

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL REVISIONAL JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRR 737 of 2011
CRAN 3 of 2012
CRAN 4 of 2018
CRAN 7 of 2019
CRAN 15 of 2023
CRAN 16 of 2023
CRAN 18 of 2023

NATIONAL STOCK EXCHANGE OF INDIA LIMITED & ORS.
VS.
THE STATE OF WEST BENGAL & ANR.

For the Petitioners	: Mr. Milon Mukherjee, Sr. Adv. Mr. Sandipan Ganguly, Sr. Adv. Mr. Sourav Chatterjee, Adv. Mr. P.K. Dutta, Adv. Mr. Susanta Kr. Dutta, Adv. Mr. Syamantak Banerjee, Adv.
For the O.P. No. 2	: Mr. Sudipta Moitra, Adv. Mr. Pratim Priya Dasgupta, Adv. Mr. Amit Dey, Adv.
For the State	: Ms. Faria Hossain, Adv. Mr. Anand Keshari, Adv.
Hearing concluded on	: 15 th September, 2023
Judgement on	: 19 th October, 2023

Siddhartha Roy Chowdhury, J.:

1. Seeking quashment of proceeding in Complaint Case No. C/254/2003 pending before the learned Metropolitan Magistrate, 11th Court, Calcutta under Section 406/120B of the Indian Penal Code,

the petitioners filed this application under Section 482 of the Code of Criminal Procedure.

2. Briefly stated, the opposite party no. 2, Mr. Surendra Kumar Jain filed a petition of complaint before the learned Chief Metropolitan Magistrate, Calcutta stating, *inter alia*, that the petitioner is a share holder and one of the directors of Rusoday Securities Limited, a company incorporated in the Companies Act 1956. The company is engaged in the business of share contracting and is a registered trading member of Capital Market Segment of National Stock Exchange of India Limited since 1994.
3. The accused person nos. 2 to 5, were the principal persons in charge of and responsible for the conduct of the affairs of business of accused no. 1, National Stock Exchange of India Limited. Accused person nos. 7 and 8 Sri A.S. Patky, the manager of Oriental Insurance Company Limited and Sri Mahesh Kalara, Manager of Oriental Insurance Company Limited (hereinafter referred as 'OICL') are the persons responsible for the day to day affairs of the Regional office of accused no. 6.
4. It is contended further that National Stock Exchange (hereinafter referred to as 'NSE') introduced an Indemnity Insurance Scheme for its members and directed each of the trading members to get their dealings covered under the Master Policy No. 120000/46/47/000/00000/96/001 as taken by NSE with the Oriental Insurance Company Limited. In compliance with such directions, the company of the complainant paid the due premium of

Rs. 19,740/- by cheque favouring OICL on 28th April, 1995 and was issued Certificate No. 96/166 under the policy of OICL. The said company upon the instruction from various clients executed deals to sell shares of different corporate bodies through NSE. Such deals required securities to be sent to Mumbai for onward delivery to NSE but unfortunately a packet containing share strips sent through M/s SKYPAK Courier Limited from Calcutta to Mumbai valued at Rs. 6,36,0000/- approximately got lost. The opposite party company being covered under the policy of OICL notified the insurer and the claim was accepted.

5. The insurer approved a claim of Rs. 5,50,177/- as due and payable to the opposite party company but demanded No Objection Certificate from NSE for the disbursement of the said claim. NSE however, maintained silence over the issue and finally OICL informed the opposite party vide letter dated 5th April, 2002 that in the event NOC was not received within 15 days, the claim of Opposite party, company would be treated as "No Claim". Finally OICL closed the claim and thus converted the said claim money to its use depriving the opposite party company of its legitimate property. NSE however, took a stand that they were not required to issue any such No Objection Certificate. Learned Metropolitan Magistrate, took cognizance of the complaint and transferred the petition of complaint to the learned 11th Court of Metropolitan Magistrate after complying with the provision of Section 200 of the Criminal Procedure Code and issued process against the accused persons.

6. The accused person nos. 1 to 5 are the petitioners seeking quashment of the proceeding.
7. Mr. Milon Mukherjee, learned Senior Counsel representing the petitioners submits that the dispute has a long chequered history. The proceeding sought to be quashed is devoid of merit inasmuch as learned Metropolitan Magistrate had no reason to issue process as there is no ingredient of offence within the meaning of Section 405 of the Indian Penal Code.
8. It is submitted that the opposite party no. 2, the complainant was admitted to the trading membership of NSE on 16th May, 1994. The trading facility was withdrawn w.e.f. 13th October, 1997 only on the ground of failure of the opposite party no. 2 to meet its obligation. In the month of June, 1995 NSE introduced indemnity insurance claim for its trading members which subsequently made mandatory by the SEBI.
9. The opposite party no. 2 took the protection of insurance by putting Rs. 19,740/- and in terms of such policy opposite party no. 2 was required to forward notice of claim to OICL. Sometime in the year 1996, the opposite party no. 2 made the claim to OICL at its Mumbai office for loss of shares and documents and by letter dated 15th November, 1996, NSE was authorized by opposite party no. 2 to credit the claim amount. As the trading facility of the opposite party no. 2 was withdrawn, the opposite party no. 2 filed a writ petition being W.P. No. 2242 of 1997 before the Hon'ble Court, *inter alia*, for restoration of trading facility which was allowed by the Hon'ble Court

but upon payment of Rs. 50,00,000/- with NSE which was not complied with.

10. On 21st December, 1998 the opposite party no. 2 lodged a complaint against NSE with SEBI which was answered by NSE within on 30th October, 2000. The opposite party no. 2 filed a Civil Suit before the Hon'ble Court being C.S. No. 429 of 2000, *inter alia*, praying for restoration of trading facility by NSE and the suit was withdrawn on 15th May, 2002 at the behest of opposite party no. 2 who claimed that the dispute would be resolved through machineries of SEBI.
11. Opposite party no. 2, it is further adverted by Mr. Mukherjee, being unsuccessful in availing any relief from this Hon'ble Court, filed a petition of complaint being C-1688 of 2001 under Section 193/34 of the Indian Penal Code. Process was issued against NSE and NSCCL. The proceeding was challenged by the NSE under Section 482 of the Code of Criminal Procedure, which was registered as CRR 2203 of 2001 and it was quashed. Challenging the said order of the Hon'ble Court the opposite party no. 2 preferred Special Leave Petition which was dismissed summarily by the Hon'ble Apex Court on 20th December, 2002.
12. It is contended further by Mr. Milon Mukherjee that the opposite party no. 2 while taking out the petition of complaint before the learned Metropolitan Magistrate, Calcutta, subsequently transferred to Court of learned 11th Metropolitan Magistrate, Calcutta, suppressed all these facts as to previous litigations. Relying upon the

decision of Hon'ble Apex Court in the case of ***Haji Iqbal vs. State of U.P.*** reported in **2023 SCC OnLine SC 946**, Mr. Mukherjee submits that the proceeding in Complaint Case No. C/254/2003 is frivolous, vexatious and under such circumstance, Court owes a duty to look into many other attending circumstances without restraining itself only to the stage of case. Court is empowered to take into account. The overall circumstances leading to the initiation of the case.

13. It is further contended that non-issuance of No Objection Certificate by the NSE cannot by itself saddle the petitioners with the criminal liability for committing offence under Section 406 of the Indian Penal Code. NOC cannot be considered to be a property of the opposite party no. 2.
14. It is contended further that the question of non-issuance of NOC is based entirely on the contingency and eventuality of the claim being raised. The NOC is not a document which was either entrusted by the opposite party no. 2 to NSE and NSE had no dominion thereon more so in view of the assertion of opposite party no. 2 that no NOC was issued, there is every reason to infer that 'NOC' does not even exist. In other words, something that does not exist cannot be distinctly misappropriated by anyone and converted to its own use. To buttress his point Mr. Mukherjee places his reliance in the judgement of Hon'ble Supreme Court in ***DEEPAK GABA VS. STAT OF U.P.*** reported in **(2023) 3 SCC 423** wherein it is held :-

“16. Thus, criminal breach of trust would, inter alia, mean using or disposing of the property by a person who is entrusted with or otherwise has dominion. Such an act must

not only be done dishonestly, but also in violation of any direction of law or any contract express or implied relating to carrying out the trust.”

15. It is further contended by Mr. Mukherjee that petitioner nos. 2 to 5 are highly paid officials of the company being Director, Company Secretary, Joint Director and Senior Vice President respectively. Learned Trial Court issued process mechanically without taking into consideration that Indian Penal Code does not contain any provision attaching vicarious liability on the part of the Managing Director or Directors or Officials of the Company when the Company is arrayed as an accused. Learned Trial Court, according to Mr. Mukherjee failed to apply judicial mind while issuing process against the petitioners.
16. Mr. Mukherjee further adverted that learned jurisdictional Magistrate issued process under Section 406 of the Indian Penal Code calling upon the petitioners to surrender to the jurisdiction of learned Trial Court and not under Section 120B of the Indian Penal Code as such the petitioners cannot even, otherwise be prosecuted in absence of any process under Section 120B of the Indian Penal Code. Mr. Mukherjee concludes his argument by submitting that at best it could be said that the contract was in place executed by the parties being the trading members of NSE and OICL as to the disbursement of claim. There can be suit to enforce such contract but there is no reason to imbibe the dispute with the colour of criminality.
17. Mr. Sudipto Moitra, learned Senior Counsel representing the opposite party no. 2 submits that in order to constitute an offence under Section 405 of the Indian Penal Code not only entrustment but

dominion over the property is also an important ingredient that may lead to an offence within the meaning of Section 405 if the property is distinctly misappropriated and converted to his own use by the person having dominion over the same. Mr. Moitra further submits referring to valuable security as defined under Section 30 of the Indian Penal Code, which says :-

“30. “Valuable security”.—The words “valuable security” denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or where by any person acknowledges that he lies under legal liability, or has not a certain legal right. Illustration A writes his name on the back of a bill of exchange. As the effect of this endorsement is transfer the right to the bill to any person who may become the lawful holder of it, the endorsement is a “valuable security”.”

18. The valuable security, according to Mr. Moitra, may be a document whereby legal right is created, extended or transferred. In this case No Objection Certificate is one such valuable security. It is further contended that because of any action or chosen in action of NSE, OICL did not release the claim amount. Such omission or inaction on the part of NSE speaks of dishonesty as defined under Section 24 of the Indian Penal Code. Mr. Moitra further contended that Section 405 of the Indian Penal Code defines criminal breach of trust which enumerates that whoever being in dominion control over the property distinctly uses the same in violation of any legal contract express or implied and by such act willfully make other persons suffer, should

be considered to have committed an offence within the meaning of Section 405 of the Indian Penal Code.

19. NSE by acting in violation of Clause 9 of General Clause contained in the contract between NSE and OICL, willfully allowed OICL to misappropriate or convert the amount of Rs. 5,50,177/-, for its use therefore, NSE cannot escape the rigour of Section 406 of the Indian Penal Code.
20. It is further contended that merely the agreement is a contingent contract it does not render the proceeding to be civil in nature. The No Objection Certificate was not issued by NSE, NSE had dominion over the property. Therefore, there is every reason to presume that NSE was instrumental in misappropriation of the money, the opposite party no. 2 was otherwise entitled to. When learned Magistrate has issued process, according to Mr. Moitra, there is every reason to presume an offence within the meaning of Section 406 had taken place. This issue should be allowed to be decided through trial. The Court may not invoke the jurisdiction under Section 482 of the Code of Criminal Procedure which can be exercised to prevent the abuse of process of law but should not be exercised to stifle the legitimate prosecution.
21. According to Mr. Moitra, learned Senior Counsel, the petitioners are the alter ego of the company they represent. Whether they had the mens-rea or not at the time of commission of offence, can be determined after trial only. This Court may not assume the role of the

Trial Court while exercising the jurisdiction under Section 482 of the Criminal Procedure Code.

22. Mr. Moitra relies upon the decision of Hon'ble Apex Court in **R.K. DALMIA & ORS. VS. THE DELHI ADMINISTRATION** reported in **AIR 1962 SC 1821** wherein it is held :-

"46. The learned Solicitor General has, on the other hand, urged that the word 'property' should be given its widest meaning and that the provisions of the various sections can apply to property other than movable property. It is not to be restricted to movable property only but includes chose in action and the funds of a company in Bank.

47. We are of opinion that there is no good reason to restrict the meaning of the word 'property' to movable property only when it is used without any qualification in s. 405 or in other sections of the Indian Penal Code Whether the offence defined in a particular section of the Indian Penal Code can be committed in respect of any particular kind of property will depend not on the interpretation of the word 'property' but on the fact whether that particular kind of property can be subject to the acts covered by that section. It is in this sense that it may be said that the, word property in a particular section covers only that type of property with respect to which the offence contemplated in that section can be committed.

50. It is to be noticed that though s. 403 I.P.C. speaks of dishonestly misappropriating or converting to one's own use any movable property, s. 404 speaks of only dishonestly misappropriating or converting to one's own use property. If the Legislature had intended to restrict the operation of s. 404 to movable property only, there war, no reason why the general word was used without the qualifying word ,movable'. We therefore do not see any reason to I restrict the word 'property' to, 'movable property only. We need not

express any opinion whether immovable property could be the subject of the offence under s. 404 I.P.C.

51. Similarly, we do not see any reason to restrict the word 'property' in s. 405 to movable property' as held in Jugdown Sinha v. Queen Empress (1). In that case also the learned Judges gave no reason for their view and just referred to the Bombay Case (2). Further, the learned Judges observed at page 374 :

"In this case the appellant was not at most entrusted with the supervision or management of the factory lands, and the fact that he mismanaged the land does not in our opinion amount to a criminal offence under section 408."

52. A different view has been expressed with respect to the content of the word 'property' in certain sections of the Indian Penal Code, including s. 405.

53. In Emperor v. Bishan Prasad, ILR 37 All 128; (AIR 1915 All 93 (2)) the right to sell drugs was held to come within the definition of the word 'property' in s. 185, I.P.C. which makes certain conduct at any sale of property an offence.

57. The case law, therefore, is more in favour of the wider meaning being given to the word 'property' in sections where the word is not qualified by any other expression like movable'."

23. It is further adverted by Mr. Moitra that property should be given to its widest meaning. It is not to be restricted to movable property only but includes chose in action and the funds of a company in bank.

24. Upon careful perusal of the materials on record, I find that the opposite party no. 2 raised the claim under Certificate No. 96/166 and authorized the OICL to release the claim in favour of the NSE vide letter dated 15th November, 1996 and over such claim quite considerable number of litigations took place by and between the parties under Article 226 of the Constitution of India under the Civil law and even criminal proceeding was taken out. But while filing this petition of complaint the opposite party no. 2 suppressed all such facts that had taken place previous to the filing of the application.

25. It goes without saying that in order to invoke the provision of Section 405 of the Indian Penal Code there has to have a breach of trust in respect of property entrusted or having dominion over the property of the person misappropriates the same. The word 'property' has not been defined in the Indian Penal Code but moveable property has been defined in the following manner :-

“Section 22. “Movable property”.—The words “movable property” are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.”

26. The dictionary meaning of property is :-

“Property. (14c) 1. Collectively, the rights in a valued resource such as land, chattel, or an intangible. It is common to describe property as a “bundle of rights.” These rights include the right to possess and use, the right to exclude, and the right to transfer. Also termed bundle of rights. 2. Any external

thing over which the rights of possession, use, and enjoyment are exercised <the airport is city property>.

"Property (from the Lat. proprius, meaning belonging to one; one's own) signifies, in a strict sense, one's exclusive right of ownership of a thing.' In their strict meanings, therefore, the right of ownership and property are synonymous, each term signifying a bundle or collection of rights. In a secondary meaning, however, the term 'property' is applied to every kind of valuable right and interest that can be made the subject of ownership, and in this sense, since it is the subject of ownership, land is called property. The term, therefore, includes both real and personal property, and it is often thus expressly defined in statutes. The word 'property, however, may have different meanings, under different circumstances, according to the manner in which it is used." William L. Burdick, Handbook of the Law of Real Property 2-3 (1914) (citations omitted).

"In its widest sense, property includes all a person's legal rights, of whatever description. A man's property is all that is his in law. This usage, however, is obsolete at the present day, though it is common enough in the older books. In a second and narrower sense, property includes not all a person's rights, but only his proprietary as opposed to his personal rights. The former constitute his estate or property, while the latter constitute his status or personal condition. In this sense a man's land, chattels, shares, and the debts due to him are his property; but not his life or liberty or reputation.... In a third application, which is that adopted [here], the term includes not even all proprietary rights, but only those which are both proprietary

and in rem. The law of property is the law of proprietary rights in rem, the law of proprietary rights in personam being distinguished from it as the law of obligations. According to this usage a freehold or leasehold estate in land, or a patent or copyright, is property; but a debt or the benefit of a contract is not.... Finally, in the narrowest use of the term, it includes nothing more than corporeal property that is to say, the right of ownership in a material object, or that object itself." John Salmond, Jurisprudence 423-24 (Glanville L. Williams ed., 10th ed. 1947).

(Black's Dictionary 11th Edition)

27. In terms of Clause 9 under general conditions of the policy, the parties agreed and declared that upon any monies becoming payable under the policy, the same shall be paid by the underwriters to the Trading Members of the National Stock Exchange of India Ltd., only after they have obtained a 'No Objection Certificate' from National Stock Exchange of India Ltd. regarding release of such payments directly to the Trading Members.
28. Therefore, 'No Objection Certificate' is to be issued by the NSE in order to money becoming payable under the policy. So, this is a contingent contract in a sense when the insurer becomes liable to confiscate the insured upon happening of certain nature, the NOC would be required to be issued. Therefore, by no stretch of imagination it can be said that the certificate including 'No Objection' is a property. If the agreement entered into among the NSE its trading members and OICL and one of the parties to the agreement acts in breach of the contract, in my opinion, it does not make one of the

parties to the contract under given circumstances culpable within the meaning of Section 405 of the Indian Penal Code, punishable under Section 406 of the Indian Penal Code.

29. That apart when learned Jurisdictional Magistrate did not issue any process under Section 120B of the Indian Penal Code, there has to have specific averment how the property was entrusted or how could, the accused persons had dominion over NOC, if it is assumed to be property. A general and bald statement having been made in the petition of complaint, without attributing the definite role played by the accused persons, learned Judicial Magistrate had no reason to issue process, when vicarious liability is alien to the penal laws, unless of course there is a penal provision creating vicarious liability.

30. Therefore, it is not sufficient for the opposite party no. 2 who is the complaint to make a bald and cursory statement that the accused persons 2 to 5 are in charge of and responsible to the company for the conduct of the business without anything more as to the role played by them. The opposite party as complainant had the obligation to spell out as to how and in what manner the accused persons were in charge of or were responsible for the conduct of day to day business of opposite party no. 1. This is in consonance with the strict interpretation of penal statute.

31. Hon'ble Apex Court in **SUNIL BHARTI MITTAL VS. CENTRAL BUREAU OF INVESTIGATION** reported in **(2015) 4 SCC 609** wherein it is held :-

"42. No doubt, a corporate entity is an artificial person which acts through its officers, directors, managing director,

chairman etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

43. xxxx

44. *When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is [Section 141](#) of the Negotiable Instruments Act, 1881. In Aneeta Hada (supra), the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, [Section 141](#) of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction namely where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company."*

32. In **PEPSI FOODS LTD. VS. SPECIAL JUDICIAL MAGISTRATE**

reported in **(1998) 5 SCC 749**, Hon'ble Apex Court held :-

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have

the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.”

33. Learned Magistrate, as it appears from the attending facts of the case, failed to apply judicial mind while issuing process and thus failed to exercise jurisdiction vested in it.
34. That apart conduct of the opposite party no. 2 regarding non-disclosure of fact, I am of the view that the present proceeding has been taken out to wreck vengeance, it is attended with malafide and should not be allowed to remain in force and should be set aside, which I accordingly do. Consequently, the proceeding in C/254/2003 pending before the learned Metropolitan Magistrate stands quashed. Pending applications, if any, stand disposed of.
35. Let a copy of this judgement be sent down to the learned Trial Court for information and necessary compliance.

36. Urgent certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)