

(2009) 11 GAU CK 0060

In the Gauhati High Court

Case No : Criminal Revision No. 1 (SH) of 2009

Karan Luthra

APPELLANT

Vs

State of Meghalaya

RESPONDENT

Date of Decision : 06-11-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Criminal Procedure Code, 1973 (CrPC) — Section 397, 397(2), 401, 482
Penal Code, 1860 (IPC) — Section 405, 406, 409

Citation : (2010) 3 GLR 600 : (2010) 1 GLT 474

Hon'ble Judges : P.K. Musahary, J

Bench : Single Bench

Advocate : J.M. Choudhury, A.K. Agarwal, R.M. Khengton, S.P. Mahanta and R. Thapa, for the Appellant; K. Sunar, for the Respondent

Final Decision : Allowed

Judgement

P.K. Musahary, J.—Heard Mr. H. Abraham, learned Counsel, appearing for the petitioner and also heard Mr. K. Sunar, learned Addl. P.P. Meghalaya.

2. The petitioner has filed this application u/s 482 read with Section, 401 and Section 397 of the Code of Criminal Procedure, 1973 for quashing the proceeding in GR Case No. 28(S) of 2007 pending in the court of the learned Chief Judicial Magistrate, Shillong and also for setting aside and quashing the impugned orders dated 16.9.2008 and 3.11.2008 passed by the learned Chief Judicial Magistrate, Shillong in the said proceeding.

3. The facts in brief, for the purpose of disposal of this matter, are that the Government of Meghalaya introduced the State Lottery in 1982 with an object of mobilising additional resources and it appointed the petitioner as Organising Agent by executing an agreement dated 4.6.1982. The said appointment was extended by executing 2 other agreements dated 5.6.1985 and 26.4.1988. The petitioner failed to submit returns of prizes as per the terms/clauses of the agreement. He rather disputed the amount payable to the Government. An

arbitrator was appointed by the Government and an award was passed on 3.2.1998 in favour of the Government and against the petitioner directing him to pay Rs. 1,025.65 lakhs as total dues to the Government, which he failed to pay. The State Government filed Money Execution Case, in which the petitioner filed objection by way of filing a miscellaneous application in the Court of Assistant District Judge, Shillong. The said miscellaneous case was allowed by a judgment and order dated 26.9.2005 setting aside the award dated 3.2.1998. The State of Meghalaya preferred no appeal against the said judgment but lodged FIR on 11.7.2000 against the petitioner.

4. Mr. Abraham, learned Counsel appearing for the petitioner submits that the arbitrator appointed by the State Government initiated the arbitration proceeding to settle the dispute between the petitioner and the respondent-State in regard to some dues from the petitioner as organising agent as per the agreement and in the said arbitration proceeding, the petitioner was made liable to pay an amount of Rs. 1,025.55 lakhs to the respondent-State. The respondent-State filed a Money Execution Case No. 1(H) of 1999 before the Court of Assistant District Judge, Shillong. In the said proceeding, the present petitioner filed a miscellaneous application No. 25(H) of 2004. The said miscellaneous application was considered and heard by the learned Assistant District Judge and the same was disposed of by a judgment and order dated 26.9.2005 whereby the award dated 3.2.1998 passed by the arbitrator was set aside. It is also submitted that the money execution case was also dismissed. The respondent-State has not challenged the aforesaid judgment and order dated 26.9.2005 and as such, the same has attained its finality. Therefore, as submitted by Mr. Abraham, the present criminal proceeding cannot proceed inasmuch as the petitioner has no dues or liability towards the respondent-State.

5. Mr. Sunar, learned Addl. P.P. submits that the learned Chief Judicial Magistrate has already framed charges vide order dated 3.11.2008 which is an interlocutory order and the same cannot be sought to be quashed u/s 397(2) of the Cr.P.C. Moreover, in the judgment and order dated 26.9.2005 passed by the learned Assistant District Judge, Shillong in MC No. 25(H) of 2004, it is mentioned that the award of the learned arbitrator dated 6.3.1998 has been set aside. The award dated 6.3.1998 as stated in the said judgment and order is not connected with the present proceeding. In view of the above, he submits that the criminal proceeding cannot be quashed for the ends of justice.

6. There is no dispute that the petitioner was appointed as Organising Agent of the State Lottery by the Government of Meghalaya by executing an agreement dated 4.6.1982, which was extended from time-to-time. The dispute arose between the Government and the Organising Agent/petitioner regarding submission of return in respect of all prizes as required under the said agreement for which an arbitrator was appointed to resolve the dispute vide arbitration Case No. ARB 01 of 1996. An award was passed on 3.2.1998 in favour of the Government directing the Organising Agent M/s. Karan and Company (petitioner)

to pay Rs. 1,025.65 lakhs as total dues to the Government. As the petitioner did not pay the aforesaid awarded amount, the Government filed Money Execution Case No. 01(H) of 1999 before the Court of learned Assistant District Judge, Shillong. In the said execution case, the petitioner filed an objection, which was registered as miscellaneous case No. 25(H) of 2004. While disposing of the aforesaid misc. application vide judgment and order dated 26.9.2005, the learned Assistant District Judge set aside the award of the arbitrator as under:

Accordingly, the application u/s 34 of the Arbitration and Conciliation Act 1996 of the Respondent is allowed and the award of the learned arbitrator dated 6.3.1998 is hereby set aside.

7. There is an apparent typographical mistake which should have been recorded as 3.2.1998 in place of 6.3.1998 inasmuch as in the objection petition/application u/s 34 of the Arbitration and Conciliation Act 1996, which was registered as MC 25(H)/2004, the date of the award of the arbitration was mentioned as 3.2.1998 and at several places of the judgment and order, the learned Assistant District Judge referred the award as dated 3.2.1998. It is also an admitted position that there is no other arbitration proceeding between the petitioner and the respondent-State except the arbitration case No. ARB 01 of 1996 and there is no other award except the one dated 3.2.1998.

8. For passing an order quashing the criminal proceeding, the court is to be guided by the principles laid down by the Supreme Court in State of Haryana and others Vs. Ch. Bhajan Lal and others, Out of 7 golden principles laid down therein, the Principle Nos. (1) and (3) would be relevant for this case. It would be appropriate to quote the said principles:

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2)

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

9. In order to examine the present case in the light of the aforesaid principles, it would be relevant to refer to the FIR dated 11.7.2000 lodged by the Government against the petitioner. The same may be quoted below:

GOVERNMENT OF MEGHALAYA EXCISE, REGISTRATION TAXATION, STAPS DEPARTMENT

No. ESTS (T) 11/98/76 Dated Shillong, the 11th July, 2000. From: Smt. B.I. Jyrwa,

Under Secretary to the Government of Meghalaya.

To: The Superintendent of Police, East Khasi Hills District, Shillong.

Subject: FIR in connection with Meghalaya State Lotteries.

Sir,

I am directed to say that the Meghalaya State Lotteries was introduced by Government in July 1982 with the main purpose of mobilizing additional resources for the Government of Meghalaya and M/s. Karan & CO. New Delhi was appointed as the Organising Agent vide Agreement dated 4.6.1982. The appointment of M/s. Karan & Co. and Organising Agent was again extended vide two other Agreements dated 5.6.1985 and dated 26.4.1988.

The clauses of the agreement were violated time and again by the organising agent as the organising agent submitted no return in respect of all prizes payable by the organising agent as required under Clause 10(b) of agreement dated June 1982 and Clause 12(2) of agreement dated June 1985.

The organising agent also disputed the amount payable to the Government of Meghalaya by the Organising Agent to the tune of Rs. 1025.65512 lakhs pertaining to the Meghalaya State Lottery (i.e., Guaranteed Profit interest Rs. 538.145 lakhs, Rs. 411.22 lakhs, Rs. 76.29012 lakhs @4.6% not paid during June, 1988 to March, 1996. As provided by Clause 21 of the Agreement, an Arbitration Case was filed by Shri A. Sarma Bar-at-Law was appointed by Government as Arbitrator in the Arbitration Case No. ARB. 1/96. The award of the Arbitrator dated 3.2.1998 was in favour of the Government and M/s. Karan & Co. was directed to pay Rs. 1,025.65 lakhs as the total dues to the Government. But the organising agent has till date not paid the amount to the State Government. M/s Karan & Co. has not responded to the correspondences sent by the Government and appears to be deliberate by trying to escape from paying the Government dues. It is imperative for the interest of the State Revenue that the Organising Agent be apprehended and produced before the court.

The address of the Organising Agent is as follows: M/s. Karan Luthra & Co. 1st B-50, Lajpat Nagar, New Delhi.

It is, therefore, requested, that investigations be made from your end and the persons responsible for the loss of income by the Government be prosecuted according to law.

Yours faithfully, Sd/-Illigible (B.I. Jyrwa) Under Secretary to the Government of Meghalaya, Excise, Registration, Taxation, Stamps Department.

10. On the basis of the FIR, a crime being CID (Hqrs.) FIR No. 4 of 2000 was registered u/s 406, IPC. Now, it is to be seen from the allegations made in the FIR, even if, they have taken at their face value and accepted in their entirety, prima facie, do not constitute any offence or make out a case against the petitioner. The allegations in the FIR are mainly about the violation of agreement and dispute on the amount payable by the petitioner as Organising Agent of the

State Lottery. There is no allegation that the petitioner was entrusted with property in any manner or with any dominion over property and the said property was dishonestly misappropriated or converted by the petitioner to his own use. The entrustment of property is the main prerequisite for constituting offence of criminal breach of trust u/s 405, IPC. It would be clear if Section 405, IPC is referred to and quoted below:

405. Criminal breach of trust. - Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits: criminal breach of trust.

11. What is apparent from the aforesaid FIR is that the very prerequisite of entrustment of property and its misappropriation by the petitioner are lacking so as to establish a case of criminal breach of trust u/s 405, IPC. The learned Chief Judicial Magistrate, Shillong while framing the charge u/s 406, IPC did not consider as to the existence of entrustment of any property with the petitioner and misappropriation of the same by him by evaluating the material and documents on record. The Apex Court in Onkar Nath Mishra and Others Vs. State (NCT of Delhi) and Another, held that at the stage of framing the charge, the court is not expected to go deep into the probative value of the material on record but the court has to form a presumptive opinion as to existence of factual ingredients constituting the offence alleged. The duty of the court has been explained in paragraphs 11 of the judgment of the said case, which read as follows:

11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.

12. The offence u/s 409, IPC, which relates to criminal breach of trust by public servant, or by banker, merchant or agent, also speaks about the entrustment with property and commission of criminal breach of trust. As discussed earlier, there is no element of entrustment of any property with the petitioner and therefore, it can be said that the FIR, even if, they are taken at their face value and expected in their entirety do not prima facie constitute any offence or make

out a case against the petitioner u/s 409, IPC.

13. The question whether criminal prosecution could be allowed to be continued, if the allegation made against the accused is of civil nature and civil proceedings are also maintainable, has been answered by the Apex Court in *Trisuns Chemical Industry Vs. Rajesh Agarwal and others*, It is held that arbitration is a remedy for affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the agreement. It is also held that criminal prosecution cannot be thwarted merely because civil proceedings are also maintainable. But, in the present case, the parties, both petitioner and the respondent-State, submitted themselves before the arbitrator and the arbitrator, after hearing them, passed the award in favour of the State, which was set aside by the learned Assistant District Judge, Shillong as discussed earlier.

14. It is an accepted position that a civil court namely, the Assistant District Judge, Shillong had adjudicated upon the dispute/issues between the parties and discharged the petitioner from the liability of any dues to the respondent-State, which was not challenged by it before any appropriate forum. This aspect of the matter was not taken into consideration by the learned Chief Judicial Magistrate, Shillong while framing the charge against the petitioner.

15. I have also perused the impugned order dated 16.9.2008 passed by the learned Chief Judicial Magistrate, Shillong wherein the award dated 3.2.1998 passed by the arbitrator in money execution case filed by the Government and also the miscellaneous application No. 25(H) of 2004 filed by the petitioner have been reflected. The learned Chief Judicial Magistrate was aware about the judgment and order dated 26.9.2005 passed in MC No. 25(H)/2004 setting aside the arbitration award and also dismissal of the money execution case filed by the Government. I have also perused the impugned order dated 3.11.2008 whereby the learned Chief Judicial Magistrate, Shillong framed charges against the petitioner under Sections 406/409 of the IPC. In spite of knowledge about the aforesaid facts, the learned Chief Judicial Magistrate, Shillong has framed the charges against the petitioner under Sections 406/409 IPC. As on now, no claim can be made by the respondent-State against the petitioner as the award has been set aside and the money execution case was also dismissed. That apart, the respondent-State, admittedly, has not challenged the order of the learned Assistant District Judge, Shillong setting aside the award of the arbitrator and also the order dismissing the money execution case.

16. I am not prepared to accept the submissions of the learned Addl. P.P., that the order framing the charges is an interlocutory order and the same cannot be interfered with in exercising revisional power of the court u/s 397(2) of the Cr.P.C. inasmuch as, the learned trial court has proceeded against the petitioner even after the claim of the respondent/informant has been found to be unsustainable and for which, the award of the arbitrator has been set aside and

consequently, the money execution case was also dismissed. I am of the considered view that if the present criminal proceeding is allowed to proceed further, it would cause undue harassment to the petitioner and it would also amount of abuse of process of the court. Under such circumstances, the revisional court has the power to exercise its power u/s 482 of the Cr.P.C. to prevent such abuse of process of the court which is apparent on the impugned order dated 3.11.2008.

17. In view of the above discussion in the light of the law laid down by the Apex Court, this Court would direct for quashing of the proceeding in GR Case No. 28(S) of 2007 pending in the court of the learned Chief Judicial Magistrate, Shillong and also for setting aside and quashing the impugned orders dated 16.9.2008 and 3.11.2008 passed by the learned Chief Judicial Magistrate, Shillong in the said proceeding.

18. With the above observations and directions, this criminal revision stands allowed. There shall be no order as to costs.