
(2010) 07 OHC CK 0012
In the Orissa High Court
Case No : C.R.M.C. No. 5226 of 2002

Mobashar Javed Akbar and Others

APPELLANT

Vs

Asian Age (Utkal) Publication (P) Ltd.

RESPONDENT

Date of Decision : 28-07-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 482
Penal Code, 1860 (IPC) — Section 406, 415, 420, 467

Citation : (2010) 2 ILR (Ori) 590 : (2010) 2 OLR 629 : (2011) 7 RCR(Criminal) 819

Hon'ble Judges : Indrajit Mahanty, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Indrajit Mahanty, J.—The petitioners herein, namely, Mobashar Javed Akbar and Ors. have sought to challenge an order dated 28.1.2002 taking cognizance of offence u/s 420, IPC in I.C.C. No. 41 of 2000 pending before the Court of the S.D.J.M., Bhubaneswar on the basis of a complaint filed by opposite party. Asian Age (Utkal) Publication (P) Ltd.

2. On perusal of the complaint filed by the opposite party (Complainant, it appears that the allegations contained therein pertain to purported allegations for violation of terms and conditions of a tripartite agreement dated 7.5.1995 entered into by Asian Age (Utkal) Publication (P) Ltd. (Complainant-Company) and Mr. Mobashar Javed Akbar (Opp. Party No. 1) and the then Franchise Holder Sri Swapna Sudhan Bose representing Asian Age Newspaper.

3. The complainant alleges that he had incurred substantial expenditure pursuant to the memorandum of understanding entertained into between the parties amounting to Rs. 19,47,693/- towards pre publication expenses including sum of Rs. 7,12,400/- for two MTNL lines. It was further alleged that due to illegal aborting the contract, the accused persons had not returned the amount spent by the complainant. Accordingly a complaint was filed, alleging therein that the

accused persons had committed deception and wrongful gain and or caused wrongful loss and committed criminal breach of trust in respect of the money spent by the complainant company. It was further alleged that in spite of demand made on the accused persons for reimbursement/return of the said money, they did not respond to the demand notice issued on behalf of the complainant. It was further alleged in the complaint petition that the accused persons had committed an offence u/s 406 I.P.C.

4. From the impugned order dated 28.1.2002 (Annexure-2) it appears that the learned S.D.J.M. on perusal of the complaint petition, initial statement recorded u/s 200, Code of Criminal Procedure and the documents annexed to the complaint petition came to hold that a prima facie case u/s 420, IPC had been made out against the accused persons, and, therefore, took cognizance of the offence u/s 420, IPC. The accused-petitioners herein sought to challenge the order of cognizance, inter alia, on the ground that the inter se dispute incepted between the parties is essentially civil in nature and a civil suit bearing O.S. No. 28 of 2001 was filed on 23.1.2001 by the complainant (through his wife Smt. Asha Manjari Mishra) before the Court of Civil Judge (Senior Division), Khurda, Bhubaneswar, in which based on the self same allegations as contained in the present complaint case, a decree for damages has been sought for amounting of Rs. 50,00,000/- with a further prayer for reimbursement of an amount of Rs. 8,76,000/- with pendente lite interest. Accordingly the Appellant submits that the filing of the present complaint case and passing of an order of cognizance dated 28.1.2002, clearly amounts to an "abuse of the process of the Court" and, therefore, justifies the interference by the High Court in exercise of its power u/s 482, Code of Criminal Procedure

5. It is further stated by the learned Counsel for the petitioners that on a reading of the complaint petition and documents appended thereto, as well as the initial statement of the complainant, recorded u/s 200 Code of Criminal Procedure, no criminal offence u/s 420, IPC has been made out against the accused-petitioners, for the purpose of justifying an order of cognizance, which is impugned herein.

6. Learned Counsel appearing for the petitioners submitted that it is well settled that powers u/s 482, Code of Criminal Procedure has been vested on the High Court to act *ex debito justitiae* i.e. to do real and substantial justice for the administration of which alone it exists, or to prevent abuse of the process of the Court. It is also well settled that inherent powers u/s 482, Code of Criminal Procedure though wide, have to be exercised sparingly, carefully and with great caution and such authority has been vested with a Court for the advancement of justice, and if any abuse of the process leading to injustice is brought to the notice of the Court, then the Court would be justified in preventing injustice by invoking its inherent powers u/s 482, Code of Criminal Procedure

7. Learned Counsel for the complainant-opposite party submitted that the mere filing of a civil suit can not be a bar for initiating a complaint case for an offence under the I.P.C. It is submitted that the learned S.D.J.M. took cognizance u/s

420, IPC only upon perusing complaint petition, documents appended thereto and after recording initial statement u/s 200, Code of Criminal Procedure It is asserted that since in the present case, the accused-petitioners have not only breached the tripartite agreement, such breach or illegal act amounts to a criminal breach of trust and cheating. The fact that the civil suit has already been filed by the complainant, through his wife does not disentitle the petitioner from seeking criminal remedy against the accused-petitioner.

8. Learned Counsel for the opposite party placed reliance on the judgment of the Hon"ble Supreme Court in the case of Rajesh Bajaj Vs. State NCT of Delhi and Others, and state that the Hon"ble Supreme Court came to the conclusion that many a cheating takes place or committed in the course of commercial and also money transactions and, therefore, 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.

9. Reliance was placed by the learned Counsel for the opposite party from a judgment of the Supreme Court in the case of Veer Prakash Sharma v. Anil Kumar Agarwal and Anr. 2007 (2) OLR 608 (SC) as well as the judgment of the Supreme Court in the case of M/s. Suryalakshmi Cotton Mills Ltd. v. M/s. Rajvir Industries Ltd. and Ors. AIR 2008 Supreme Court 1683. In both the aforesaid judgments the ingredients of Section 415, IPC i.e. cheating was dealt with and explained.

10. The Hon"ble Supreme Court in the case of State of Karnataka Vs. L. Muniswamy and Others, came to hold that the wholesome power u/s 482, Code of Criminal Procedure entitles the High Court to quash a proceeding when it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. It is further held therein that the High Court has been invested with inherent powers, both in civil and criminal matters, to achieve a salutary public purpose. A Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution.

At this juncture, it becomes necessary to deal with Section 420, IPC, an offence, of which cognizance has been taken against the accused-petitioner. Cheating has been defined in Section 415, IPC which is punishable u/s 420, IPC. Section 415, IPC is set out herein below:

415. Cheating - Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property is said to "cheat".

Explanation- A dishonest concealment of facts is a deception within the meaning of this section.

Section 415, IPC thus requires:

1. deception of any person
2. (a) fraudulently or dishonestly inducing that person:
 - (i) to deliver any property to any person; or
 - (ii) to consent that any person shall retain any property; or
- (b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

On a reading of the aforesaid section, it is manifest that in the definition there are two separate classes of acts which the person deceived may be induced to do. In the first class of acts he may be induced fraudulently or dishonestly to deliver property to any person. The second class of acts 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 need not be fraudulent or dishonest. 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 a fraudulent or dishonest intention at the time of making the promise. From his mere failure to subsequently keep a promise, one cannot presume that he all along had a culpable intention to break the promise from the beginning.

11. The Hon"ble Supreme Court in the case of Inder Mohan Goswami and Anr. v. State of Uttaranchal and Ors. AIR 2008 SC 251 came to the following conclusion:

We shall now deal with the ingredients of Section 467, IPC. Section 467, IPC reads as under:

467. Forgery of valuable security, will etc. - Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security or to receive the principal, interest or dividends thereon, or to receive or deliver any money, movable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

12. In the case of Haridaya Ranjan Prasad Verma and Ors. v. State of Bihar and Anr. AIR 2000 SC 2341 the Hon"ble Supreme Court came to hold as follows:

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.

13. In the case of All Cargo Movers (I) Pvt. Ltd. and Others Vs. Dhanesh Badarmal Jain and Another, , the Hon''ble Justice S.B. Sinha dealt with the case similar to the present case wherein the complainant had initiated a civil suit and had also filed a complaint petition thereafter. Paragraph 17 of the judgment is as follows:

We are of the opinion that the allegations made in the complaint petition, even if given face value and taken to be correct in its entirety, do not disclose an offence, For the said purpose, This Court may not only take into consideration the admitted facts but it is also permissible to look into the pleadings of the plaintiff-respondent No. 1 in the suit. No allegation whatsoever¹ was made against the appellants herein in the notice. What was contended was negligence and/or breach of contract on the part of the carriers and their agent. Breach of contract simpliciter does not constitute an offence. For the said purpose, allegations in the complaint petition must disclose the necessary ingredients therefor. Where a civil suit is pending and the complaint petition has been filed one year after filing of the civil suit, we may for the purpose of finding out as to whether the said allegations are prima facie cannot notice the correspondences exchanged by the parties and other admitted documents. It is one thing to say that the Court at this juncture would not consider the defence of the accused but it is another thing to say that for exercising the inherent jurisdiction of this Court, it is impermissible also to look to the admitted documents. Criminal proceedings should not be encouraged, when it is found to be mala fide or otherwise an abuse of the process of the Court. Superior Courts while exercising this power should also strive to serve the ends of justice.

14. In the light of the above decisions of the Hon''ble Supreme Court as noted herein above and on considering the facts of the present case herein clearly indicates that, the parties had entered into a memorandum of understanding dated 7.5.1995. The object of such an agreement was for the purpose of permitting to print newspaper by the name of Asian Age at Bhubaneswar. In this respect the complainant alleged to have made such an investment and the accused, petitioner-company No. 4 has supplied certain equipment of printing,

which has to be installed at Bhubaneswar. It appears that since differences arose between the parties and as a consequence of which, the object of tripartite agreement was not achieved. It is further alleged that the accused-petitioner in violation of such tripartite agreement proceeded to print a news paper through another agency at Bhubaneswar. It is also pertinent to mention here that the complainant-opp. party's wife, namely, Smt. Asha Manjari Mishra had filed a suit registered as O.S. No. 28 of 2001 before the Civil Judge, Senior Division, Khurda, Bhubaneswar on 23.1.2001 i.e. exactly 5 days prior to the order of cognizance dated 28.1.2002 passed by the learned S.D.J.M., Bhubaneswar in I.C.C. No. 41 of 2000, which is impugned herein.

15. In the light of the facts of the present case noted herein above as well as the interpretation made by the Hon''ble Supreme Court on Section 415, IPC in the case of Inder Mohan Goswami and Anr. (supra) it is clear that the acts alleged against the accused-petitioners do not come under either by the two classes of acts covered u/s 415, IPC. On a perusal of the complaint petition itself as well as the claim made in the Civil Suit, it would be clear that the allegation is essentially for breach of contract alone.

16. Keeping in view the aforesaid judgments and the facts of the present case, I am of the considered view that the complainant has not made out any case that the accused persons ever had a fraudulent or dishonest intention "at the time of making the promise" and, therefore, the alleged "mere failure" by the accused persons, subsequently, to keep their promise, no presumption could arise that the accused persons had any culpable intention to break the tripartite contract from the beginning. The Hon''ble Supreme Court in various judgments referred to in the case of Inder Mohan Goswami (supra) came to hold in paragraphs 45 of the judgment that a Court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressure the accused.

On a consideration of the aforesaid decisions of the Hon''ble Supreme Court and on an analysis of the facts of the present case, I am of the considered view that impugned order of cognizance dated 28.1.2002 passed by the learned S.D.J.M., Bhubaneswar in I.C.C. No. 41 of 2000 cannot be sustained and hence, the same is quashed. At the same time, it is needless to mention that the concerned Civil Court (where the civil suit is pending) shall decide the suit without in any manner being influenced by any observation made in this judgment.

17. The petition u/s 482 Code of Criminal Procedure is allowed in terms of the directions noted hereinabove.