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(2023) 07 OHC CK 0260

In the Orissa High Court

Case No : CRLMC No.69 Of 2023

Damayanti Nayak and Another — APPELLANT

Vs

State Of Odisha — RESPONDENT

Date of Decision : 27-07-2023

Acts Referred:

Constitution of India, 1950 — Article 226
Code of Criminal Procedure, 1973 — Section 482
Indian Penal Code, 1860 — Section 34, 405, 406, 420
Odisha Protection of Interests of Depositors (In Financial Establishments) Act, 2011 — Section 2(d), 6

Citation : (2023) 07 OHC CK 0260

Hon'ble Judges : R.K. Pattanaik, J

Bench : Single Bench

Advocate : Suresh Tripathy, A.K. Nayak

Final Decision : Dismissed

Judgement

R.K. Pattanaik, J

1. Instant petition under Section 482 Cr.P.C. is filed by the petitioners for quashment of FIR dated 4th August, 2015 (Annexure-2) registered under Section 420 read with 34 IPC and also the chargesheet dated 29th September, 2015 (Annexure-4) pending in the file of learned Presiding Officer, DC, OPID Act, Cuttack corresponding to C.T. Case No.35 of 2015 arising out of G.R. Case No.1325 of 2015 on the grounds inter alia that no offence much less the offence alleged is prima facie made out against them besides Section 6 of the OPID Act.

2. As per the petitioners, they are the Managing Director and Director of a company incorporated under the Companies Act by name Vasundhara Land and Developers Pvt. Ltd. are engaged in real estate business for providing plots and houses to their customers and in so far as the informant is concerned, he had entered into an agreement with them, whereby, it was decided that a house after construction would be handed over to him within two years. According to the

petitioners, the informant had paid Rs.4,35,000/- on 29th October, 2011 and considering the allegation in Annexue-2, in spite of three years having elapsed, the commitment made was not honoured. The informant alleged that a sum of Rs.5,35,000/- was paid to the petitioners but when the construction of the house was not complete in time, there was a demand by him for refund of the money and the petitioners accordingly refunded an amount of Rs.1,25,000/- and issued cheques for the balance which were presented for encashment but all were bounced back. Thereafter, as it appears, the FIR was lodged on 4th August, 2015 for which Chauliaganj P.S. Case No.159 was registered under Section 420 read with 34 IPC. Later to the lodging of the report, the chargesheet dated 29th September, 2015 was submitted against the petitioners for the alleged offence along with Section 6 of the OPID Act. The petitioners claimed that Annexure-2 does not disclose commission of any such offence, rather, the dispute is based on a contract between them and the informant and that apart, a sum of Rs.1,25,000/- was refunded and for the balance cheques had been issued and although they stood dishonoured under certain circumstances, such could not have been a ground to register a case receiving Annexure-2. It is also claimed that no offence under the OPID Act has been made out and therefore, filing of Annexure-4 is patently illegal. It is also alleged that the balance amount as agreed to be paid by the informant was not obliged and in any case, having regard to the fact that the dispute is entirely civil in nature, initiation of a criminal action against the petitioners is untenable in law.

3. Heard Mr. Tripathy, learned counsel for the petitioners and Mr. Nayak, learned counsel for the OPID State.

4. Mr. Tripathy, learned counsel for the petitioner reiterated the grounds and contended that inherent jurisdiction under Section 482 Cr.P.C. should be exercised to quash Annexure-4 since no case is made out for an offence under Section 420 IPC so also Section 6 of the OPID Act as the company of the petitioners was not involved in any such activities as a financial establishment but was providing plots and houses to its customers. The decision of the Apex Court in State of Haryana and Others Vrs. Ch. Bhajan Lal and Others AIR 1992 SC 604 is referred to Mr. Tripathy demanding exercise of extra-ordinary jurisdiction to quash the criminal proceeding and as a necessary corollary Annexure-4. Furthermore, Mr. Tripathy cited the following authorities, such as, Anand Kumar Mohata and Others Vrs. State (Govt. of NCT of Delhi) Department of Home and Others AIR 2019 SC 210; Rashmita Patra Vrs. State of Odisha and Others (2021) (III) ILR CUT 394 besides Shaikh Shaukat Vrs, State of Maharashtra and Another decided on 18th January, 2023 by Aurangabad Bench of Bombay High Court while advancing an argument for quashment of the FIR and also the chargesheet.

5. Mr. Nayak, learned counsel for the OPID State refers to a judgment of the Bombay High Court dated 24th January, 2002 (Shri Rajiv Ramanlal Shah Vrs. Senior Inspector of Police) along with an order dated 30th November, 1989 in the

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case of Bota @ Batakrishna Behera and Another Vrs. Anama Behera reported in 1999 Cri. LJ. 110. One more decision has been placed reliance on by Mr. Tripathy, such as, Sushil Sethy and Others Vrs. State of Arunachal Pradesh and Others AIR 2020 SC 765 contending that the prosecution is absolutely justified in view of the allegations in Annexure-2 and hence, it should not be interfered with.

6. Gone through the contents of the FIR as at Annexure-2.

7. As per the informant, so narrated in Annexure-2, he had an agreement with the company and in that connection, a sum of Rs.4,35,000/- was paid for construction of a simplex house and thereafter, an amount of Rs.1,0,000/- towards registration fee which was not acknowledged with any receipt but within the time stipulated, the construction was not completed and as the house was not handed over and there was further delay, refund of money was demanded which was obliged with a return of Rs.1.25,000/- in two installments and for the rest amount, the company issued cheques but due to insufficient fund in its account, the same bounced back. With the above allegation in the FIR, the informant pleaded for legal action, consequent upon which, Chauliaganj P.S. Case No.159 dated 4th August, 2015 was registered and finally the chargesheet under Annexure-4 was filed under Section 420 read with 34 IPC and Section 6 of the OPID Act.

8. The petitioners are the Managing Director and Director of the company in question. It is being alleged in Annexure-2 that the informant paid to the petitioners an amount of Rs.5,35,000/- in total and received back Rs.1,25,000/- and the balance amount was not refunded and in that respect, cheques were issued which also stood dishonoured. The petitioners do not dispute the fact that the informant had paid money towards construction of simplex house. From the FIR Annexure-2 itself, refund of Rs.1.25,000/- is revealed but not the balance. Notwithstanding the default in paying back the balance money to the informant, the petitioners claimed that the dispute is civil in nature and therefore, Annexure-2 could not have led to registration of the case for an offence of cheating. It is also contended that having regard to the nature of transaction and business which is run by the company, no offence under Section 6 of the OPID Act is established. Mr. Tripathy, learned counsel for the petitioners refers to the judgment of this Court in Rashmita Patra (supra) and submits that the company since is not involved in accepting deposits and it does not come within the definition of 'financial establishments' as defined in Section 2(d) of the OPID Act, the filing of chargesheet under Section 6 of the said Act is thoroughly misconceived. In reply, Mr. Nayak, learned counsel for the OPID State cited the decision in Shri Rajiv Ramanlal Shah (supra) to counter the contention of Mr. Tripathy, learned counsel for the petitioners.

9. In so far as the decision in Rashmita Patra (supra) is concerned, this Court expressed a contrary view and held the company being involved in real estate business not to be a financial establishment within the definition Section 2(d) of the OPID Act but the same has been stayed by the Apex Court. In recent

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judgment of this Court decided on 2nd March, 2023 in CRLMC No. 3386 of 2022, it has taken judicial notice of the judgment in Rashmita Patra (supra) which differed with the earlier views. It was held therein that since the judgment in Rashmita Patra (supra) has been stayed by the Supreme Court in SLP Nos. 2107 and 4910 of 2022, the prosecution for an offence under Section 6 of the OPID Act shall have to be continued with its fate depending on the final decision therein. So, therefore, at this juncture, having concluded so, the Court is of the view that the prosecution under Section 6 of the OPID Act with the chargesheet under Annexure-4 filed cannot be terminated.

10. In so far as Section 420 IPC is concerned, the informant alleges cheating by the petitioners as the principal office bearers of the company. After the investigation was concluded, the chargesheet was filed under Section 420 IPC as well besides Section 6 of the OPID Act. Whether an offence of cheating is prima facie made out or not is only to be considered as against the claim of the petitioners that it is a civil dispute between them and the informant. Mr. Tripathy, learned counsel for the petitioners would contend that since the parties entered into an agreement, some amount of money was paid by the informant, a sum of Rs.1,25,000/- was refunded and there was bounced cheques issued towards refund of balance money, the informant since entered into a contract with the petitioners, the dispute is entirely civil in nature and therefore, no cheating can be attributed. In Anand Kumar Mohata (supra), the Apex Court was dealing with a plea for quashing of FIR for offences punishable under Sections 405 and 406 IPC. In the said case, the High Court refused to quash the FIR and chargesheet which was challenged in appeal and having regard to the facts and circumstances of the case held that the prosecution is untenable which was solely intended to harass the accused persons and as a result, allowed it keeping in view the decision in Ch. Bhajan Lal (supra). However, the Court is of the view that the said decision is based on facts peculiar to the case and therefore, the Apex Court considered it justified to quash the FIR and chargesheet. The law is well settled that if a prima facie case is made out considering the complaint or FIR, as the case may be, jurisdiction under Section 482 Cr.P.C. cannot be exercised to stifle the prosecution. In Ch. Bhajan Lal (supra), the Apex Court held and observed that exercise of extra-ordinary power under Article 226 of the Constitution of India or for that matter, inherent jurisdiction under Section 482 Cr.P.C. could be either to prevent abuse of the process of court or otherwise to secure the ends of justice though it may not be possible to lay down any precise, clearly defined and sufficiently channelized and flexible guidelines or rigid formula and only illustrated certain categories of cases and concluded that if the allegation in the FIR or complaint at its face value even if accepted in their entirety do not prima facie constitute any offence; or disclose a cognizable offence justifying police investigation; or the allegations made therein are so absurd and inherently improbable on the basis of which no prudent person can ever each a just decision that there is sufficient ground for proceeding against the accused; or where the criminal proceeding is manifestly attended with malafide or maliciously instituted

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with an ulterior motive for wreaking vengeance on the accused with an view to spite him due to private and personal grudge, such power may be exercisable. Precisely, the above are the guidelines of the Apex Court to be borne in mind while considering plea for quashment of criminal proceedings.

11. In the instant case, no doubt the informant paid an amount of Rs.5 lac and some odd and received back a sum of Rs.1,25,000/-and not the rest due to dishonour of cheques issued by the company. There is no denial to the fact that the parties entered into a contract towards construction of a simplex house by the company and to hand it over to the informant within a period of two years. It is not denied that there has been delay in refund of money. The informant is alleged to have not received back the balance amount for which the cheques had been issued which had bounced back. If within the period specified the contract is not able to the performed and further delay occasions and one of to the parties to it suffers due to the misconduct of the other, like the present case herein, where neither the simplex house was constructed and delivered in time to the informant nor the balance money was refunded as the cheques bounced, it may be said that the intention was to be otherwise and in such a situation, mischief may be alleged for having committed an offence under Section 420 IPC. Merely for the reason that a contract has been entered into between the parties, at all circumstances, in case of any mischief committed by one of the parties, it has to be merely treated as a civil dispute. Law is also well settled that if there is a mischief committed which has a penal consequence irrespective of a civil contract between the parties, the wrongdoer may be criminally prosecuted as well besides having a civil consequence. What the intention of the petitioners and whether the informant was allegedly cheated since he had to approach the petitioners for refund of balance money, nevertheless, for such default, an offence under Section 138 of the NI Act may be said to have been committed and under such circumstances, if at all an offence under Section 420 IPC is made out or not depends on the conduct of the petitioners and in the considered view of the Court all such aspects should be left to be examined by the learned court below. Since a prima facie case is proved in view of the chargesheet filed against the petitioners, the Court is of the conclusion that the petitioners shall have to face the enquiry and may demand discharge for the offence under Section 420 read with 34 IPC and it is not inclined to quash the proceeding as a whole.

12. Accordingly, it is ordered.

13. In the result, the CRLMC stands dismissed.

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