

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1954 OF 2004

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|----|--|-----------------|
| 1. | Mr. M.S. Banga |] |
| | Age- 49 Years., |] |
| | |] |
| 2. | Mr. V. Narayan |] |
| | Age- 66 Years. |] |
| | |] |
| 3. | Mr. D.S. Parekh |] |
| | Age- 54 Years. |] |
| | |] |
| 4. | Mr. M.K. Sharma |] |
| | Age- 57 Years. |] |
| | |] |
| 5. | Hindustan Lever Limited |] |
| | [Petitioners 1 to 4 being the Directors of |] |
| | Petitioner No. 5 having its office at |] |
| | Hindustan Lever House, 165/166, |] |
| | Backbay Reclamation, Mumbai- 400 020. |] |
| | |]...Petitioners |

Versus

- | | | |
|----|---|-----------------|
| 1. | Mr. Pawan Gulzarilal Chopra |] |
| | Director of Skipper Foods Pvt. Ltd. |] |
| | a registered company having its office at |] |
| | A-831, Nabikarim, Pahar Ganj, |] |
| | New Delhi- 110 055. |] |
| | |] |
| 2. | State of Maharashtra |] |
| | |]...Respondents |

APPEARANCES-

Mr. Sushil A. Inamdar, for Petitioner.
Mr. Vinod Chate, APP for Respondent-State.

CORAM : S. S. SHINDE, J
RESERVED ON : 19th August 2019.
PRONOUNCED ON: 10th October 2019

JUDGMENT

1 This writ petition is filed with following substantive prayers:-

B) After perusal of the record of the Trial Court, this Hon'ble Court be pleased to quash the complaint Case No. 34/SW/2004 before the Court of the Additional Metropolitan Magistrate, 9th Court, Bandra; and Quash the order issuing summons/process dated 04.02.2004 in Complaint Case No. 34/SW/2004 before the Court of the Additional Metropolitan Magistrate, 9th Court, Bandra.

C) Quash the order issuing bailable warrants against Petitioners 4, 11, 13 and 15 dated 03.09.2004 in Complaint Case No. 34/SW/2004 before the Court of the Additional Metropolitan Magistrate, 9th Court, Bandra.

2 Respondent No. 1 is original complainant. Gist of the complaint is that, Mr. Pavan Gulzarilal Chopra is the Director Skipper Foods (P) Limited,

New Delhi. His company is in the business of production of ice cream. On 6th August, 1991, the complainant had entered into an agreement with Cadbury India Limited (for short "CIL") granting the complainant company the franchise for manufacture of ice cream under the brand name DOLLOPS which then belonged to CIL. The franchise agreement was for a period of 5 years. As per the franchise agreement, Rs. 8 lacs was paid for Franchise fees and Rs. 2 lacs was paid as deposit.

3 It is further the case of the complainant that for extending the territories to Punjab, Jammu & Kashmir and for sale within Delhi region, the Complainant paid a further sum of Rs. 8 lacs, 3 lacs, and 1 lac as franchise fees respectively. This franchise was granted from November 1992. The total amount therefore was Rs. 22 lacs entrusted by the complainant to CIL.

That, CIL entered into an agreement with Brooke Bond India Limited (for short "BBIL") dated 07.08.1993, by which BBIL became the owner of the said brand name. That, Rs. 58 lacs were held as deposits by BBIL and that BBIL was having dominion over the said money and were bound to account for the same. In February 1993, BBIL, ignoring the agreement gave away franchise for the manufacture of ice cream to another company. That, there was correspondence alleging that BBIL was violating the agreement which was

subsisting between CIL and the complainant. On or about 10.05.1994, the complainant company entered into a separate agreement with BBIL for manufacture of ice cream and that BBIL had undertaken to lift the said goods and sell the same in the market on their own. Accordingly, the complainant had upgraded their plant and machinery incurring Rs. 34 lacs as per specifications of BBIL and thus an amount of Rs. 34 lacs was entrusted by the complainant towards the said project to BBIL. It is further alleged that, suddenly without notice BBIL stopped operations of ice cream with the complainant company. Subsequently, BBIL came to be merged with Hindustan Lever Limited (for short "HLL") and actually the money, which was entrusted by the complainant company to CIL, whose brand DOLLOPS was in turn taken over by BBIL, were held in dominion by HLL and its Directors. It is the case of the complainant that, neither of the companies had honoured the said agreement and that the complainant was entitled to the refund of all amounts as the franchise agreement was not honoured. Similarly, Rs. 34 lacs which were to be accounted for have not be accounted for. The complainant has not received the said amounts and by virtue of with-holding the said money, the Accused have committed an offence of criminal breach of trust.

4 It appears that, the learned Magistrate directed the investigation under Section 156 (3) of Code of Criminal Procedure (for short "Cr.P.C.") and

the said investigation was entrusted to the Inspector of Police General Branch, Crime Branch, CID, Mumbai. During the said inquiry/investigation the said officer recorded statement of various persons. The police report submitted before the learned Additional Metropolitan Magistrate is reproduced herein below:-

During the course of investigation, statements of the following persons have been recorded and this gist of the same is as follows:

i. Mr. Pavan Gulzarilal Chopra, aged 42 years, occupation business R/o C/46 Greater Kailash Part I, New Delhi 400 048 has stated in his statement that he is the Complainant in this case. His statement is attached herewith and marked Exhibit B. He has stated that he hails from Delhi and is the Director of Skipper Foods (P) Limited. The Company is situated at Hissar and having its registered office at Delhi. That he is engaged in the manufacture of food products including ice cream. He has further stated that on 06-08-91, a franchise agreement was entered into between his Company and CIL. Copy of the franchise agreement is Annexure A to the complaint. According to him, the franchise agreement was signed by his brother, Mr Ashok Chopra

as Director of Skipper Foods. That a sum of Rs. 22 lacs was paid as Royalty to CIL and the agreement was for 5 years and he was given franchise to sell ice cream in punjab, Haryana, Chandigarh and this agreement lasted for 1 ½ years. That in 1993, CIL sold the brand to Brroke Bond India Limited. That the complainant wrote several letters to BBIL and there was no response. That in March 1994, one Mr. Ashok Mittal visited his factory and told the Complainant that if he was prepared to spend Rs. 34 lacs to upgrade his plant, then BBIL was prepared to enter into a principal to principal agreement and accordingly he spent Rs. 34 lacs. That he entered into an agreement on 10-05-94 with BBIL which was signed by Mr N Ramchandran on behalf of BBIL and his agreement went on for 6 months although the agreement was for 3 years. By the said agreement, if the Company placed orders and did not lift, compensation was to be paid @ 50%.

ii. That in May 1996, BBIL merged with Hindustan Lever limited (HLL) and the Company stopped buying ice cream ice cream from the Complainant. That B

BBIL had paid Rs. 58 lacs less to CIL when the brand was transferred and hence accordingly, BBIL had kept that money. That by not returning the said monies, they have committed breach of trust.

11. During the course of further investigation, Mr Ashok Mittal, presently working as Business Manager, Popular Tea was contacted and his statement was recorded. Mr Mittal's statement is hereto annexed and marked Exhibit C.

12. Mr. Ashok Mittal has stated in his statement that he was the General Operations Manager- Dollops at Bombay from February 1994 till the end of 1994 and from 01-01-95 to December 1995, he was General Operations Manager for Frozen Deserts Division. That he was aware of the facts and that he had gone through the papers and accordingly he gave his statement. At the time of transfer of business by CIL, Mr David Jones was in charge of the business. However, since he had come to India from Unilever on deputation, he went back to Unilever and therefore is not available.

13. Mr. Mittal has stated that by about February 1995,

sourcing of ice cream from the Complainant was discontinued due to poor quality. He has further stated that the complainant has been filed against the Board of Directors of HLL as it stood in 1997. He has stated that by about February 1995, business was discontinued by BBIL from the Complainant and that none of the board members who are made accused were in any way connected with any business dealings in 1997 with the Complainant.

14. With regard to the claim of Rs. 58 lacs in paragraphs 2 and 3, Mr Mittal has stated that an agreement was entered into between CIL and the Complainant on 07-08-93, that there was no privity of contract between BBIL and the Complainant and that it was one of the conditions of the agreement by which BBIL purchased the brand from CIL that it is CIL's responsibility to transfer the franchise agreement. He has further stated that the Complainant did not sign any Novation agreement with BBIL agreement with BBIL and that the liability under the franchise agreement between the Complainant and CIL was never transferred

to BBIL. He has further referred to certain correspondence, more particularly letters dated 25-02-94, 07-3-94, 11-03-94, 12-03-94, 16-03-94, 28-03-94 and 05-05-95. He has produced these letters and they are marked as Annexure B to G respectively along with his statement. Mr Mittal has stated that from these letters, it can be seen that the Complainant repeatedly urged CIL that he is discontinuing business and had claimed Rs. 42,72,112.86 in the shape of franchise fees, etc from CIL and that by letter dated 11-03-94, he informed CIL that he was closing down operations and by letter dated 12-03-94, he represented to BBIL that he is prepared to enter into a fresh agreement with BBIL and that he would settle all liabilities prior to 01-04-94 directly with CIL's area distributors and suppliers and that BBIL will in no way be involved in any dispute. That by letter dated 28-03-94 directly with CIL wrote to the complainant that he had failed to sign the novation agreement. Mr Mittal has further stated that subsequently, a fresh agreement was entered into between the Complainant and BBIL on 10-5-94 by

which the Complainant agreed on certain terms and conditions to manufacture ice cream separately for BBIL and that the earlier franchise agreement came to an end.

15. Mr Mittal has stated that at no time, any monies were given to BBIL and consequently to HLL, there was no privity of contract between the Complainant and BBIL and consequently HLL, that the agreement transferring the brand of CIL to BBIL clearly, specified that a fresh agreement will be signed, i.e. a novation agreement which never came to be signed and finally by letter dated 12-03-94, the Complainant agreed to enter into a fresh agreement with BBIL and that he would lodge his claim for all prior liabilities with CIL Mr Mittal has further stated that no monies were at any time entrusted to BBIL and consequently to HLL, that even according to the agreement, the franchise fees were not refundable and accordingly, no monies are payable by BBIL and consequently HLL to the Complainant. Mr Mittal has further stated that apart from the 12 lacs, the Complainant has not given any details as to under what documents the Complainant had entrusted the

remaining 46 lacs to CIL. Mr Mittal has denied that any monies are due and payable to the Complainant.

16. With regard to the allegations made in paragraphs 4 and 5 of the complaint, i.e. entrusting Rs. 34 lacs to BBIL, Mr Mittal, in his statement has stated that by the agreement dated 10-05-94, annexure C to the complaint, the Complainant had represented that his Company has the capacity to manufacture ice cream to the requirements of BBIL, that they would be in a position to manufacture and supply ice cream uninterruptedly, that they are not restrained from entering into an agreement, that BBIL will place orders on the Complainant from time to time to manufacture ice cream, that the manufacturer will procure raw material, that the Complainant will sell the said products to BBIL and that in the event of orders being placed and supplies not taken, BBIL will have to pay 50% of the cost as damages. Mr Mittal has stated that the agreement does not require the Complainant to put up any plant or renovate his plat at the request of BBIL and/or that BBIL had taken the responsibility for any sum of money. Mr

Mittal was denied the allegation that the Complainant had spent Rs. 34 lacs to renovate his plant and therefore entrusted the said amount to BBIL. Mr Mittal has specifically denied that when he went to the Complainant's factory in Hissar, he had told the Complainant that if he spends Rs. 34 lacs to upgrade his plant, BBIL would enter into a principal to principal agreement with the Complainant.

17. Mr Mittal has further stated that since the ice cream supplied by the Complainant was of a poor quality, BBIL stopped placing orders with the Complainant sometime in February 1995, that the Complainant had submitted a bill for Rs. 7.6 lacs by letter dated 10-03-95 which was settled after a meeting on 05-05-95 by paying Rs. 3.90 lacs in full and final settlement, that after the said meeting, the Complainant wrote a letter that BBIL will not be liable for any payment on account of franchise fees and other expenditure relating to the period of the management of CIL. Mr Mital has further stated that by the agreement dated 1-05-94, annexure C to the complaint, Rs. 34 lacs

was not entrusted to BBIL and therefore the allegation is denied and is false.

18. I have recorded the statement of Mr Pava G Chopra, the Complainant. I have also recorded the statement of Mr Ashok Mittal of HLL who was the General Operations Manager from February 1994 till about December 1995 looking after ice cream business, Since he was aware of all the facts and he was concerned with the business, I have not recorded the statement of the Directors.

19. From the records, I find that the Complainant had filed a complaint on the same subject matter in respect of the same agreement against the Board of Directors of CIL being Comp No. 26/I&R/1997 and this Hon'ble Court had issued notice under Section 156 (iii) of the Criminal Procedure Code. The said matter was investigated by this office and a report came to be submitted by the office in the said matter on 06-05-99. This office, after investigation, came to the conclusion that the matter is of a civil nature and accordingly closed the case. Hereto annexed and marked Exhibit D is a

copy of the said report.

5 The concerned police officer in Para 20 has recorded his conclusion, which are as under:-

20. From the statements recorded and after going through the 3 agreements namely agreement dated 06-08-91, 07-08-93 and 10-05-94, Annexure A,B and C to the complaint and the correspondence produced by Mr Ashok Mittal, the following becomes very clear:

i. That the amounts paid by way of franchise fess (the agreement dated 06-08-91 refers to only Rs. 10 lacs and for the remaining 46 lacs claimed, the Complainant does not rely on any documentary evidence to show that the said amount was paid to CIL of BBIL), were not entrusted to BBIL but to CIL;

ii. That by the agreement which was entered into between CIL and BBIL dated 07-08-93, it was the responsibility of CIL to ensure that a fresh agreement was entered into between the Complainant and BBIL and that such an agreement which was a novation agreement was not entered into and which was put on

record by CIL by its letter dated 28-03-94.

iii. That from the correspondence, more particularly, letter dated 25-02-94, 07-03-94 and 11-03-94, it is further clear that the Complainant had repeatedly written to CIL to put an end to the franchise agreement and by letter dated 12-03-94, represented to BBIL that he was prepared to enter into a fresh agreement and that they would settle all liabilities and amounts directly with CIL and the BBIL will in no way be involved in any dispute and that he will sign a fresh agreement from 01-04-94. It will be seen from this letter that the Complainant had given up all claims with BBIL and had agreed to make his claim against CIL accordingly, as per the said representation, an agreement came to be entered into on 10-05-94 which is annexure C to the complaint.

iv. From the correspondence, it is further clear that no amount was entrusted to BBIL and consequently to the Directors of HLL and that the Complainant had clearly agreed to make all his claims against CIL and not to BBIL which he had further confirmed in the meeting

dated 05-05-95 and confirmed the same by his letter dated 05-05-95. That the Complainant will not make BBIL liable for any payment of franchise fees and other expenditure relating to the period of management of CIL. No evidence has been produced by the Complainant to show that any amount was entrusted to BBIL and consequently to HLL.

6 In this report the said Inspector further observed that, with regard to the allegation in paragraphs 4 and 5 of entrusting Rs. 34 lacs to BBIL and consequently to HLL towards upgrading his plant and machinery, on going through Annexure C, i.e. agreement dated 10-05-94 entered into between the Complainant and BBIL, it is clear that there was no such agreement between the Complainant and BBIL requiring the Complainant to spend Rs. 34 lacs to upgrade his plant and machinery. The Complainant has not produced any documentary evidence to show that he entrusted Rs. 34 lacs to BBIL. On the contrary, in the said agreement, the Complainant has made representation that his plant is capable of meeting the requirements of BBIL. There is no documentary evidence which will go to show that the said amount was entrusted to BBIL or the said amount was spent by the Complainant.

7 The said officer has also taken the note of the fact that, the complainant has also filed arbitration proceedings against CIL and BBIL and has produced before the said officer a copy of notice addressed to BBIL with regard to the said arbitration proceedings.

8 The said officer reached to the conclusion that, the case does not come in criminal breach of trust. He opined that, the dispute is of commercial nature, and therefore, investigation conducted and the evidence in hand disclosed that, subject matter comes within the purview of civil jurisdiction.

9 I have carefully perused the grounds taken in the present petition, so also, contention of the Complainant, impugned order passed by the Additional Metropolitan Magistrate 9th Court, Bandra, Mumbai, and the report submitted by the Police Inspector referred herein above. In the present case, Petitioners are approaching with the specific contentions that, there was no entrustment of property to the Petitioner-Company directly or indirectly, and therefore, Petitioners cannot be prosecuted, the police report submitted by the police officer has been casually rejected by the learned Magistrate., the dispute is of civil nature, due to liquidation of BBLIL, all criminal proceeding against it stands abated, there is no vicarious liability under criminal law, unless a statute specifically incorporates the same, and there are no averments in the complaint to

attribute criminal responsibility to the Petitioners No. 1 to 4 other than the fact that they were Directors of Petitioner-Company.

10 Upon careful perusal of the order passed by the Trial Court, it is abundantly clear that, the said Court has not given cogent reasons justifying the order of issuance of process. However, it appears that, there is a casual reference to the police report in the impugned order and vague reasons are given by the learned Magistrate while issuing the process. When the material was on record including the report submitted by the police officer, it was incumbent upon the the learned Magistrate to look into the entire material and by assigning proper reasons, either to issue process or reject the complaint.

11 In the light of discussion made herein above, this Court is of the opinion that, the impugned order cannot legally sustain. Hence, the following order:-

- i) The impugned order dated 04.02.2004 stands quashed and set aside.
- ii) The Criminal Complaint No. 34/SW/2004, stands restored to its original file before the Additional Metropolitan Magistrate, 9th Court, Bandra, Mumbai.
- iii) The Additional Metropolitan Magistrate, 9th Court,

Bandra, Mumbai is directed to decide the complaint afresh, taking into consideration the police report, three agreements, and the fact that the complaint has invoked arbitration clause, merger of companies i.e. Broke Bond India Limited merged with Lipton India Limited, so also contention of Petitioners recorded hereinabove and pass the appropriate orders giving detail reasons for entertaining or dismissing the complaint as the case may be.

iv) Learned Magistrate shall take the decision afresh as expeditiously as possible, however, within four months from today.

v) Till the such exercise is done by the learned Magistrate, the learned Magistrate shall exempt presence of Accused i.e. Petitioners herein.

vi) This Court appreciates the sincere efforts taken by the learned counsel Mr. Sushil A. Inamdar in arguing the matter on behalf of the Petitioner who was appointed by the High Court Legal Services Committee, Bombay, and therefore, High Court Legal Services Committee, Bombay is

directed to pay Rs. 10,000/- (in words Rs. Ten Thousand only) as professional fees and expenses incurred, to the learned counsel Mr. Sushil A. Inamdar, within a period of one month from today after completion of procedural formalities.

vii) In the light of above, writ petition is allowed and same stands disposed of accordingly. Rule made absolute on above terms.

[S. S. SHINDE ,J]