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ASHIM KUMAR ROY

v.

BIPINBHAI VADILAL MEHTA AND ORS.

OCTOBER 14, 1997

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[DR. A.S. ANAND AND K. VENKATASWAMI, JJ.]

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Indian Penal Code, 1860—Sections 409 and 120-B—Code of Criminal Procedure, 1973—Section 482—Inherent jurisdiction of High Court—Criminal case registered against the respondent and committed to the Sessions Court for proceeding further—Complaint prima facie failed to disclose any case under Section 409 or 120-B IPC—Respondents were not even Directors of the company on the relevant dates of which the transaction complained of—Held, it would be unjust to allow proceedings to continue and as such, High Court rightly exercised its inherent jurisdiction to quash the proceeding.

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The appellant-complainant made a complaint that as per the memorandum of understanding, the contesting respondents had to discharge certain liability prior to takeover of the management and control of the companies and the respondents in order to discharge the said liability, entered into a conspiracy to commit criminal breach in relation to the funds of the company and thereby dishonestly siphoned the public funds of the company.

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The Magistrate on the complaint registered a criminal case under Section 120-B and 409 IPC read with section 77 of the Companies Act against the respondent and committed the case to the Sessions Court.

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The respondent moved the High Court against the order of the Magistrate and the High Court in its inherent jurisdiction quashed the complaint and the charge against the contesting respondents on the grounds that on the day on which the offence was said to have been committed by the contesting respondents, they were not even ordinary Directors much less

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Managing Directors of the company having control and management of the affairs the company. Hence these appeals.

Dismissing the appeals, the Court.

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HELD : 1. The accused respondents No. 1 and 2 could have come into

picture only after the transactions complained of had taken place. It was the father of the first respondent, who was the Managing Director of the company when the transactions took place. Respondents No. 1 and 2 could have played no part in that transaction as they were not even ordinary Directors at that time in the company. Therefore the allegations made in the complaint, even if it is taken in its entirety, do not constitute an offence either under section 120-B or under Section 409 IPC. Hence it would be manifestly unjust to allow proceedings in the criminal complaint to be proceeded with against contesting respondents No. 1 and 2. As such, the High Court has rightly exercised its inherent jurisdiction under Section 482 Cr. P.C. in quashing the complaint. [454-F-G]

R.P. Kapur v. State of Punjab, AIR (1960) SC 866, held applicable.

State of U.P. v. O.P. Sharma, [1996] 7 SCC 705 and *State of Bihar v. Rajendra Agarwalla*, [1996] 8 SCC 164, relied on.

Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre and Ors., AIR (1988) SC 709, referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 486-487 of 1995.

From the Judgment and Order dated 2.12.94 of the Gujarat High Court in CrI. Misc. A. No. 4216/94 with CrI. R.A. No. 247/1989.

R.K. Jain and S. Sanjanwala and Anil Shrivastava for the Appellant.

Shanti Bhushan, Arun Jaitley, Levang S. Nanavati, Yashank Adhyaru, V.K. Bhatt, Saurin A. Mehta, Mrs. Nirmala Gupta and Mrs. V.D. Khanna for M/s I.M. Nanavati Associates for the Respondents.

Ms. Hemantika Wahi for the State.

The Judgment of the Court was delivered by

K. VENKATASWAMI, J. These appeals arise out of a complaint filed by the appellant which was subsequently registered as Criminal Case No. 262/89. Brief facts leading to the filing of these appeals are given below :-

The appellant who was a General Secretary of Hind Mazdoor Kisan Panchayat to which Gujarat Mazdoor Panchayat, a recognised trade union of

A a limited company, originally known as M/s. Sayaji Mills Ltd, now known as Sayaji Industries Ltd, is affiliated. According to the appellant/complainant, respondents 1 & 2 (hereinafter called the "contesting respondents") have committed offences under Sections 120-B and 409 IPC read with Section 77 of the Companies Act. The contesting respondents are father and son. One

B Vadilal Lalbhai Mehta was the father of the first respondent Bipinbhai Vadilal Mehta. One Subhasbhai Vadilal Mehta was the brother of the first respondent. They entered into a memorandum of understanding on 30.1.1982 for dividing their properties. As per the said memorandum of understanding, the first respondent's family will be given management and control of M/s. Sayaji Industries Ltd and M/s. C.V. Mehta Pvt. Ltd. On the other hand, the management

C and control of other companies, namely, M/s Industrial Machinery Manufacturers Pvt. Ltd, M/s C. Doctor. & Co. Pvt. Ltd. shall remain with Subhash Bhai Mehta, brother of the first respondent. As per the terms of the memorandum, the liabilities of M/s. C.V. Mehta Pvt. Ltd. towards other concerns amounting to Rs. 39 lacs and odd was to be discharged by the first respondent and his family and only after the clearance of the said liability, the first

D respondent and his family could take over the management and control of the companies allotted to them. It was alleged by the appellant in the complaint that the contesting respondents had no funds with them to discharge the liability allotted to them and they could not also raise funds to be deposited with M/s. C.V. Mehta Pvt. Ltd. within the stipulated period, namely, February

E to November, 1982. Therefore, a modification to the memorandum of understanding was entered into between the same parties on 13.11.1982. As per the modified memorandum of understanding, it was agreed that the contesting respondents will deposit Rs. 20 lacs immediately with M/s. C.V. Mehta Pvt. Ltd. in order to acquire the shares of M/s. Sayaji Industries Ltd and thereby gain management and control of M/s. Sayaji Industries Ltd.

F (hereinafter referred to as the 'Company'). In order to discharge the liability as per the modified memorandum of understanding, it is the specific case of the appellant that the contesting respondents entered into a conspiracy to commit criminal breach in relation to the funds of the company and thereby dishonestly siphoned the public funds to the detriment of the shareholders and the employees of the company. The appellant explaining the act of alleged

G conspiracy has stated in the complaint that the contesting respondents diverted the funds of the company in a clandestine manner by manipulating and tempering the records and accounts and caused the wrongful gain in so transferring the funds of the company by making advances to a supplier M/s. Santosh Starch Products Ltd. by three different cheques drawn on

H Punjab National Bank. It was further alleged that the accused persons in

furtherance of the conspiracy made it to appear that M/s. Santosh Starch Products advanced a loan of Rs. 20 lacs on 13.11.1982 by three cheques in favour of Bipin Mehta who in turn ploughed the amount in M/s. C.V. Mehta Pvt. Ltd. to discharge the liability undertaken by him as per the modified memo of understanding. In this process, the contesting respondents acquired the control and management of M/s. Sayaji Industries Ltd. Inasmuch as the funds of the company were utilised in the manner aforesaid, according to the appellants, the contesting respondents have violated Section 77 of the Companies Act. In addition, it was the case of the complainant that the contesting respondents have also committed offences punishable under Section 120-B and 409 of IPC. A B

On receipt of such complaint, the Judicial Magistrate, First Class, Ahmadabad (Rural) conducted an inquiry under Section 202 Cr. P.C. The learned Magistrate recorded statements of four witnesses. After considering the deposition of the said four witnesses and also the documents produced before him, the Magistrate was of the opinion that prima facie a case against the contesting respondents was made out for the offences punishable under Section 120-B and 409 IPC read with Section 77 of the Companies Act. Learned Magistrate was also of the view that the case has to be tried by the Sessions Court and accordingly he committed the case under Section 323 of Cr. P.C. to Sessions Court. C D

The contesting respondents previously moved the Sessions Court for anticipatory bail while the proceedings were pending before the Magistrate. The learned Sessions Judge rejected that application for anticipatory bail. The contesting respondents moved the Gujarat High Court against the order of the Sessions Judge declining to grant anticipatory bail and also against the order of the Magistrate registering the case and committing the same for proceeding further by the Sessions Court. These two cases, namely, Criminal Revision Application No. 247/89 and Criminal Miscellaneous Application No. 4216 of 1994 came up for consideration before the High Court. E F

Before the learned single Judge, it was conceded by the learned counsel appearing for the complainant that the warrant issued against the contesting respondent for the offence punishable under Section 77 of the Companies Act was uncalled for and that the order of committing criminal case to the Sessions Court was also not proper. In view of these concessions, the High Court confined the dispute as to whether the warrant issued against the contesting respondents for the offences punishable under Section 120-B and 409 was G H

A justified. The learned Judge by his detailed and considered order dated 2.12.94 held that the order passed by the learned Magistrate was without application of mind and that on the day on which the offence was said to have been committed by the contesting respondents, they were not even ordinary Directors much less Managing Directors of the company having control and management of the affairs of the company. On the other hand, B the learned Judge held on facts that it was established, it was the father of the respondent no. 1 who was the Chairman and Managing Director of the company on the relevant date and he was not impleaded as a party. The company also was not impleaded as a party. The learned Judge further found that the complaint was at the instance of somebody to settle his score with C the contesting respondents and it was a clear case of deliberate attempt on the part of the complainant to use the machinery of the court for an oblique purpose. The learned Judge also found that the chances of ultimate conviction are bleak and therefore, no useful purpose will be served by allowing the criminal prosecution to continue. In coming to this conclusion, the learned Judge placed reliance on a judgment of this Court in *Madhavrao Jiwaji Rao Scindia and Another v. Sambhajirao Chandrojirao Angre and Others*, AIR (1988) SC 709. In the result, the learned Judge allowed the applications and D quashed the complaint and charge against the contesting respondents.

E Aggrieved by the common order of the High Court, the present appeals by special leave are preferred.

Mr. R.K. Jain, learned Senior Counsel appearing for the appellant, submitted that when the money was advanced from the funds of the company, it was for a definite purpose of getting it back to discharge the personal liability and this is sufficient to constitute an offence under Section 409. He F further submitted that even though the contesting respondents were not in actual control and management of the company on the relevant date, they were in de facto control of management of the company and that was sufficient for making them liable under Section 409. In any case that was a matter for evidence and not a case for quashing. He emphasized that contesting G respondents held dominion over the company's funds and the company having 67% public money, the transaction in question coupled with the manner in which it was carried out clearly or at least prima facie bring out an offence under section 409 punishable under Section 120-B IPC. He further emphasized about the limited jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure and according to him the High Court H exceeded its jurisdiction in quashing charge and proceeding which was the

result of preliminary inquiry held under Section 202 of Cr. P.C.

Mr. Shanti Bhushan, learned Senior Counsel, appearing for respondent no. 1, on the other hand submitted that all the three findings of the High Court are well-founded. In addition to that, he also submitted that there was delay in filing the complaint and the complainant as such has no locus standi to file the complaint. After referring to Section 405 IPC Mr. Shanti Bhushan submitted that the element of entrustment is totally absent in this case as the accused persons came into picture only after the relevant date and, therefore, no case was made at all against the contesting respondents under Section 409 and 120-B IPC. Therefore, the question of registering the complaint will not arise. According to the learned Senior Counsel, in addition to the absence of entrustment aspect, the further ingredient required to make out a case, namely "with a view to cause wrongful loss or gain" was also not there. The transaction was a normal one. Advances were given to the regular supplier. The cheques given by the supplier to the individual by way of loan has nothing to do with the subject matter of complaint and the whole thing was misconceived by the complainant.

According to the learned Senior Counsel, the High Court was right in quashing the proceedings.

Mr. Arun Jaitley, learned Senior Counsel, for the second respondent, adding to the submissions of Mr. Shanti Bhushan, highlighted that on the relevant date, namely, 13.11.1982, contesting respondents were not in control or management of the company and they were not even de facto directors and according to the memorandum of understanding, both original and modified, the accused came into picture only after the discharge of the liability and not earlier to that. Therefore, the accused, if at all, could take over the control and management of the company only after the transaction complained of was over. Therefore, the High Court was right in quashing the proceedings. He also emphasized that the complaint was to achieve an oblique purpose and the High Court was right in observing that there was somebody behind the appellant.

Mr. Jain in reply to the argument submitted that under Section 409 IPC, there is no question of limitation and in any case the complainant has explained the delay in moving the court. He also submitted that the complainant has locus standi to prefer the complaint.

We have carefully scrutinised the complaint and the documents and

A considered the arguments advanced by the counsel on both sides. We are of the view that the High Court was right in exercising the power under Section 482 Cr. P.C. and quashing the proceedings in this case. As noticed above, the High Court has given mainly three reasons in support of its conclusion. We feel that out of three reasons by the High Court the one reason with which we propose to deal with is more than sufficient to sustain the order of the High Court. Before giving our reasons, it is necessary to extract the relevant portions from the complaint itself. The pivotal point in the complaint finds a place in paragraph 8 of the complaint, which reads as follows :-

C “These accused persons in furtherance of the conspiracy made advances to a supplier M/s Santosh Starch Products situate at 71, New Cloth Market, Ahmedabad, as under :-

Amount Rs.	Date	Cheque No.	Bank's name
D 10.00 lacs	13.11.82	853901	PNB, Maskati Mkt. Branch
5.00 lacs	-do-	853902	-do-
5.00 lacs	25.11.82	853934	-do-

E thus the accused persons in furtherance of conspiracy diverted the funds of M/s Sayaji Industries Ltd. to M/s Santosh Starch Products to the tune of Rs. 20.00 lacs. The complainant has also learnt that M/s Santosh Starch Products had actually advanced loans to the concerns of accused persons M/s Santosh Starch Product advanced loan of Rs. 20.00 lacs on 13th November, 1982 by different cheques as under :

Amount Rs. in lacs	Date	Cheque No.	Name of Party	Bank's name
G 7.00	13.11.82	887275	Bipinbhai V. Mehta (HUF)	PNB
6.00	-do-	887276	-do-	-do-
7.00	-do-	887277	Priyambhai Bipinbhai Mehta	-do-

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This transfer of amount from M/s Santosh Starch Products as loan in their personal accounts and the transfer of funds from M/s Sayaji Industries limited clearly reflected the dishonest and fraudulent intention to take over the management and control of M/s Sayaji Industries Limited. These accused persons in furtherance of their conspiracy cleared their liability of making immediate payment of Rs. 20.00 lacs in M/s C.V. Mehta Pvt. Ltd. as part payment of the total payment of about Rs. 39.00 lacs and odd and the accused defrauded company viz. M/s Sayaji Industries Ltd. by transferring the amount of Rs. 20.00 lacs to M/s Santosh Starch Product. The accused acquired the controlling interest in the companies shareholders by using funds of the company itself and thereby violated the provisions of Section 77 of the Companies Act as well as the Articles of the Association of the Company. The accused dishonestly and fraudulently made payment to M/s Santosh Starch Products from M/s Sayaji Industries Ltd. as well as from M/s Maize Products unit of Sayaji Industries Ltd. with a view to obtain loan from M/s Santosh Starch Products in their own personal account. Thus these accused persons in furtherance of the conspiracy to take over the management and control of M/s Sayaji Industries Ltd. illegally and fraudulently siphoned the funds of the company. Thus the accused achieved their primary objective of taking over the management and control of M/s Sayaji Industries Ltd. continued with their conspiracy in arranging to consolidate control and management of M/s Sayaji Industries Ltd. This was done by acquiring the control and management of M/s C.V. Mehta Pvt. Ltd. This was very essential to consolidate the control of M/s Sayaji Industries Ltd. Primarily because M/s C.V. Mehta Pvt. Ltd. owned approximately 10,000 shares of M/s Sayaji Industries Ltd."

Apart from the above, it is also relevant to notice some of the other allegations in the complaint which are given below :

In paragraph 6, it is stated : "According to this Memorandum of Modification the accused persons were required to deposit Rs. 20.00 lacs immediately with M/s C.V. Mehta Pvt. Ltd. in order to acquire first the shares of M/s Sayaji Industries Ltd.

In paragraph 7, the complainant has stated : "These accused persons with a dishonest and fraudulent intention, with a view to acquire and gain the management and control of M/s Sayaji Industries Ltd. diverted the funds

A *of the company in a clandestine manner.*

The complainant/appellant herein in his affidavit in reply before the High Court in Crl. Misc. Application No. 2627 of 1988, inter alia, had stated thus :

B “The said document also contained a recital that *transfer of the management of Sayaji Mills Ltd. and the appointment of Shri Bipinbhai Vadilal Mehta and Shri Pribambhai Bipinbhai Mehta on the Board of Directors thereof are only to be made after Shri Bipinbhai Vadilal Mehta has paid and brought in C.V. Mehta Pvt. Ltd. the sum of Rs. 20.00 lacs.* No doubt this document has been
 C signed on 13th November, 1982 but it clearly transpires that move for this modification *must have started prior to 13th November, 1982* and both the petitioners having finalised the deal with M/s Santosh Starch Products Pvt. Ltd. to obtain loan of Rs. 20.00 lacs in their private and personal capacity, the document came to be executed on 13th
 D November, 1982.” Here the complainant has speculated also.

A cursory reading of the complaint, in particular the extracts especially the underlined portion as given above, will clearly show that the contesting respondents (accused) will come into picture only after the liability contemplated under the modified memorandum of understanding was discharged. In other words, the accused respondents 1 and 2 could have come into picture only after the transactions complained of had taken place and as noticed above it was the father of the first respondent, who was the Managing Director of Sayaji Industries Ltd. when the transactions in question took place. The respondents Nos. 1 and 2 could have played no part in that transaction as they were not even ordinary Directors at that time in M/s Sayaji
 E Industries Ltd. Therefore, the allegations made in the complaint even if it is taken in its entirety still they do not constitute an offence either under Sections 120-B and 409 IPC. In the circumstances. It would be manifestly unjust to allow the proceedings in the criminal complaint to be proceeded with
 F against respondents 1 and 2.

G In this connection, though it is very well settled that the power under Section 482 Cr. P.C. should be sparingly invoked with circumspection, this Court consistently has taken the view that it should be exercised to see that the process of law is not abused or misused. In *R.P. Kapur v. State of Punjab*, AIR (1960) SC 866, a three-judge Bench of this Court while considering the
 H exercise of power under Section 561-A of the code (predecessor for Section

482) held as follows :-

“It is well established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any Court or otherwise to secure the ends of justice.....It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice..... Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person.”

We are firmly of the view that the above observations with all fours apply to the facts of this case in the light of the extracts given above from the complaint itself. The law laid down by this Court in R.P. Kapur's case has stood the test of time and held the field for more than three decades. This Court has applied the above ruling wherever the facts warranted the application, Very recently in *State of U.P. v. O.P. Sharma*, [1996] 7 SCC 705, again a three-Judge Bench of this Court quoted with approval the following passage from the *State of Bihar v. Rajendra Agrawalla*, [1996] 8 SCC 164 :-

“It has been held by this Court in several cases that the inherent power of the Court under Section 482 of the Code of Criminal Procedure should be very sparingly and cautiously used only when the court comes to the conclusion that there would be manifest injustice or there would be abuse of the process of the court, if such power is not exercised. So far as the order of cognizance by a Magistrate is concerned, the inherent power can be exercised when the allegations

A in the first information report or the complaint together with the other materials collected during investigation taken at their face value, do not constitute the offence alleged. At that stage it is not open for the court either to shift the evidence or appreciate the evidence and come to the conclusion that no *prima facie* case is made out.”

B In fairness to the High Court, we must also set out the reasoning of the High Court on this aspect. The High Court rightly observed :-

C “Reading the complaint and other material on record it appears that even according to the complainant the loan was advanced on 13.11.1982 by Sayaji Industries Limited to Santosh Starch Products and the Santosh Starch Products are alleged to have advanced the loan to the accused on the same day i.e. on 13.11.1982 and this, according to him, is an offence constituting both criminal breach of trust and conspiracy. Reading the requirement of Section 409 it is clear that proof of entrustment of money is a condition precedent. The ingredients of offence u/s 409 of IPC are to be found in the definition clause of “criminal breach of trust” in section 405 of IPC. It is therefore necessary for the complainant to prove the entrustment of property or dominion over it and in the second instance “dishonest misappropriation” or “conversion to the accused own use” of the property concerned. It is well settled that the dishonest use or disposition of the property in question in violation of any direction of the law prescribing the mode in which the trust is to be discharged or of any legal contract, express or implied, which is made touching the discharge of such trust, or wilfully suffering of any person to do so also constitute the offence of “Criminal Breach of Trust”. Now, upon reading the complaint, it becomes clear that it is the specific case of the complainant that the loan was advanced on 13.11.1982 by Sayaji Industries Limited to Santosh Starch products alleged to have advanced the loan to the accused on the same day and thus, according to him, is an offence constituting of both criminal breach of trust and conspiracy. This, in my view, does not amount in law into an offence under Section 409 as the ingredients of Section 409 are not attracted. For attracting the provisions of Section 409 one has to allege that the breach of trust is committed by public servant or by banker, merchant or agent, broker or attorney. Reading the complaint, it is nowhere stated that the accused occupy any of these positions. In absence of these particulars in the complaint, in my view, the complainant has *prima facie* failed to

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make out the case against the petitioners. Similarly, it is clear from reading the complaint and other material on record that the complainant has failed to make out any case under Section 120B or 409 of IPC.” A

We are in agreement with the view expressed above by the High Court. This one aspect is sufficient to quash the proceeding and we need not deal with the other points on which arguments were advanced before us. In the result, the appeals fail and are accordingly dismissed. B

B.K.S.

Appeals dismissed.