 2016.

JUDGMENT .

1. This is an application under Section 482 of Cr.P.C. challenging order dated 21st January 2000, in C.C.No.162/S/2000 whereby the learned Metropolitan Magistrate, 33rd Court, Ballard Pier has issued process against the applicants for offence under Section 409, 418, 420 r/w. 34 of the Indian Penal Code.

2. The applicant no.1 is a recognized stock exchange under the provisions of the Securities Contract Act, 1956 and governed by the Rules, Bye-laws and Regulations, 1957 of the Stock Exchange. The applicant no.2 (deceased) was the President of the Exchange whereas the applicant nos.3, 4 and 5 were the Directors of the exchange.

3. The respondent no.1 who claims to be a card holder member of the applicant accused no.1 Bombay Stock Exchange had lodged a private complaint before the Metropolitan Magistrate 33rd Court, Ballard Pier, Mumbai alleging that the fully paid up shares of M/s. Coromandal Pharmaceuticals Limited (hereinafter referred to as CPL) were listed in the Stock Exchange Mumbai vide notice No.3213/1994 dated 6.6.1994. The notice interalia stated that all the shares listed having distinctive numbers from 1 to 5626370 were of Rs.10/- paid up i.e. fully paid up and the scrip was allotted only one code no.24524 for trading purpose on the floor of accused no.1. On 14.7.1995 the complainant sold 2,40,800 shares of CPL to various members/brokers @ Rs.2340/- i.e. shares worth Rs.534720 in settlement no.B2/09-95/96. The said shares were delivered to him for selling by his sub-broker M/s. S.P.Enterprises.

4. The said shares were sent for transfer to the names of purchasing persons along with duly signed transfer deed to the Registrar of CPL, M/s. I Con Region Pvt. Ltd., Hyderabad before the book closure date

i.e. 16.9.1995. After processing the applications for transfer of shares, the Registrar M/s. Icon Region sent objection memos along with some of the shares, stating that the signatures of transferors on the transfer deed did not match with the signatures lodged in their records.

5. The complainant claimed that on 22.12.1995 CPL sent a letter to the applicant no.1 Bombay Stock Exchange along with the list of shares purportedly forfeited by CPL, in the meeting of Board of Directors held on 22.12.1995. The complainant claims that the applicant no.1 i.e. Bombay Stock Exchange and the other applicants in collusion with each other entered into a criminal conspiracy to cheat him and to cause wrongful loss to him and wrongful gain to themselves and thus issued notice no.393 of 1996 dated 16.1.1996 informing its members regarding the forfeiture of shares of CPL. The complainant claims that the said notice was in total contravention of the earlier notice dated 6.6.1994 which clearly states that Dist. No.1 to 56,26,370 are paid up shares of Rs.10/- excluded promoters quota non

transferable shares Dist no.9,18,971 to 23,26,470/-.

6. The complainant had stated that in the second week of February 1996 the Registrar of the Co. CPL, M/s. Ikon-Vision sent back xerox copies of the share certificates and transfer deeds out of shares sent for transfer stating that the transfer of the shares could not be effected as they are partly paid and the company had forfeited those shares. The Purchasing member brokers approached the complainant to replace bad delivery shares with good delivery shares. The complainant claims that he could not purchase or replace CPL shares from the market as none was available. Meanwhile the applicant no.1 delisted the CPL shares from the listed securities for non payment of listing fees by CPL.

7. The complainant claims that vide notice no. 4019 of 1996 dated 26.6.1996 the applicant fraudulently and arbitrarily closed out CPL shares and cheated him by debiting from his Valan Account to the tune of Rs.13,46,000/- and thereby caused wrongful loss to him. The

complainant further stated that he was deprived of “BOLT” Connection and Power supply”. The complainant therefore claimed that the applicant accused had committed criminal breach of trust and the offence of cheating.

8. The learned Magistrate recorded verification statement on 24.4.1998. By order dated 19.6.1998 the learned Magistrate sent the complaint to the MRA Marg Police Station for enquiry under Section 202 of Cr.P.C. with direction to submit the report on 11.9.1998. During pendency of the said enquiry under Section 202 of Cr.P.C. the complainant by application dated 27.8.1999 prayed for review of the order dated 19.6.1998 and prayed for recall of the case papers from the MRA Marg Police Station. The learned Magistrate granted the application, recalled the papers and issued process against the applicants.

9. The learned Senior Counsel for the applicant has submitted that the learned Magistrate has by order dated 19.6.1998 forwarded the

matter to the police station for enquiry under Section 204 of Cr.P.C. and he has submitted that during pendency of the said enquiry the learned Magistrate has recalled the order and has issued process without there being any prima facie material on record to show the involvement of the applicant in committing the offence under Section 409 and 420 of Indian Penal Code.

10. The learned Sr. Counsel Shri Desaid has further submitted that the applicant no.1 and its governing body has acted in accordance with the bye laws, rules and regulations and that no process could be issued against the applicant on the bare allegations of 'criminal conspiracy', 'mis-appropriation' or 'cheating'. The learned Senior Counsel has stated that the respondent no.1 had already filed a civil suit and the arbitration proceedings. The learned Sr. Counsel has submitted that the complainant had suppressed the fact that the said arbitration proceedings were pending. He has stated that by filing the said complaint the respondent no.2 had tried to convert the civil dispute into criminal prosecution. The learned Senior Counsel Shri Desai has

further submitted that the complaint on the face of it does not disclose the offence alleged against the applicant and hence this is a fit case to involve the jurisdiction under Section 482 of Cr.P.C. and quash the order of issuance of process.

11. The respondent no.2 was not represented by any counsel despite due service of notice. Consequently, no arguments have been advanced on behalf of the respondent no.2. I have perused the records and considered the submissions advanced by the learned Senior Counsel Shri Desai for the applicant and the learned APP for the State.

12. At the outset, it may be stated, in ***M/s. Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors, (1998) 5 SCC 749*** the Apex Court has observed that summons to an accused in a criminal case is something very serious as it puts the accused person, so summoned, to a great degree of peril of facing an unending trial, mental torture and harrassment, and therefore this should not be done in a casual manner.

13. In ***M/s. Indian Corporation vs NEPC India Ltd. & Ors. dated 20.7.2006,*** the Apex Court after considering its previous decisions on the principles relating to exercise of jurisdiction under Section 482 of Criminal Procedure Code has reiterated the principles as under :

> "9(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.
>
> For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.
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> (ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with malafides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.
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> (iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out : (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceedings are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

10. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes

and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged. In G. Sagar Suri vs. State of UP [2000 (2) SCC 636], this Court observed :

“"It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under section 250 Cr.P.C. more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant.”

14. In the light of the above well settled principles, the question which falls for consideration is whether the averments in the complaint

taken at its face value, make out the ingredients of criminal breach of trust and cheating which are the essential ingredients of offence under Section 409 and 418 and 420 of IPC.

15. Section 405 IPC defines criminal breach of trust 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".

16. Whereas, cheating as defined under Section 415 IPC reads as under:

> **415. Cheating**.—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

17. A plain reading of these provisions indicates that the offence of criminal breach of trust involves the following essential ingredients:

1) Entrustment with property or dominion over property.

2) Dishonest mis-appropriation of such property, or conversion to own use or disposal of the property by the person entrusted with such property.

18. Likewise, the essential ingredients of cheating are :

1) Deception, fraudulent or dishonest inducement

a) to deliver any property or to consent to retain any property or

(b) intentionally inducing that person to do or omit to do anything which that person would not have done or omitted to do if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

19. In the instant case, the applicant herein is a recognized stock exchange under the provision of Security Contract (Regulation) Act, 1956. The activities of the applicant are governed by rules, bye laws and regulations of the Stock Exchange, Mumbai. The main object of the applicant no.1 as set out in Exchange Rules, Bye-laws and regulations is to support and protect (in the public interest) the character and status of progress of dealers and to further their interest both of brokers and dealers as well as of the public interested in securities, to assist, regulate and control (in the public interest. The exchange primarily provides facilities for trading in shares and other securities which are listed/quoted on the exchange and also provides facilities for settling such trades/purchases/sales by payment of purchase price and delivery of the concerned shares/securities on "net".

20. As per the procedure the shares and securities are traded in exchange on every trading day. Under bye-law 191 of the Exchange

Rules, the Exchange does not recognize as parties to any bargain in the market other than its own members and every member is directly and primarily liable to every other member with whom he effects a bargain for its due fulfillment in accordance with the Rules.

21. The bargain bye-law 192 further provides that all bargains at the stock exchange are regulated by rules, bye-laws and regulations of the exchange. As per the said rules and regulations each member broker is liable to fulfill/ perform his obligations to a contract by paying money for shares bought by him and by delivering shares which were sold. In case of 'bad delivery' i.e. in the event the shares delivered by a member do not meet the description, and cannot be transferred either due to technical defect or on account of shares being forged, fabricated, hypothecated etc, the introducing member/broker is primarily responsible to rectify the defect or to replace the bad delivery shares with an equivalent numbers of other good delivery shares of the same company. If the broker/member fails to rectify the defect or replace the shares, the exchange is required to conduct an auction, purchase

the requisite number of shares on the selling members account, and deliver the same to the buying members. If the shares of the company are not available in the market due to delisting of the company, or suspension of scrip etc, the transaction is closed out by the Exchange and compensation is paid to the buying member on the selling member's account, in accordance with the fixed prescribed formula. As regards the market settlement as approved by the Central Government as well as SEBI, the member is required to maintain the requisite capital for the purpose of conducting the transaction on the floor of the Exchange. This amount is reflected on the Valan account of the member broker. The said account is like a ledger account and it reflects a type of credit and debit position of money and securities of the member broker. As per the norms the member is statutorily required to maintain the credit balance to discharge his obligation and in the event of bad delivery or in order to fulfill market obligation unless there is any order passed by any regulatory authority or court.

22. Reverting to the facts of the present case, the averments in the

complaint reveal that fully paid up shares of M/s. Coromandal Pharmaceuticals Ltd of face value of Rs.10/- each were listed on the Bombay Stock Exchange vide Notice No.3213/94 dated 06.06.1994. The respondent no.2 complainant had sold 2,40,800/- shares of CPL @23.40 per share worth Rs.56,34,720/- in settlement of B2/09-95/96. The Exchange suspended trading of CPL shares with effect from 11.9.95 vide its notice No.6304 of 1995 prior to the closure date. The said shares along with duly signed transfer deeds were sent to the Registrar of CPL, M/s. Ikon-Vision Pvt. Ltd., for transfer to the names of the purchasing persons. The averments in the complaint further reveal that after processing of the applications for transfer of shares, the Registrar of CPL, M/s. Icon-Vision Pvt. Ltd., sent objection memo around 25.10.1995 along with some of the shares stating that the signatures of the transferor on the share deed did not meet with the signatures lodged in their records. The CPL also informed the Exchange that its board of directors had at their meeting held on 22.12.1995 forfeited shares as per the list which was enclosed with the letter. The list mentioned the names of the concerned share holders distinctive numbers, folio numbers, certificate numbers and numbers of shares and also contained a note of caution to the public not to deal with the said share certificates. This led to the Exchange issuing notice No.393 of 1996 dated 16.1.1996 intimating to its members about the forfeiture of the said shares, the object being to ensure tat the shares are not traded and the innocent investors are not saddled with forfeited shares.

23. It is to be noted that 2,40,800/- shares sold by the respondent no.2 in exchange settlement No.B-2-09/95-96 formed part of the said forfeited shares. M/s. Ikon Vision Pvt. Ltd., transfer agent of CPL, refused to transfer the shares in the names of purchasing investors as they were partly paid up and had been forfeited. It is to be noted that since CPL had failed to pay annual listing fees, the exchange by its notice dated 30.3.1996 delisted CPL and other listed companies which had failed to pay annual listing fee.

24. As per the procedure, the complainant being the introducing

broker was required to rectify the defect or replace the same by good delivery shares. By notice dt. 26th June, 1996 the exchange notified the decision of the governing board of the exchange for adopting the general procedure for squaring up of bad delivery transactions in scrips where trading had been suspended indefinitely. Since the complainant did not replace the said shares of CPL, the bad delivery transactions were closed out in accordance with the procedure notified in the notice and the amount payable by the complainant viz. 13,46,000/- was debited from the complainant's valan account and credited to the valan account of the concerned purchasing brokers, to be paid to the concerned purchasing investors.

25. The averments in the complaint thus indicate that in view of forfeiture of shares by CPL and non replacement of the bad delivery by good delivery shares by the complainant, the applicant exchange had acted as per the procedure in the interest of the investors. The money recovered by the exchange by the sale proceeding of the membership card of the complainant and all his assets have applied to

pay off his debtors as per rules. There is no material on record to show that the exchange has withheld any amount or made any wrongful gain from the said recovery. Apart from the bald allegation in the complaint, that the applicants have acted in collusion with CPL and that they have committed breach of trust and the offence of cheating, there are no averments in the complaint that the applicant had misappropriated or converted to its own use any money or property allegedly entrusted to it by the applicant or that the applicant had induced or deceived the complainant in any manner. The complaint , on the face of it does not disclose the essential ingredients of the offences alleged to have been committed by the applicant.

26. It is also pertinent to note that some of the share holders had filed a petition before the High Court at Hyderabad for quashing the forfeiture of CPL. The exchange was not a party to the said petition. The petition was subsequently dismissed. In another petition filed before the Andhra Pradesh High Court by some new shareholders, had restrained the exchange as well as CPL from giving effect to the

forfeiture of shares. The applicants have stated that the said order was served on the exchange on 6.11.1996 and by that date closed out of bad delivery was already effected. It is pertinent to note that the complainant had also filed arbitration application against various purchasing brokers for contesting their claims for bad delivery and all these arbitration applications have been dismissed and the squaring up of the account of the respondent no.2 was upheld. Out of 19 appeals filed by the respondent no.2, 10 were dismissed and 9 were partly allowed. The said orders were further challenged by filing appeal with the Governing Board which had restored the earlier order and had thereby upheld the bad deliveries claim against the respondent no.2. The Respondent no.2 had not disclosed these facts in the complaint.

27. It is also to be noted that the respondent no.2 had filed a civil suit before this Court and had sought relief against the exchange in respect of CPL shares claiming the amount of Rs.13,46,000/-. However, no relief was granted in favour of the respondent no.2. The applicant had suppressed this fact. It is therefore evident that having failed to secure

any order in the arbitration proceedings as well as in the civil court, the respondent no.2 has resorted to filing of the criminal proceedings.

28. In ***G. Sagar Suri v. State of UP. (2000) 2 SCC 636*** the Apex Court has observed :

> *" It is to be seen if a matter, which is essentially of civil nature has been given a look of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process, a criminal court has to exercise a great deal of caution. Fpr the accused it is a serious matter. This court has laid down certain principles on the basis of which the High Court is to exercise its jurisdiction under Sec. 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of process of any court or otherwise to secure the ends of justice."*

29. In the instant case, the averments in the complaint as well as the statement under Section 200 of Cr.P.C. do not disclose the essential ingredients of the offence. It is also pertinent to note that after having recorded the verification statement under Section 200 of Cr.P.C., the learned Magistrate had postponed issuance of process and by taking

recourse to section 202 of Cr.P.C., the learned Magistrate had directed the police to enquire whether there were sufficient grounds to proceed against the applicant. The records reveal that the police had not submitted any report. The learned Magistrate, thereafter based on the application filed by the complainant recalled the order under Section 202 of Cr.P.C. and without conducting any further enquiry ordered issuance of process. The order of recall as well as the order of issuance of process are passed mechanically, without application of mind and are illegal and untenable. Under the circumstances, continuation of the proceeding would be nothing but abuse of process of law.

30. Hence the application is allowed. The impugned Order dt.21.1.2000 in C.C.No.162/S/2000 passed by the Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai is hereby set aside.

(ANUJA PRABHUDESSAI, J.)