(2012) 05 JH CK 0067

In the Jharkhand High Court

Case No : Writ Petition (Cr.) No. 49 of 2012

B.N.Hotels Private Limited and Rajendra Kumar Gupta — APPELLANT

Vs

The State of Jharkhand and Pradeep Kumar Sonthalia — RESPONDENT

Date of Decision : 18-05-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Companies Act, 1956 — Section 291, 34, 56, 58A, 60A
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 482
Penal Code, 1860 (IPC) — Section 23, 24, 25, 34, 406

Citation : (2012) 05 JH CK 0067

Hon'ble Judges : Dhrub Narayan Upadhyay, J

Bench : Single Bench

Advocate : Shailendra Kumar Singh, for the Appellant;

Final Decision : Dismissed

Judgement

D.N. Upadhyay, J.—This Criminal Writ Application has been filed for quashing the entire criminal proceeding arising out of Dhanbad Bank More P.S. Case No. 104 of 2012 dated 2.2.2012, corresponding to G.R. No. 392 of 2012, registered under Sections 406/420/506 and 34 of the Indian Penal Code. The present case was registered on the basis of a complaint vide C.P. Case No. 154 of 2012 filed on 24.1.2012 by the respondent No. 2-Complainant and the said complaint was transferred to the concerned Police Station for institution and investigation u/s 156(3) Cr.P.C.

2. The brief facts appearing from the First Information Report/Complaint is that the petitioners happen to be the owner of landed property area measuring 73 decimals at Dhanbad which was mortgaged with the United Bank of India by M/s World Metal Movers, a Company floated by the family of petitioner No. 2. Due to non-payment of loan advanced in favour of said company, the jurisdiction of Debt Recovery Tribunal was invoked by the Bank and the property was at the verge of auction sale in the year 2007. The petitioners under that financial constraints

approached the respondent No. 2 and offered land for development and requested to pay Rs. 55,00,000/- (Fifty five lakh) as advance for getting the D.R.T. case disposed of. The Respondent No. 2 conceded the request and paid aforesaid sum of Rs. 55,00,000/- (Fifty five lakh) as detailed given by them to the petitioners in order to facilitate them to get the land released from the said mortgage. Thereafter development agreement on 8.8.2007 was signed between the parties as per the terms and conditions mentioned therein. After execution of the said development agreement, the land in question was handed over to the complainant on 03.04.2008 whereafter construction work as per approved plan commenced. Till the dispute arose the Respondent No. 2 had already spent Rs. 5,21,59,889.00/-. According to the Development Agreement, the original deed of the land was required to be handed over to the Respondent No. 2 for the purpose of creating mortgage over the said property for facilitating the complainant to take loan for the smooth progress of the development work but the petitioners in spite of repeated requests did not hand over the documents which caused financial crisis in the progress of the construction work. Initially, the Respondent No. 2 tried to get the matter solved by using arbitration clause mentioned in the agreement and after some litigation an Arbitrator was appointed and the matter was referred to him. The complainant was shocked to receive letter dated 31.12.2011 issued by the petitioners by which the power of attorney was revoked and vide letter dated 3.1.2012 the development agreement was not only terminated but the complainant was also asked to hand over the possession of the land. After receiving aforesaid letters, the complainant felt cheated and had reason to believe that the property invested by him has been misappropriated and then contacted the accused petitioner No. 2 but he was threatened with dire consequences and hence he lodged a complaint as referred to above.

3. Before adverting the submissions made by the parties and the grounds taken by them, I feel it desirable to mention hereunder the indisputable facts.

(a) The schedule property was put under mortgage by the petitioners with the United Bank of India and the matter was pending before the Debt Recovery Tribunal and the property was at the verge of auction sale.

(b) A sum of Rs. 55,00,000/- (Fifty five lakh) was paid to the petitioners for getting the mortgaged property redeemed and after it being redeemed the development agreement was executed between the parties on 8.8.2007.

(c) The possession of land was handed over to the complainant over which the development and construction work commenced.

(d) The petitioner did not hand over Title Deed relating to schedule property after which the complainant filed a suit in the Court of Sub- Judge- I at Dhanbad vide Misc. Arbitration Case No. 44 of 2009 on 16.06.2009 seeking interim injunction under the provisions of Section 9 of the Arbitration and Conciliation Act, 1996. In the Misc. Arbitration Case, interim injunction was granted in favour of respondent No. 2 on 22.07.2011.

(e) The petitioners preferred appeal before this Hon''ble Court vide Arbitration Appeal No. 13 of 2011 and the appeal was allowed in favour of the petitioners and the order dated 22.07.2011 passed by the learned Sub-Judge-I in Misc. Arbitration Case No. 44/2009 was set aside.

(f) The petitioners cancelled the power of attorney executed in favour of respondent No. 2 vide its letter dated 31.12.2011 and the development agreement was also terminated vide letter dated 3.1.2012.

4. It was submitted on behalf of the petitioners that no offence either u/s 420 or 406 or 506 is made out on the averments made in the complaint. If there was breach of contract, the complainant had right to sue the petitioners for the remedy. In view of the admitted facts, no criminal prosecution is required to be continued against them. It is indicative that the complainant took steps to get remedy by knocking the door of the Civil Court and filed Misc. Arbitration Case No. 44/2009 and succeeded to have favourable order from the Court of Sub-Judge-I at Dhanbad. When the said order was set aside by this Hon''ble Court in Arbitration Appeal No. 13 of 2001, this criminal case has been filed and prosecution of the petitioners is manifestly intended with mala fide for wrecking vengeance. There is inordinate delay in lodging the case and no such criminal prosecution is permitted to be continued to create pressure on the petitioners. The complainant shall not be allowed to adopt short cut method to get the fruit. The learned C.J.M. has sent the complaint to the concerned Police Station for investigating into the matter u/s 156(3) Cr.P.C. without application of judicial mind and hence the same is bad in law.

5. In the previous admitted civil litigation the complainant never raised or averted that he was cheated by the petitioner or the property in question was misappropriated. In contrary to that, it was stated in the pleadings that issue between the parties was ''Minor Issue'' amounting to "clear violation of terms of the agreement''. Thus according to the complainant himself no cheating or misappropriation of the property were the issues involved.

6. Section 415 of the I.P.C. was referred by the learned Counsel appearing for the petitioners and it was contended that ingredients of cheating were absent, there was no fraudulent or dishonest intention at the time the petitioners approached the complainant for giving their property for development. The fraudulent and dishonest intention for deceiving any person must exist at the very inception when the assurance/promise was given and on that assurance the property was delivered to any persons. Here in the instant case, the petitioners did not deny that they received Rs. 55,00,000/- (Fifty five lakh) as security deposit against the development agreement and after receipt of the said amount further conduct of the petitioners is very important. They had honoured their proposal and executed development agreement and also handed over possession of the land to the Complainant and allowed him to start construction work. It is admitted fact that construction work continued for about 2 years. Had the petitioners dishonest or fraudulent intention to cheat, they would not have

allowed the complainant to go further and therefore, the important ingredient of cheating are lacking. It was further contended that violation of terms of agreement would not constitute offence u/s 406 of the I.P.C. there was no question of misappropriation of property and this issue was never raised before filing of the complaint. Only because the Title Deed was not handed over, offence of criminal breach of trust is not attracted and to address that issue the complainant had already taken steps under the Arbitration and Conciliation Act, 1996. Likewise, offence u/s 506 I.P.C. is also not attracted because the Company i.e. B.N. Hotels Private Ltd., a Company run by the petitioners cannot be held liable for the offence.

7. It is not expected that the learned C.J.M. on presentation of any complaint is bound to send the same to the police u/s 156(3) Cr.P.C. for registration and investigation. What was expected from the learned C.J.M. is that he should have applied judicial mind to see whether the averments made in the complaint constitute any criminal offence or not before referring it to the police u/s 156(3) Cr.P.C. In the instant case, the learned C.J.M. has not applied his mind and in a format approved by him he order was passed and the complaint was referred to the police in a totally mechanical way without application of judicial mind. Had the complainant felt cheated, it was expected that he should have launched criminal prosecution at the initial stage and he would not be permitted to fulfill his vengeance after he failed to get favourable order in a civil litigation.

8. The criminal prosecution of the petitioners if permitted to be continued it will amount sheer misuse of the process of the Court. The malicious prosecution shall be stopped at the initial stage for the ends of justice and the petitioners shall not be left for harassment at the hands of the police. Learned Counsel has relied on the following judgment and submitted that the entire criminal prosecution arising out of Dhanbad Bank More P.S. Case No. 104 of 2012, corresponding to G.R. No. 392/2012, pending in the Court of C.J.M. at Dhanbad is liable to be quashed.

In Suryalakshmi Cotton Mills Ltd. Vs. Rajvir Industries Ltd. and Others, , the Hon''ble Supreme Court held:-

the scope of taking into consideration the documents of unimpeachable character for the purpose of finding out as to whether continuance of the criminal proceedings would amount to an abuse of process of Court or that the complaint petition is being filed for causing mere harassment to the accused.

In B. Suresh Yadav Vs. Sharifa Bee and Another, the Hon''ble Supreme Court held:-

It is permissible law to consider the stand taken by a party in a pending civil litigation in case where the offence alleged prima facie belongs to civil dispute.

In (2007) 14 S.C.C. 776, the Hon''ble Supreme Court held:-

Where civil suit is pending and the complaint petition has been filed after one year of the filing of the civil suit, for the purpose of finding out as to whether the allegations made in the complaint petition are prima facie correct has been taken into consideration in the civil suit and the correspondences exchanged by the parties and other documents can be looked into by the Hon''ble Court.

The petitioner further relied upon the following judgments:-

(2006) 1 S.C.C. 746; (2006) 2 S.C.C. 49; (2006) S.C.C. (Cri.) 430; V.P. Shrivastava Vs. Indian Explosives Ltd. and Others, Maksud Saiyed Vs. State of Gujarat and Others, ; (2001) 13 S.C.C. 412 & Thermax Ltd. and Others Vs. K.M. Johny and Others, .

9. The Respondent No. 1 State of Jharkhand has filed counter affidavit stating therein that Dhanbad Bank More P.S. Case No. 104 of 2012 was registered on the basis of C.P. Case No. 154/2012 which was received from the Court of learned C.J.M. u/s 156(3) Cr.P.C. After registering the F.I.R., the investigation commenced and witnesses have been examined and they have supported the prosecution case. Since the Investigating Officer has collected cogent evidence and found the offence prima facie correct, the investigation may not be stopped. There is no merit in this writ application and the same is liable to be dismissed.

10. The Respondent No. 2 has filed written notes of argument submitting therein that the property in question belonging to the petitioners was mortgaged with the United Bank of India against the loan advanced in favour of M/s World Metal Movers, a Company floated by the petitioners'' family. Since there was default in re-payment of loan amount, the matter was referred to the Debt Recovery Tribunal by the concerned Bank and the property was at the verge of auction sale. The petitioners were under acute financial constraints and, therefore, with oblique motive to get rid of inseparable financial disorder the petitioner accused No. 2 approached the complainant with fraudulent and dishonest intention and induced him to pay Rs. 55,00,000/- (Fifty five lakh) against the property in question and agreed to give the said property to the complainant for its development. Having been so induced, the complainant parted with Rs. 45,00,000/- (Forty five lakh) till 8.8.2007 and entered into a development agreement of which they were the party. It is pertinent to mention that the petitioners had signed the development agreement knowing full well the terms and conditions. As per clause 12,22.3 & 22.5 of the said agreement, the petitioners had undertaken to hand over all the original deeds of the property to the complainant to create mortgage of the schedule land to the Bank. They had also agreed that the developer (complainant) may take loan or financial assistance from any Bank/Financial Institution for the speedy construction of the said Building Complex at his own risk. The petitioners (owners) of the property will provide/facilitate to mortgage the schedule property with the Bank against the loan. Financial assistance is to be taken by the developer/complainant which is an essence of development agreement. It was also agreed that the liability of repayment of the loan amount will be the sole responsibility of the developer/ complainant. It is contended that the petitioners were having deceptive intention from the very beginning and they had been giving assurance on one ground or

the other to hand over the Title Deed but did not do so with an intention to cheat the complainant. On being assured that the complainant can take loan against the property in question for which co-operation and assistance will be provided by the petitioners, invested huge amount to the tune of Rs. 5,21,59,889.00/- from his own resources and the value of constructed property as now assessed by the valuer is about 30 crores. Had the complainant knowledge and belief that the petitioners shall not give support in getting loan to complete the project, he should not have parted with money as indicated above. Initially, the complainant was under impression that minor disputes between the parties in compliance with the terms and agreement is expected and therefore, he invoked the arbitration clause mentioned in the agreement but he was surprised and shocked when the petitioners revoked the power of attorney and terminated the development agreement only with an intention to misappropriate the property and to cheat the complainant. Even after knowing the termination of development agreement at the instance of petitioners, he approached them but he was threatened with dire consequences and then he felt that he has been cheated and the petitioners have committed criminal breach of trust to misappropriate the property and then he realized that the petitioners were having deceptive and fraudulent intention from the very beginning. Thereafter, he lodged a complaint in the Court of learned C.J.M. and it was referred to the Police Station concerned and registered as Dhanbad Bank More P.S. Case No. 104 of 2012 and the investigation proceeded ahead. It was submitted that the State of Jharkhand through S.P., Dhanbad has filed counter affidavit disclosing therein progress of investigation. The evidence collected by the I.O. supports the prosecution case and therefore, the investigation cannot be stopped at this stage. It is not expected that the ingredients of offence should be expressed verbatim in the complaint. If the contention made by the complainant and the facts brought by him constitute offence, the F.I.R. cannot be quashed.

11. Having heard and after going through the judgments cited from both sides, the principle settled is that in a case of cheating it is necessary that the deception by the accused of the person deceived, must be fraudulent or dishonest. Such deception must induce the person deceived to either (a) deliver property to any person or (b) consent that any person shall retain any property. The second part also requires that the accused must by deception intentionally induce the person deceived either to do or omit to do anything which he would not do or omit, if he was not so deceived. Furthermore, such act or omission must cause or must be likely to cause damage or harm to that person in body, mind, reputation or property. Thus it is evident that deception is necessary ingredient for the offence of cheating under both parts of this Section. The complainant, therefore, necessarily needs to prove that the inducement had been caused by the deception exercised by the accused. Such deception must necessarily produce the inducement to part with or deliver property, which the complainant would not have parted with or delivered but for the inducement resulting from deception.

12. It was submitted that the complainant/informant should be given opportunity to adduce evidence in support of his case and he should not be debarred from adducing evidence at the initial stage of investigation. If the offence is committed by a Corporate Body, it can also be prosecuted if the degree of control exercised by persons in charge of affairs of Company is so intense that a corporation may be said to think and act through a person or body of person, mens rea of person or persons in control is attributed to the Corporation, the Corporate Body cannot escape from criminal liability.

13. The Respondent No. 2 has relied on the following judgment of the Apex Court:-

Iridium India Telecom Ltd. Vs. Motorola Incorporated and Others, State of West Bengal Vs. Narayan K. Patodia, , M/s. Medchl Chemicals and Pharma P. Ltd. Vs. M/s. Biological E. Ltd. and Others, ; Lalmuni Devi Vs. State of Bihar and Others, ; 1992 Suppl.(1) S.C.C. 222 ; State of Karnataka Vs. M. Devendrappa and Another, Rajesh Bajaj Vs. State NCT of Delhi and Others, ; Kamaladevi Agarwal Vs. State of West Bengal and Others, ; (2008) 16 S.C.C. 390 (M. Viswanathan Vs. S.K. Tiles and Potteries Pvt. Ltd. & Others).

14. Further principle decided is that fraudulent and dishonest intention must exist at the very inception of the transaction held between the parties and to find out that the facts and circumstances of each and every case shall be relevant.

15. Now coming to the averments made by the complainant, it appears that the foundation of the deal was not sound. The property in question was lying under mortgage with the United Bank of India and due to non-payment of loan, the Bank had invoked jurisdiction of D.R.T. The property was at the verge of auction sale. The petitioners were in search of ray of hope to get the property redeemed by any means. In that constraint situation, the petitioners approached the complainant, who help them to get rid of the situation and for that they became ready to execute development agreement and it was done after receipt of a sum of Rs. 55,00,000/- (fifty five lakh). The petitioners had agreed to abide by the terms and conditions led in the agreement including that the original Title Deeds shall be handed over to the complainant authorizing him to take loan or financial assistance from any Bank or Financial Institution for the progress and completion of the development project. According to the complainant, he agreed for the project because he had belief in his mind that the project would not suffer financial constraints. Under that belief and promise given by the petitioners, the complainant spent more than 5 crores of Rupees on the project but the petitioners instead of co-operating, created hindrance and did not hand over the Title Deed as a result no loan process was initiated. The complainant had further averted that the petitioners kept on giving assurance to hand over the Title Deed but they did not do so only because they were having deceptive intention from the initial stage of transaction.

16. It is also contended that the complainant was under impression that due to

some confusion the petitioners have retained the Title Deed with them and therefore, he invoked arbitration clause. Even at that point of time he was not knowing that he has been cheated by the petitioners. When he received letters by which power of attorney was revoked, the development agreement was terminated, the threatening was hurled and the petitioners in clear term have disclosed that Rs. 55,00,000/- (Fifty five lakh) which the complainant had given to the petitioners has been forfeited, made him to believe that he has been cheated and put under huge loss, he lodged the complaint. It was known fact that the project for which development agreement was executed between the parties was not likely to be completed without getting financial assistance from Bank and hence had the complainant knew that the petitioners would not stand to their promise, he would not have parted with any amount. The cause of action for offence of cheating arises only when the person so deceived realize that he has been cheated.

17. The facts referred to above appearing in the complaint prima facie attracts the ingredients of cheating and therefore, the submission that contention made in the F.I.R. does not constitute criminal offence, is not tenable.

18. In every case of breach of contract the grievance can be redressed in a civil suit but there are cases of breach of contract which also attract ingredients of Section 420/406 of the I.P.C. Again such situation can be assessed from the facts of the case. The petitioners never issued letters revoking the power of attorney or terminated the development agreement or informed the complainant against the forfeiture of the amount paid by him at any initial stage when they knew that the progress of project was delayed but it was done by the them only when the matter was referred to arbitrator which indicates their intention. A criminal proceeding cannot be thwarted at the initial stage merely because civil proceeding is also pending- Kamaladevi Agarwal Vs. State of West Bengal and Others, . If there is deceptive intention and mens rea to misappropriate the property after committing criminal breach of trust may be the result of breach of contract held in commercial dealings, the ingredients of Section 406 I.P.C. appears to be attracted and the person aggrieved can take recourse to both civil and criminal process. Both the parties have relied on the judgment of State of Haryana Vrs. Bhajan lal and the seven points indicating the grounds for quashing of the criminal prosecution do not appear to be attracted in view of the facts of the case in hand.

19. I have carefully gone through the judgment reported in Iridium India Telecom Ltd. Vs. Motorola Incorporated and Others, in which most of the points raised by both the parties and many of the judgments cited by them have been discussed and this judgment is sufficient to cover all the questions arising out of present case. The head notes of the said judgments are as under:

A Corporate Laws- Company Law- Corporate criminal liability Offences requiring mens rea or a particular state of mind (like dishonesty)- Whether a corporate body can be prosecuted when offence is committed in relation to business of a company Doctrine of attribution and imputation- Degree of control exercised by persons in charge of affairs of company- Principle of alter ego- Held, if degree of control is so intense that a corporation may be said to think and act through a person or body of persons, mens rea of person or persons in control is attributable to the corporation- A corporate body cannot also escape criminal liability merely on the ground that punishment prescribed is imprisonment and fine- On facts held, prosecution could be launched against respondent Company for offence of cheating under S. 415 IPC- Criminal Trial- Mens rea- Dishonesty or fraudulent act- Whether corporate body capable of committing such acts- Penal Code, 1860-Ss. 415, 24, 25 and 23- Companies Act, 1956- Ss. 34 and 291- Corporate criminal liability- Attribution of criminal intent to juristic person of company.

Penal Code, 1860-Ss. 415, 24, 23, and 25- Cheating- Deception as a necessary ingredient under both parts of S. 415- When culpable- Such deception, held, must necessarily produce inducement to part with or deliver property which the complainant would not have parted with or delivered, but for inducement resulting from the deception.

Penal Code, 1860- S. 415 Expln. and Ss. 24 and 23- Deception- Scope of- Non-disclosure of relevant information- Held to be treated as misrepresentation leading to deception- Further held, S. 415 Expln. gives statutory recognition to the judicially evolved principle that misleading statements which withhold vital facts for intentionally inducing a person to do or omit to do something, would amount to deception- Misleading statement causing damage wrongfully to the person deceived, amounts to cheating- A corporate body seeking investment by means of misleading statement may therefore be subjected to prosecution for cheating- Corporate Laws- Company Law- Corporate criminal liability- prospectus/ Private Placement Memorandum (PPM)- Misleading statement in- Whether amounts to cheating- Companies Act, 1956- Ss. 56, 58A, 60A, 60B, 61 to 68- Fraud/Forgery/ Mala fides- Criminal Procedure Code, 1973, S. 482.

The appellants were entitled to an opportunity to prove the averments made in the complaint. They were entitled to establish that they have been deliberately induced into making huge investments on the basis of representations made by Respondent 1 and its representatives, which representations subsequently turned out to be completely false and fraudulent. The appellants were entitled to an opportunity to establish that Respondent 1 and its representatives were aware of the falsity of the representations at the time when they were made. The appellants have given elaborate details of the positive assertions made by Respondent 1 which were allegedly false to its knowledge. It is also claimed by the appellants that Respondent 1 and its representatives wilfully concealed facts which were material and ought to have been disclosed, but were intentionally withheld so as to deceive the appellant into advancing and expending a sum of Rs. 500 corers.

20. In view of the ratio decided by the Apex Court a Company can also be held

liable for the offence of cheating.

21. Respondent No. 1 in his counter affidavit has referred few paragraphs of the case diary and the witnesses examined have supported the prosecution case and the Investigating Officer has prima facie found the occurrence true and the Respondent No. 1 has also justified investigation which is under progress. When the I.O. has collected material which constitute the offence as alleged in the F.I.R., the order of the learned C.J.M. by which the complaint was referred to the Police Station concerned u/s 156(3) Cr.P.C. cannot be questioned. In view of the discussions made above and the judgments relied upon, the F.I.R. and the criminal proceeding arising out of Dhanbad Bank More P.S. Case No. 104 of 2012 cannot be quashed and there is no merit in this writ application and the same stands dismissed. The stay order dated 16th March, 2012 stands vacated and the Investigating Officer is at liberty to proceed with the investigation and do the needful in accordance with law. Petitioners are at liberty to raise relevant issues at appropriate stage before the appropriate court for which liberty is granted and the observations with regard to the facts made by this Court shall not cause any prejudice to any of the parties in course of trial.