(2007) 08 PAT CK 0094

In the Patna High Court

Case No : Cr. Misc. No. 8361 of 2005

Jorjy International Private Limited and Others APPELLANT

Vs

State of Bihar and Another RESPONDENT

Date of Decision : 13-08-2007

Acts Referred:

Citation : (2007) 08 PAT CK 0094

Final Decision : Allowed

Judgement

Sadanand Mukherjee, J.—Heard the parties.

2. This is application for quashing the complaint case bearing Complaint Case No. 2697(C) of 2004 including the entire criminal proceedings before the Chief Judicial Magistrate, Patna, who was pleased to transfer the case u/s 192(1) of the Cr.P.C. for enquiry and disposal to the court of S.D.J.M. Patna in Trial No. 2304 of 2004, where in the learned S.D.J.M. was pleased to take cognizance against the accused persons Under Sections 409, 420 and 120B of the I.P.C. on 7.1.2005, as the opposite party No. 2 had filed (Sic) fictitious complaint case against the petitioner which is an abuse of the processes of the court.

3. It has been submitted that the matter relates to a civil dispute which is being guided and governed by arbitration clause described in the agreement between the complainant-opposite party and the accused parsons. It has also been submitted that prima facie no ingredient of criminal case is involved and this case has been filed by the complainant-opposite party No. 2 only for the purpose to harass the petitioners. The petitioners belong to a reputed firm, namely, M/S Jorjy International Private Limited having its head office at F-6 Okhla Industrial Area, Phase-I , New Delhi.

4. The complaint petition was filed by the complainant-opposite party No. 2, Nilofar Nahid, wherein it was alleged that complainant-opposite party No. 2 was appointed as clearing and forwarding Agent for the city of Patna of the petitioners'' firm and after finalisation of such appointment, an agreement was

made in between the firm and the complainant opposite party No. 2 on 1.11.2003, known as Clearing and Forwarding Agency Agreement duly signed by the Director of the aforesaid Firm, Sanjay Kalra, Petitioner No. 2, and the complainant opposite party No. 2, who was no deposit Rupees two lacs as security deposit before commencement of business of clearing and forwarding Agency Agreement, which was refundable in future without any interest, but the accused-petitioner had not paid the commission, as agreed upon by the petitioner''s firm to the complainant-opposite party No. 2 inspite of repeated reminder to the firm and their officers. It is further alleged in the complaint case that the opposite party No. 2 had approached the firm of the petitioner for commission of Rs. 54000/- and also for the refund of security money of Rupees two lacs, but no action had been initiated for atleast refund of security money and they have also appointed other Clearing and Forwarding Agent for Patna and started business.

5. It has been submitted on behalf of the petitioners that in the agreement between the petitioners and the opposite party No. 2 there is an arbitration clause which clearly says that any dispute or difference at any time shall be settled by the Arbitrators, and the Arbitration will be held in accordance with the provision of Indian Arbitration Act, 1940, or by any statutory modification or re-enactment thereof for the time being in force and all proceedings in such arbitration shall be held in New Delhi. It has further been submitted on behalf of the petitioners that according to the agreement the principal of the firm shall pay to the agent a commission on the value of products sold and the invoiced as under:

Commission @ 2% on sale value exclusive of sales tax, central sales tax etc. or minimum of Rs. 6,000/- whichever is higher.

6. It has been submitted that the commission will be calculated and paid to the agent by the Principal of firm on monthly basis on receipt of bills, statements of accounts from the agent in accordance with various clauses in regard to remuneration which are binding on both, the petitioners and the opposite party No. 2. It is further submitted that one Rajesh Kumar also filed a similar frivolous complaint against the petitioner''s firm, being Complaint Case No. 2116(C)/2004 and this Court stayed the further proceeding of the complaint case pending in the court of S.D.J.M. Patna in Cr. Misc. No. 126 of 2005. It has been submitted that so far the complaint filed by the complainant-opposite party is concerned, no ingredient as contained in Sections- 409, 420 and 120B of the I.P.C. found. It is stated that the business in between the parties had been started after executing an agreement and the opposite party No. 2 has mostly violated the terms and conditions for which the petitioner''s firm had always been giving sufficient collaboration for mending the ways, but even though any grievance is left out in between the parties, the same could have bean well decided under the Arbitration Clause as laid down in the agreement which was binding on both of them. It has bean submitted that Section 420 of the I.P.C. is concerned, the

same is not applicable in this case as cheating, dishonesty including delivery of property has completely got no bearing with the instant case as it is the goods of the petitioners which are in the custody and possession of opposite party No. 2. It has further been submitted that sofar Section 120B of the I.P.C. is concerned, the name is also not applicable in this case as there was no criminal conspiracy in between the parties, as according to the agreement the goods of the petitioner''s firm were to be sold on commission and any loss incurred by the complainant-opposite party in course of business was to be compensated from the security amount deposited by the complainant-opposite party No. 2, and as such, the entire matter is covered within the preview of a civil disputes which has to be decided under the terms of Arbitration as laid down in the agreement. It is submitted that where the arbitration clause is present, the jurisdiction of the Court is completely ousted. It is stated that the complainant-opposite party has filed this complaint without any basis as there is no criminal ingredients against the petitioner and even if the complaint is taken in its entirety the same does not disclose a cognizable offence against the petitioners. It has been submitted that as the complainant-opposite party No. 2 is seeking to recover some money from the petitioners, therefore, the opposite party No. 2 has to initiate arbitration proceedings. It has further been submitted that the Apex Court has repeatedly held that criminal proceedings cannot be used as an arms twisting tactics. The opposite party No. 2 has given a purely civil and contractual matter the colour of criminality which this Court cannot permit. It has been submitted that the petitioners are alway ready to cooperate the complainant-opposite party No. 2 in accordance with the terms and conditions of the agreement arrived at between the parties, and on the grounds as stated, the petitioners prayed for to quash the entire proceeding of the complaint case.

7. It is well settled that the scope of enquiry u/s 202 Cr.P.C, in a complaint case is very limited and the Magistrate has to be satisfied if a prima facie case exists on the materials placed by the complainant for the limited purpose of finding out whether there is a chance in case for issuing process for deciding the purely on the point of the view of the complaint AIR 1976 SC 736. In (2006) SCC 736 , Indian Oil Corporation v. NEPC India Limited and Ors. it was held that the remedy under Criminal Law is not barred in the allegations disclosed in criminal offence. It has been indicated with reference to the complaint petition that there is no commission paid to the complainant and further security money was not refunded. However, there is claim in the complaint that there was an agreement which was finalised in between the parties in black and white in vide agreement in 2003. It is not clear whether the aforesaid agreement forms part of the complaint at the time of filing of the complaint. In the case of Hridaya Ranjan Pd. Verma and Others Vs. State of Bihar and Another, while determining the culpability u/s 415 it was held, in the case of Rajesh Bajaj Vs. State NCT of Delhi and Others, , as follows:

It is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the complainant should (Sic) in so many words that the intention of the accused was dishonest or fraudulent....

The crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or not. The complainant has stated in the body of the complaint that he was induced to believe that the respondent would honour payment on receipt of invoices, and that the complainant realised later that the intentions of the respondent were not clear. He also mentioned that the respondent after receiving the goods had sold them to others and still he did not pay the money. Such averments would prima facie make put a case for investigatior by the authorities.

8. In the case of Hridaya Ranjan Pd. Verma and Others Vs. State of Bihar and Another, the Hon''ble Supreme Court held as follows:

14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is, the time when the offence is said to have been committed. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.

9. From perusal of the complaint petition it appears that there was a series of terms and conditions of the business which was finalised between them and there was an agreement, and Rupees 2 lac was made security deposit. Further allegation in the complaint petition is that the accused persons never paid commission, as agreed between the parties, to the complainant inspite of repeated reminders to them and further although the complainant approached for settlement of commission of Rs. 54,000/- and refund of security money, but no action has been initiated by them and they also appointed other agent for patna and started business.

10. It has been pointed out on behalf of the petitioner that even if all the allegations in the complaint were taken as true, they do not a criminal offence Under Sections 409, 420 and 120B of the I.P.C. It is well settled that as regards criminal breach of trust to attract the provisions of Section 409 of the I.P.C there must be entrustment. The definition of Section 405 of Criminal Breach of trust conceives entrustment of the property or dominion over the property, dishonestly misappropriation of that property. Such mis-appropriation should be in violation of any direction of law in prescribed mode for which such trust is to be discharged.

11. Sofar as petitioner is concerned, even according to the complaint case some medicines have been supplied to the C.&F. agent and admittedly the business of C&F. agent was started, though only complaint was that the commission was not paid and security money of Rupees 2 lac has not been refunded.

12. Sofar as the complainant is concerned, the entrustment relates to security money. However, admittedly there was business transaction and prior to that there was an agreement.

13. Sofar as offence u/s 415 of the I.P.C. is concerned, to constitute an offence of cheating there should be deception of a person either by making a false or misleading representation or by other action or omission, fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person to do or omit to do anything which he would not do or omit if he were not so deceived.

14. In this case agreement exists, and there was transaction of business in between petitioner and the complainant. It was held by the Hon''ble apex Court in the case of G. Sagar Suri v. State of U.P. (S.C.C. page-643, para-8) that;

It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction u/s 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice.

15. It is settled law as stated above there should be dishonest intention from very begining which, however, can also be assessed from the circumstances of the case. There was arbitration clause in the agreement and there was also initial business transaction between the complainant and the accused persons and submission in that no dishonest intention is possible or considerable in the instant case.

16. As indicated above, under the settled principles of law the crux of postulate is intention of a person who induces the victim by his representation. Thus, it is

settled principles of law where mere breach of contract cannot rise to a criminal proceeding for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Intention from very beginning is the gist of the offence.

17. In this case even according to the complaint case business transaction took place and there is nothing to show from very beginning that there was dishonest intention on the part of the petitioner to fraudulently and dishonestly induce the complainant to deliver any property or to do or omit todo anything. For mere failure to keep his promise subsequently, culpable intention right from the beginning cannot be inferred. In the State of Haryana and others Vs. Ch. Bhajan Lal and others, , wherein categories of cases have been mentioned, which has been reiterated as principle of law in several cases, it was held about the cases where the allegation made in the first information report or complaint even if they are taken on their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the accused. The present case also comes within the first category of offence, as stated therein and as such warrants interference by this Court. Even if the allegations are accepted as true, the ingredients of intentional deception on the part of the petitioner right from beginning of the negotiation in the transaction was not made out.

18. In view of aforementioned facts and circumstances of the case, it is an abuse of the processes of the Court to continue criminal proceeding against the petitioner. The criminal proceedings against the petitioners is accordingly quashed.

This criminal miscellaneous application No. 8361 of 2005 is allowed.