

(2023) 11 PAT CK 0039

In the Patna High Court

Case No : Criminal Writ Jurisdiction Case No. 276 Of 2021

Nilesh Singh Solankee

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 23-11-2023

Acts Referred:

Indian Penal Code, 1860 — Section 34, 405, 406, 420
Code of Criminal Procedure, 1973 — Section 482

Citation : (2023) 11 PAT CK 0039

Hon'ble Judges : Anil Kumar Sinha, J

Bench : Single Bench

Advocate : Puneet Siddhartha, Amit Kumar Singh, Shiv Shankar Prasad, Md. Irshad

Final Decision : Allowed

Judgement

1. The petitioner has filed the present writ application for quashing of the First Information Report, bearing Civil Line Police Station Case No. 226 of 2020, Gaya, registered for the offences punishable under Sections 406, 420 and 34 of the Indian Penal Code and further by way of amendment, the petitioner has prayed for quashing of the order taking cognizance, dated 02.03.2023.

2. The petitioner no. 1 was engaged in the construction business, who entered into a sub-contract agreement with one developer, namely, Akarshan Infra Developers Pvt Ltd, for construction of stilt plus eight floor multi-storied residential quarters for Bokaro Steel Officer's Housing Co-operative Society Limited. The respondent no. 2/informant entered into an investment agreement with the petitioner no. 1 in order to earn profit, according to which respondent no. 2 had to invest a sum of Rupees two crores in two months, but he invested only Rs. Eighty five lakhs and that too in thirteen months. The investment agreement failed, however, the petitioner no. 1 in order to return the amount of Rupees eighty five lakhs to respondent no. 2 along with interest at the rate of 9 per cent per annum, amounting to Rs. 1,09,73,000/-, entered into a settlement

agreement with respondent no. 2. The amount was to be refunded within a period of fifteen months from the date of settlement agreement, i.e. 24.04.2018. Out of the aforesaid amount of Rs. 1,09,73,000/-, a sum of Rs. 44,00,000/- was refunded by the petitioner no. 1 to respondent no. 2 in two years.

3. The respondent no. 2 lodged the present First Information Report against the petitioners, alleging therein that at the behest/representation of petitioner no. 2, the respondent no. 2 agreed to invest the amount of Rupees two crores for construction of stilt plus eight floor, multi-storied residential quarters, at Bokaro, by petitioner no. 1.

4. The police, after completion of investigation, submitted charge sheet against the petitioners on 31.10.2021 and the learned Judicial Magistrate, 1st Class, Gaya, took cognizance of the offences on 02.03.2023.

5. The case of the petitioners is that the petitioner no. 1 is the proprietor of M/s N.S.S. & Company engaged in the civil construction work within the States of Odisha and Jharkhand.

6. On 01.07.2015, one sub-contract agreement was executed at Bokaro (Jharkhand) between Akarshan Infra Developers Private Limited, a Private Limited Company represented by Mr. Anand Anu, Director, (herein after referred to as 'the Contractor') and M/S N.S.S. & Company, (hereinafter referred to as 'Sub-Contractor'), wherein the Contractor was awarded the contract by Bokaro Steel Officer's Housing Co-operative Society Limited for construction of stilt plus eight floor multi-storied residential quarters, at Ranipokhar, Bokaro, Jharkhand to the tune of Rs. 87,00,00,000 (Rupees eighty seven crores) approximately.

7. The petitioner, being the sub-contractor, undertook the construction work of stilt plus eight floor multi-storied residential quarters, for Bokaro Steel Officer's Society Limited at Ranipokhar, Bokaro within a period of 30 months from the date of the agreement.

8. When the aforesaid agreement, dated 01.07.2015, came into knowledge of respondent No. 2, he approached the petitioner no. 1 to invest his Rupees two crores on the basis of profit sharing at the rate of 20 per cent of the entire project in the firm of petitioner no. 1.

9. Accordingly, on 14.06.2016, an investment agreement was executed at Dhanbad (Jharkhand), which was signed between M/s N.S.S. & Company and the respondent No. 2, under which the respondent no. 2 was supposed to invest a sum of Rupees two crores within a period of sixty days from the date of execution of the agreement.

10. Since the respondent no. 2 invested only Rs. 85,00,000/- (Eighty-Five Lakh) only and that too in the span of thirteen months, the terms of the agreement, dated 14.06.2016, failed.

11. The petitioner no. 1 requested the respondent no. 2 many a times through

phone to pay the remaining amount of Rs. 1,15,00,000/-, but the respondent no. 2 failed to pay the same to the petitioner no. 1. Due to breach of the agreement, the petitioner no. 1 Company incurred a huge loss.

12. Even though the respondent no. 2 failed to comply with the terms and conditions of the investment agreement, dated 14.06.2016, the petitioner no. 1 entered into a settlement agreement, dated 24.04.2018, executed at Bhubaneswar, in the State of Odisha, wherein the petitioner no. 1 has undertaken to return the amount Rs. 85,00,000/- invested by the respondent no. 2, along with interest of 9 per cent within a period of fifteen months, having the total amount of Rs. 1,09,73,748/-.

13. As per the settlement agreement, the petitioner no. 1 paid a sum of Rs. 44,05,000/- through NEFT/RTGS and also paid some amount through cash for settlement with respondent no. 2 out of the total amount of Rs. 1,09,73,748/.

14. In November, 2019, the work of housing project was stopped because of disputes between the principal employer and the main contractor, i.e. M/s Akarshan Infra Developers Pvt. Ltd. and a huge amount of the firm of the petitioner no. 1, amounting to Rs. Twenty three crores (approx) were held up by both, the principal employer as well as the main contractor.

15. The petitioner no. 1 Company filed a civil suit, bearing Original Suit No. 23/2020 before Civil Judge Senior Division, Bokaro (Jharkhand) against both, the principal employer as well as the main contractor, which has been withdrawn by the petitioner no. 1, as there was an arbitration clause in the Agreement executed between the petitioner no. 1 company and the Principal employer.

16. In the aforesaid background, the respondent no. 2/informant lodged the present First Information Report on 03.07.2020, alleging therein that the respondent no. 2 had invested a sum of Rs. 85,00,000/- in view of the investment agreement, dated 14.06.2016, but neither the invested amount nor the profit, as agreed by the petitioner no. 1, were refunded. Subsequently, settlement agreement, date 24.04.2018 was executed in which the petitioner no. 1 promised to return the amount invested by respondent no. 2 with interest at the rate of 9 per cent per annum till the actual payment of the aforesaid amount.

17. In the aforesaid transaction of money, the petitioner no. 2, who is the friend of petitioner no. 1, played an important role and the respondent no. 2 has invested the amount in the firm of petitioner no. 1 company on the advise of petitioner no. 2.

18. After the settlement agreement, Rs. 44,00,000/- has been returned in two years and one ESCROW account was opened in Kotak Mahindra Bank in order to return the money, but the petitioner no. 1, instead of depositing the amount in this account, used to deposit the amount in the account of petitioner no. 2.

19. Learned Counsel for the petitioners argued that the petitioner no. 1 was supposed to pay the settlement amount to the respondent no. 2/informant

through irrevocable escrow account by agreeing to pay 12 per cent of the payments received from M/s Akarshan Infra Developers Private Limited, i.e. the main contractor, until the payments are settled completely. He placed clause 7 of the settlement agreement, dated 24.04.2018, in this regard.

20. He further argued that the petitioner no. 1 has no dishonest intention to misappropriate the amount invested by the respondent no. 2 and had it been so, the petitioner no. 1 neither had entered into any settlement agreement nor would have transferred Rs. 44,05,000/- in the respondent no. 2/informant's account. Even if the allegations are taken at their face value and accepted in their entirety, the same does not constitute any criminal offence.

21. He further submits that no offence, under section 406 of Indian Penal Code, is made out against the petitioners inasmuch as the respondent no. 2 voluntarily approached the petitioner no. 1 to invest a sum of Rs. Two crores in the firm of the petitioner no. 1 and entered into an investment agreement with the petitioner no. 1 and the petitioner no. 1 has never induced with dishonest intention the respondent no. 2 to invest money in this project.

22. However, to make out an offence under Section 420 of the Indian Penal Code, it is necessary that there was intention to commit fraud right from the inception, but in the present case, there was no such intention to commit fraud from the very inception, and neither there is any allegation in this regard made in the First Information Report,. There is no intention on the part of the petitioner no. 1 to commit fraud from the very inception, which would be evident from the facts brought before this Court.

23. The very fact that the respondent no. 2 has admitted in the First Information Report that a sum of Rs. 44,05,000/- was returned to him by the petitioner no. 1 goes to show that the petitioner no. 1 was having no intention to cheat and/or deceived the informant.

24. The First Information Report has been lodged in abuse of the process of law for recovery of money arising out of a contract/agreement between the petitioner no. 1 and the respondent no. 2, having an arbitration clause. The dispute raised by the respondent no. 2/informant is purely a civil dispute.

25. Learned Counsel for the petitioner relies upon the decisions of the Supreme Court, in the case of Bhajan Lal v. State of Haryana, reported in 1992 SCC (Cri) 426, U. Dhar v the State of Jharkhand (AIR 2003 SC 974), M/s Indian Oil Corporation v. NEPC India Ltd. And Others (AIR 2006 SC 2780) and Hotline Teletubes and Components Ltd. v. State of Bihar, reported in 2005 SCC (CR.) 1515.

26. Lastly, learned Counsel argues that the First Information Report, in question, has been registered in a Police Station, which does not have the territorial jurisdiction to register the same as no cause of action has arisen within the territory of Gaya. No transaction of money had taken place in Gaya, Bihar and

both the agreements, dated 14.06.2016 and 24.04.2018, were executed outside the State of Bihar. Thus, the impugned First Information Report is not only illegal, but also the same is registered with an evil design by the respondent no. 2 to harass the petitioners by abusing process of law.

27. On the other hand, learned Counsel for the respondent no. 2 as well as the State argued that the First Information Report discloses the offence against the petitioners, who, after entering into an agreement with respondent no. 2/informant, failed to pay the profit to the respondent no. 2 or return the amount as promised by way of settlement agreement. The police, after completion of investigation, have submitted charge sheet, finding prima facie case against the petitioners and learned Judicial Magistrate, 1st Class, Gaya, has also taken cognizance of the offences against the petitioner. As such, this writ petition is fit to be dismissed with costs.

28. I have heard learned Counsel for the parties concerned and have gone through the materials available on record.

29. Based upon the arguments advanced by the parties and the facts available on record, it emerges that there was a profit sharing agreement between the petitioner no.1 and the respondent no. 2, having an arbitration clause.

30. From the plain reading of the First Information Report, it is evident that the informant/respondent no. 2 has said that pursuant to the settlement agreement entered into between the petitioner no. 1 and the respondent no. 2, the petitioner no. 1 has returned back/paid Rs. 44,05,000/-. It also appears from the available material that there was a dispute between the main contractor and the petitioner no. 1 company regarding failure of the project for construction of stilt plus eight floor multi-storied residential quarters, at Bokaro, in which the petitioner no. 1 company has already invested Rs. Twenty three crores, for which an arbitration clause has been invoked and the Delhi High Court has appointed an arbitrator on 03.05.2023 in A.R.B.P. No. 186 of 2023 (Annexure 8).

31. In the investment agreement between the petitioner no. 1 and the respondent no. 2/informant, there is arbitration clause also at clause 7 of the agreement, duly signed by the informant/respondent no. 2. The settlement agreement has also Clause 7, which says that payment to respondent no. 2 would be dependent upon the payment received by the petitioner no. 1 from the main contractor. Due to failure on the part of the main contractor to make payment to the petitioner no. 1 company, who is the sub-contractor, the petitioner no. 1, after refunding a sum of Rs. 44,05,000/-, failed to make further payment as per the settlement agreement.

32. If the petitioner no. 1 has failed to keep his promise, as per the settlement agreement, or there is a breach of agreement beyond the control of the petitioner no. 1, the same cannot be termed as a dishonest intention on the part of the petitioner no. 1 from the very inception, i.e. at the time of entering into the investment agreement.

33. In the case of Hridaya Ranjan Prasad Verma and Others v. the State of Bihar and Another, reported in (2000) 4 SCC 168, the Supreme Court has held that 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 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.

34. Section 406 of the Indian Penal Code is punishable for criminal breach of trust. The definition of criminal breach of trust is in Section 405 of the Indian Penal Code, which says that 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 willfully suffers any other person so to do, commits "criminal breach of trust."

35. A careful reading of Section 405 of the Indian Penal Code says that criminal breach of trust involves the ingredients, (i) a person should have been entrusted with property or with any dominion over property (ii) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly uses or dispose of that property or willfully suffer any other person so to do (iii) that such misappropriation, conversion, use, or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract made, which the person has made, touching the discharge of such trust.

36. In the present case, the petitioner no. 1 entered into an investment agreement with respondent no. 2/informant on profit sharing basis with open eyes that the investment, which the respondent no. 2/informant is going to make, may have profit or may not have profit. The investment, as per the terms of the agreement, was made by the respondent no. 2/informant for construction of stilt plus eight floor multi-storied residential quarters and that cannot be said that the respondent no. 2/informant entrusted the property in favour of petitioner no. 1, which the petitioner no. 1 has converted to his own use dishonestly.

37. If the respondent no. 2/informant fails to earn profit out of his investment, the same cannot constitute criminal breach of trust.

38. The Supreme Court, in the case of M/s Indian Oil Corporation (supra), has observed that there is a growing tendency in the business circles to covert purely civil dispute into criminal cases. It is obviously on account of prevalent impression that civil law remedies are time-consuming, and do not adequately protect the interest of lenders/creditors.

39. The Supreme Court, in paragraph 13 of M/s Indian Oil Corporation (supra), has observed thus:

13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable breakdown of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged. In G. Sagar Suri v. State of U.P. [(2000) 2 SCC 636 : 2000 SCC (Cri) 513] this Court observed: (SCC p. 643, para 8)

"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 under Section 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."

40. It appears from bare perusal of the First Information Report and other contemporaneous documents that it is a case of purely civil nature, arising out of contracts between the parties and no criminal offence under Section 420 and/or 406 of the Indian Penal Code is made out.

41. The controversy between the parties relates to non-payment of agreed settlement amount and/or profit in favour of the informant/respondent no. 2.

42. After careful consideration of the facts placed on record, it appears to this Court that a civil dispute has been given the nature of a criminal dispute inasmuch as the grievance of the respondent no. 2/informant is about the failure of the petitioner no. 1 to pay/refund the balance amount as per the settlement agreement, out of which Rs. 44,05,000/- has, admittedly, been paid by petitioner no. 1 to the respondent no. 2/informant.

43. Since the basic ingredients of Section 406 and/or 420 of the Indian Penal Code are not satisfied in the present case, the order taking cognizance, dated 02.03.2023, as well as issuance of summonses to the petitioners, passed by

learned Judicial Magistrate, 1st Class, Gaya, in Civil Line Police Station Case No. 226 of 2020, is not sustainable in the eyes of law and continuance of the criminal case will amount to abuse of the process of the Court.

44. When no case is made out against the petitioners, even as per the complaint filed by the informant/respondent no. 2, the petitioners cannot be subjected to trial for the alleged offences.

45. The Supreme Court, in the case of Anand Kumar Mohatta and Another v. State (Government of NCT of Delhi), Department of Home and Another, reported in (2019) 11 SCC 706, has held that there is nothing in the words of Section 482 of the Code of Criminal Procedure, 1973, which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the First Information Report. It is settled principle of law that the High Court can exercise jurisdiction under Section 482 of the Code of Criminal Procedure, 1973, even when the discharge application is pending. Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of First Information Report, but not if it has advanced and the allegations have materialized into charge sheet. On the contrary, it could be said that the abuse of process caused by First Information Report stands aggravated if the First Information Report has taken the form of the charge sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court.

46. In view of the aforesaid discussion and the law laid down by the Supreme Court, I come to the conclusion that allowing the prosecution of the present case to continue will amount to abuse of the process of law and miscarriage of justice to the petitioners because in the opinion of this Court, the dispute between the parties gives rise to a civil dispute, having an arbitration clause in the agreement, which can be invoked by the informant/respondent no. 2.

47. Accordingly, the First Information Report of Civil Line Police Station Case No. 226 of 2020 is quashed and the consequential order, taking cognizance of the offence, dated 02.03.2023, as well as issuance of summonses to the petitioners, passed by learned Judicial Magistrate, 1st Class, Gaya, in Civil Line Police Station Case No. 226 of 2020, is also hereby quashed.

48. In the result, this application is allowed.

49. There shall be no order as to costs.