
(2016) 04 JH CK 0237
In the Jharkhand High Court
Case No : Cr.M.P. No. 1509 of 2004

S. Kumars Online Limited

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 18-04-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 120B, 406, 420

Citation : (2016) 3 ECrC 280 : (2017) 1 JBCJ 262 : (2016) 2 JLJR 648 : (2017) 1 PCCR 135

Hon'ble Judges : Rongon Mukhopadhyay, J.

Bench : Single Bench

Advocate : Mr. A.K. Sahani, Advocate, for the Appellant; Mr. S.K. Dwivedi, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Rongon Mukhopadhyay, J.—In this application the petitioner has prayed for quashing the entire criminal proceedings in connection with C. P. Case No. 359 of 2004 including the order dated 18.10.2004 passed by Shri Uttam Anand, learned Judicial Magistrate, 1st Class, Bokaro whereby and where under cognizance has been taken for the offences punishable under Sections 406, 420, 120B of the Indian Penal Code.

2. The prosecution case as would appear from the complaint petition is that pursuant to an advertisement published by the accused persons the complainant has sent Rs. 500/- towards franchisee application money in favour of the accused no. 1 which was also acknowledged vide receipt dated 08.05.2000. A letter dated 17.06.2000 was sent by the accused no. 10 in which the complainant was communicated about the acceptance of his application. The complainant was subsequently requested to send the agreement duly signed with an earnest money of Rs. 5,000/- in the form of demand draft which was complied by the complainant. A further letter dated 28.07.2000 was received by the complainant

for purchase of equipments required for franchisee network and it was assured that the individual invoices would be sent directly to him. Several letters followed in which the complainant was informed about the intimation to the Bank of India for sanction of loan and it is alleged that the complainant was induced to take loan from Bank of India for franchisee purpose. Instalment amounting to Rs. 2,00,000/- were sent to the petitioner's Company by taking loan from Bank of India, Chas, Branch which was duly acknowledged by the officials of Company. A further amount of Rs. 3600/- was deposited by the complainant by a bank draft dated 26.07.2001 towards annual maintenance charge per VSAT. It is alleged that the complainant was further directed to send an amount of Rs. 30,000/- before February, 2002. The Company had floated stock performance on the website in which the growth of the Company was shown to be negative. It has been stated that the complainant had informed the Company about his intention to terminate the franchisee agreement. The complaint petition further alleged that the accused persons dishonestly misappropriated the money of the complainant.

3. On the basis of the said allegations referred to above Complaint Case No. 359 of 2004 was instituted in which after conducting an enquiry under Section 202 of the Cr.P. C. cognizance was taken by the learned judicial Magistrate, 1st Class, Bokaro on 18.10.2004 for the offences punishable under Sections 406, 420, 120B of the Indian Penal Code.

4. Heard Mr. A. K. Sahani, learned counsel appearing for the petitioner and Mr. S. K. Dwivedi, learned counsel appearing for the opposite party no. 2.

5. It has been submitted by the learned counsel for the petitioner that the entire dispute is civil in nature as the same is related to appointing the complainant as a franchisee of the petitioner. It has been submitted that an agreement was also duly entered into and in case of any dispute or difference between the parties the agreement contained a clause with respect to referring the said dispute or difference to the arbitrator. It has been submitted that the arbitration clause was invoked by the petitioner and the arbitrator has passed an award on 05.06.2006 and the net balance payable amount to the opposite party no. 2 was to the tune of Rs. 36,661/- which according to the learned counsel for the petitioner was sent by cheque to the complainant and it was also duly accepted. It has further been submitted that the question of allurement does not arise as the complainant had fully acknowledged the franchisee agreement. Learned counsel submits that the ingredients of cheating being absent in the allegations made against the petitioners the entire criminal proceedings as against the petitioner deserves to be quashed and set aside.

6. In support of his contention, learned counsel for the petitioner has referred to the case of Vesa Holding P. Ltd. & Anr. v. State of Kerala & Ors. reported in [2015 (2) East Cr C 226 (SC)].

7. Mr. S. K. Dwivedi, learned counsel appearing for the opposite party no. 2, has

referred to the complaint petition and has submitted that an allegation of cheating and criminal breach of trust is made out from the complaint petition as it was on account of inducement of the petitioner the complainant had deposited the amount which was never returned to the complainant. Learned counsel submits that so far as the arbitration proceedings are concerned, the complainant had never participated in the said proceeding and in fact the award dated 05.06.2006 has already been challenged by him. Learned counsel adds that although an amount of Rs. 36,661/- was sent to the complainant but the same was accepted on protest. Learned counsel further submits that the contentions of the petitioner cannot be looked into in a proceeding under Section 482 of the Cr.P.C. as the court is not to consider the defence of the petitioner at this stage. Reference in support of his contention has been made to the case of Iridium India Telecom Limited v. Motorola Incorporated and Others reported in (2011) 1 SCC 74 and Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. and Others reported in (2000) 3 SCC 269.

8. Perusal of the complaint petition reveals that the dispute between the petitioner and the opposite party no. 2 had arisen as the franchisee did not take off as the complainant himself had intimated the Company about his intention to terminate the agreement. The complainant is also aggrieved by the fact that he had taken a loan of Rs. 1,75,000/- for starting the franchisee business of S Kumars Online Limited but since the supply of the equipment was not made the Bank had served the notice upon the complainant to return back the amount of Rs. 1,75,000/-. The complaint petition, therefore, reveals a business transaction between the petitioner and the complainant for setting up a franchisee business. The agreement which has been referred to by the learned counsel for the petitioner has not been disputed by the learned counsel for the opposite party no. 2 nor is the arbitral award passed by the arbitrator and in such circumstances, therefore, the said documents being unimpeachable in nature can be looked into by this Court while deciding the application under Section 482 of the Cr.P.C.

9. The agreement suggests that an arbitration clause was in existence as clause 19 of the agreement contains the dispute resolution mechanism. Clause 19.1 of the agreement reveals that any dispute arising between the parties under the agreement shall be referred for resolution to an arbitrator appointed in this behalf by the Company. Clause 15 of the agreement deals with the right of the Company to cancel and terminate the agreement under certain circumstances. The petitioner had invoked clause 19 of the agreement and the matter was referred to the arbitrator who had given an award on 05.06.2006 directing the petitioner to make payment of Rs. 36,661/- to the opposite party no. 2 which the petitioner had complied and the amount was also sent which was accepted by the complainant-opposite party no. 2.

10. In the case of Vesa Holding P. Ltd. & Anr. v. State of Kerala & Ors. (Supra) it was held as follows:-

"8. From the decisions cited by the appellant, the settled proposition of law is that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In other words for the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out.

9. It is true that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may be available to the complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint disclose the criminal offence of cheating or not. In the present case there is nothing to show that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 IPC. In our view the complaint does not disclose any criminal offence at all. Criminal proceedings should not be encouraged when it is found to be malafide 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. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of court and the High Court committed an error in refusing to exercise the power under Section 482 Criminal Procedure Code to quash the proceedings."

11. Learned counsel for the opposite party no. 2 has referred to the judgment in the case of Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. and Others (Supra) wherein while considering an application under Section 482 Cr.P.C. it was held as follows:-

"16. Be it noted that in the matter of exercise of the High Court's inherent power, the only requirement is to see whether continuance of the proceeding would be a total abuse of the process of court. The Criminal Procedure Code contains a detailed procedure for investigation, charge and trial, and in the event, the High Court is desirous of putting a stop to the known procedure of law, the High Court must use a proper circumspection and as noticed above, very great care and caution to quash the complaint in exercise of its inherent jurisdiction. Recently, this Court in Trisuns Chemical Industry v. Rajesh Agarwal observed: (SCC pp. 689-90, paras 5-9)

"5. The respondent's counsel in the High Court put forward mainly two contentions. The first was that the dispute is purely of a civil nature and hence no prosecution should have been permitted, and the second was that the Judicial Magistrate of the First Class, Gandhidham has no jurisdiction to entertain the

complaint. Learned Single Judge has approved both the contentions and quashed the complaint and the order passed by the Magistrate thereon.

6. On the first count learned Single Judge pointed out that there was a specific clause in the memorandum of understanding arrived at between the parties that disputes, if any, arising between them in respect of any transaction can be resolved through arbitration. The High Court made the following observations:

?Besides supplies of processed soyabean were received by the complainant Company without any objection and the same have been exported by the complainant Company. The question whether the complainant Company did suffer the loss as alleged by it are matters to be adjudicated by the civil court and cannot be the subject-matter of criminal prosecution.

7. Time and again this Court has been pointing out that quashing of FIR or a complaint in exercise of the inherent powers of the High Court should be limited to very extreme exceptions (vide *State of Haryana v. Bhajan Lal* and *Rajesh Bajaj v. State NCT of Delhi*).

8. In the last referred case this Court also pointed out that merely because an act has a civil profile is not sufficient to denude it of its criminal outfit. We quote the following observations: (SCC p. 263, para 10)

?10. It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions.?

9. We are unable to appreciate the reasoning that the provision incorporated in the agreement for referring the disputes to arbitration is an effective substitute for a criminal prosecution when the disputed act is an offence. 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. Hence, those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases as indicated in *State of Haryana v. Bhajan Lal*."

17. On a careful reading of the complaint, in our view, it cannot be said that the complaint does not disclose the commission of an offence. The ingredients of the offences under Sections 415, 418 and 420 cannot be said to be totally absent on the basis of the allegations in the complaint. We, however, hasten to add that whether or not the allegations in the complaint are otherwise correct has to be decided on the basis of the evidence to be led at the trial in the complaint case but simply because of the fact that there is a remedy provided for breach of

contract, that does not by itself clothe the court to come to a conclusion that civil remedy is the only remedy available to the appellant herein. Both criminal law and civil law remedy can be pursued in diverse situations. As a matter of fact they "are not mutually exclusive but clearly coextensive and essentially differ in their content and consequence. The object of criminal law is to punish an offender who commits an offence against a person, property or the State for which the accused, on proof of the offence, is deprived of his liberty and in some cases even his life. This does not, however, affect the civil remedies at all for suing the wrongdoer in cases like arson, accidents, etc. It is an anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred. The two types of actions are quite different in content, scope and import". (vide *Pratibha Rani v. Suraj Kumar*) (SCC p. 383, para 21)".

12. Reference has also been placed in the case of *Iridium India Telecom Limited v. Motorola Incorporated and Others* (Supra) wherein it was held as follows:-

"75. The aforesaid observations leave no manner of doubt that the appellants were entitled to an opportunity to prove the averments made in the complaint. They were entitled to establish that they have been deliberately induced into making huge investments on the basis of representations made by Respondent 1 and its representatives, which representations subsequently turned out to be completely false and fraudulent. The appellants were entitled to an opportunity to establish that Respondent 1 and its representatives were aware of the falsity of the representations at the time when they were made. The appellants have given elaborate details of the positive assertions made by Respondent 1 which were allegedly false to its knowledge. It is also claimed by the appellants that Respondent 1 and its representatives wilfully concealed facts which were material and ought to have been disclosed, but were intentionally withheld so as to deceive the appellant into advancing and expending a sum of Rs. 500 crores.

76. As noticed earlier, both the appellants and the respondents have much to say in support of their respective viewpoints. Which of the views is ultimately to be accepted, could only be decided when the parties have had the opportunities to place the entire materials before the Court. This Court has repeatedly held that power to quash proceedings at the initial stage has to be exercised sparingly with circumspection and in the rarest of rare cases. The power is to be exercised *ex debito justitiae*. Such power can be exercised where a criminal proceeding is manifestly attended with *mala fides* and have been instituted maliciously with ulterior motive. This inherent power ought not to be exercised to stifle a legitimate prosecution.

77. In the present case, the parties are yet to place on the record the entire material in support of their claims. The issues involved are of considerable importance to the parties in particular, and the world of trade and commerce in general. In such circumstances, in our opinion, the High Court ought to have refrained from indulging in detailed analysis of very complicated commercial

documents and reaching any definite conclusions.

78. In our opinion, the High Court clearly exceeded its jurisdiction in quashing the criminal proceeding in the peculiar facts and circumstances of this case. The High Court noticed that while exercising jurisdiction under Section 482 CrPC "the complaint in its entirety will have to be examined on the basis of the allegations made therein. But the High Court has no authority or jurisdiction to go into the matter or examine its correctness. The allegations in the complaint will have to be accepted on the face of it and the truth or falsity cannot be entered into by the Court at this stage". Having said so, the High Court proceeded to do exactly the opposite."

13. Section 415 of the Indian Penal Code defines cheating and in order to constitute an offence of cheating the complainant must allege that there was fraudulent or dishonest intention at the time of making the promise. The allegations which have been made in the complaint petition does not go to suggest that there was deliberate or intentional act of dishonesty on the part of the petitioner from the initiation of the business transaction. If the intention of cheating is absent from inception of the transaction the same cannot constitute an offence of cheating against the petitioner. Even otherwise the allegations which have been levelled does not make out a case for an offence under Sections 406 of the Indian Penal Code. It is no doubt true that an act may constitute a civil as well as a criminal wrong but as has been stated above, the complaint petition as well as the subsequent events including the initiation of the arbitration proceeding does not make out a case for which the petitioner can be prosecuted under the provisions of the Indian Penal Code.

14. This Court in a proceeding under Section 482 Cr.P.C. is required to be circumspect in considering such application as this Court cannot conduct a roving enquiry or sift through the evidences if the same are not unimpeachable in nature. However, if on considering the allegations and the documents which are not denied by the opposite party no. 2 this Court can exercise its inherent power under Section 482 Cr.P.C. to prevent the abuse of the process of the Court and the miscarriage of justice.

15. Resultantly having found merit in this application, the same is allowed and the entire criminal proceedings in connection with C. P. Case No. 359 of 2004 including the order dated 18.10.2004 passed by Shri Uttam Anand, learned Judicial Magistrate, 1st Class, Bokaro is hereby quashed and set aside.