(2021) 03 JH CK 0138

In the Jharkhand High Court

Case No : Criminal Miscellaneous Petition No. 1097 Of 2008

Shasank Gupta And Ors APPELLANT

Vs

State Of Jharkhand And Ors RESPONDENT

Date of Decision : 15-03-2021

Acts Referred:

Indian Penal Code, 1860 — Section 120B, 406, 417, 418, 420
Code Of Criminal Procedure, 1973 — Section 82, 83, 155(2) , 156(1), 482
Constitution Of India, 1950 — Article 226

Citation : (2021) 03 JH CK 0138

Hon'ble Judges : Anubha Rawat Choudhary, J

Bench : Single Bench

Advocate : Anil Kumar Sinha, Pankaj Kumar, Jitendra Pandey, Sharabil Ahmed

Final Decision : Dismissed

Judgement

1. Heard Mr. Anil Kumar Sinha, learned senior counsel appearing on behalf of the petitioners.

2. Heard Mr. Sharabil Ahmed, learned counsel appearing on behalf of the opposite party No. 2.

3. Heard Mr. Jitendra Pandey, learned counsel appearing on behalf of opposite party-State.

4. This petition has been filed for the following reliefs: -

"That in the instant criminal miscellaneous application the petitioners pray for quashing the entire criminal proceeding in connection with C.P. Case No. 1484/2007 including the order taking cognizance dated 13.2.2008 passed by learned Pawan Kumar, Judicial Magistrate, Dhanbad, whereby and whereunder cognizance under section 420/406/120B of I.P.C. against the petitioners was taken and summons were issued against the petitioners."

5. The complaint petition indicates that there were three accused, namely, one

Shiv Prasad Singh, Son of Late Gopi Nath Singh and the present two petitioners. Cognizance has been taken against all the three accused.

Arguments on behalf of the petitioners

6. Learned senior counsel for the petitioners submits that so far as the accused No.-1 is concerned, he has expired on 26.06.2011 and he had filed Criminal Miscellaneous Petition No. 753 of 2008 and on account of his death, the same was withdrawn vide order dated 01.08.2012.

7. The learned senior counsel has placed the complaint petition and has submitted that upon perusal of the entire complaint case, it appears that the case arises out of civil dispute between the parties and it is alleged that there were certain transaction of money pursuant to agreement dated 13.11.2006 and as per the complainant himself, he was put in possession of the property alongwith witness No.-1. The grievance of the complainant is that ultimately the sale-deed was not executed in spite of the fact that huge amount was taken by the accused persons. He submits that no criminal case is made out upon perusal of the complaint case and therefore the entire criminal proceeding is fit to be quashed and set-aside in exercise of the powers under section 482 of Cr.P.C. The learned senior counsel has heavily relied upon the judgment passed by the Hon'ble Supreme Court reported in (2015) 8 SCC 293.

Arguments on behalf of the opposite party No.-2

8. Learned counsel appearing on behalf of opposite party No. 2 has referred to the impugned order taking cognizance. He submits that the order taking cognizance is an elaborate order dealing with every aspect of the matter and a well speaking order indicating the criminality of Shiv Prasad Singh as well as the petitioners involved in the present case.

9. He also submits that altogether 4 witnesses were also examined from the side of the prosecution and a number of documents were placed, and the learned court below upon recording of satisfaction, took cognizance of offence.

10. Learned counsel submits that merely because there is an element of civil dispute between the parties, that by itself does not exclude criminal liability, as the basic ingredients of offence under Sections 420/406 read with Section 120B of IPC are made out in the present case. He has referred to the judgment passed by the Hon'ble Supreme Court reported in (2009) 8 SCC 751 paragraph 8 and also the judgment reported in (2019) 9 SCC 677 paragraphs 8,9 and 10 to submit that it has been held by the Hon'ble Supreme Court that there could be situations where civil as well as criminal liability are involved.

11. Learned counsel has referred to the impugned order taking cognizance to indicate that the learned court below has found the criminal intent of the petitioners right from inception. He also submits that not only the complaint petition and solemn affirmation of the complainant but also the deposition of the witnesses and the materials produced before the learned court below are

required to be considered and deposition of the witnesses have not been filed by the petitioners and the learned counsel for the petitioners has only placed the complaint petition. He also submits that otherwise also, upon perusal of the complaint petition, there is enough allegations to proceed against the accused persons.

Rejoinder arguments of the petitioners

12. In response, learned senior counsel appearing on behalf of the petitioners has submitted that the fact remains that apart from money transaction, the factory premises was handed over to the complainant and witness No.-1. This itself indicates that there was no criminal intent right from the beginning of the transaction and the judgments which have been cited by the learned counsel for the opposite party No. 2 only indicate exception to the general rule, that when there is civil dispute it cannot be given a colour of a criminal case. He has referred to the judgment passed by the Hon'ble Supreme Court reported in (2005) 10 SCC 336 paragraph 7 as well as judgment reported in (2015) 8 SCC 293 paragraphs 9 to 12 which arose out of petitions filed under Section 482 of Cr.P.C. for quashing of the F.I.R. and he submits that in these judgments it has been held that, if at the initial stage, there is no criminal intent, subsequent change of intention will not give rise of a criminal case. However, during the course of argument, it has not been disputed by the learned senior counsel for the petitioners that statement of the four witnesses, who have deposed before the learned court below prior to taking cognizance, have not been filed in this case for consideration by this Court. Findings of this Court

13. This Court finds that the learned senior counsel for the petitioners has submitted that the accused No. 1, namely, Shiv Prasad Singh had expired on 26.06.2011 and accordingly, the separate criminal miscellaneous petition filed by him being Criminal Misc. Petition No. 753/2008 was withdrawn vide order dated 01.08.2012. This Court has called for the records of Criminal Misc. Petition No. 753/2008 and only order-sheet of the said case is available. There is nothing in the order-sheet to indicate that the case was withdrawn on 01.08.2012 on account of death of Shiv Prasad Singh. This Court also finds that there is nothing on record either in the present case or in Cr.M.P. No. 753/2008 that Shiv Prasad Singh has expired and even the death certificate is not on record. From perusal of status report received from the learned court below, it appears that there is no indication regarding death of Shiv Prasad Singh. The status report from the learned court below indicates that the process under Section 82 of Cr.P.C. was issued on 22.05.2017 and the process under Section 83 was issued on 19.06.2018 against both the present petitioners. It further appears that on 26.10.2018, accused person, namely, Shasank Gupta has taken bail on surrender and the petitioner, namely, Jagjot Singh is still absent and the next date which was fixed by the learned court below as per the status report dated 21.10.2020, was 20.01.2021 for appearance of the present petitioner, namely, Jagjot Singh.

14. This Court finds that the present case was filed on 01.08.2008 and

thereafter, it was listed for the first time before the Bench only on 24.01.2011, wherein a prayer for adjournment was made and the case was directed to be listed on 07.02.2011. Thereafter, on 07.02.2011, nobody appeared on behalf of the petitioners and the matter was adjourned to be listed after one week under the same heading. Thereafter, again the matter was listed on 09.07.2015 and on that day also nobody appeared on behalf of the petitioners. However, this Court was pleased to direct the petitioners to take steps for service of notice against Opposite Party No.-2, but no steps were taken and thereafter vide order dated 06.01.2016 by way of last chance, time till 12.01.2016 was granted to comply with the order dated 09.07.2015 and it was indicated that failing which this application shall stand rejected without further reference to a Bench. Thereafter, the opposite party No.-2 appeared through Advocate and when the matter was taken up on 04.07.2017, the case was dismissed for non-prosecution. Subsequently, the case was restored vide order dated 28.09.2019 passed in Cr.M.P. No. 2627/2018.

15. As per the prosecution case, the complainant as well as the accused persons are involved in coal business. The accused No. 1 was a major share-holder of Mahakali Hard Coke. In the last week of October, 2006, the accused persons, with a fraudulent and malafide intention, in conspiracy with each other, approached the complainant and witness No. 1 (who happens to be his brother) and stated that accused No. 1 along with his other two partners, Mr. Manmohan Grover and Mr. Vijay Grover, were intending to sell their Mahakali Hard Coke Plant and were looking for a prospective buyer. The accused Nos. 2 and 3 stated that they had decided to purchase the Mahakali Hard Coke Plant, but since they do not have enough cash, they were looking for some other viable partners who could invest money.

The accused deceitfully proposed the complainant and witness No. 1 to invest money and purchase the plant from accused No. 1 by becoming their partners. Accordingly, the complainant and witness No. 1 arranged money upon fraudulent inducement by the accused persons. On 13.11.2006, an agreement for sale was executed between accused No. 1 and other two partners. i.e. Manmohan Grover and Vijay Grover on one side and the complainant, witness No. It is alleged that the complainant and witness No. 1 became partners of accused Nos. 2 and 3 on their fraudulent misrepresentation and entered into an agreement dated 13.11.2006 with the accused No. 1 and other two persons (i.e. Manmohan Grover and Vijay Grover).

The total cost of plant and other establishment was valued at Rs. 72 lakhs, out of which Rs. 4 lakhs was value of the plant office, and the said accused No. 1 wanted to retain it individually. So, Rs. 4 lakhs was to be deducted from the amount of share receivable by accused No. 1. Further Rs. 24 lakhs was the liability of the Bank of the first party and it was decided that Rs. 72 lakhs minus Rs. 4 lakhs i.e. Rs. 68 lakhs would include Rs. 24 lakh of Bank's liability also.

The complainant and witness No. 1 in the said sale agreement had share of 20%

each. The accused No. 1 was paid Rs. 10 lakhs in cash and Rs. 6,88,000/- through draft made on 03.11.2006 as advance amount and the same was paid by the complainant and witness No. 1 as a result of internal understanding between the complainant and witness No. 1 and accused Nos. 2 and 3. The plant in question was handed over to the complainant and witness No. 1.

16. It is further alleged that the accused persons manipulated the complainant and witness No.1 to pay the respective shares of the two partners of the firm, namely, Vijay Grover and Manmohan Grover, and Manmohan Grover also accepted the same in an agreement dated 12.01.2007. The two partners i.e. Manmohan Grover and Vijay Grover after taking their entire share were totally out of picture.

17. After these transactions true colour of the accused persons started surfacing and they started conspiring again and as a result started ignoring the complainant and witness No. 1 by regrouping themselves in order to cause loss to the complainant by their act of cheating. The complainant and witness No. 1 approached the accused Nos. 2 and 3 who with dishonest intention gave a complete go by to the request of complainant. The complainant also sent a legal notice on 08.12.2006 to accused No. 1 requesting him to take his balance consideration of his share and transfer the plant in question. The accused No. 1 gave a reply to the legal notice and the content of the legal notice indicated that the accused persons had already decided to cheat the complainant. The accused No. 1 through his advocate completely denied agreement dated 13.11.2006 though, expressly and impliedly, money receipt dated 27.12.2006 indicated existence of agreement dated 13.11.2006. Even the two partners Vijay Grover and Manmohan Grover had admitted this fact in their deed of acknowledgment as well as money receipt.

It has also been alleged that the plant in question, whose possession handed over to the complainant and witness No. 1, was made open to accused Nos. 2 and 3 to operate along with complainant and witness No. 1 for sometimes. It is alleged that the accused Nos. 2 and 3 while they were dealing with their business of the plant sold Hard Coke worth Rs. 7,13,729/- and also Rs. 4,82,000/-. The accused no. 2 and 3 admitted this in their own handwriting given to witness no. 2. The money earned by the accused no. 2 and 3, who are the petitioners before this court, is alleged to be fraudulently used and misused by them for their own purpose.

18. This Court finds that the complainant was examined on solemn affirmation and he produced four witnesses in support of his contention. This Court also finds that the deposition of four witnesses have not been filed by the learned senior counsel for the petitioners and it was specifically pointed out to the learned senior counsel for the petitioners during the course of hearing. This Court finds that the learned trial court after considering the complaint, the solemn affirmation of the complainant and the evidences of four prosecution witnesses was of the view that the accused persons conspired with each other, fraudulently

and dishonestly induced the complainant and witness No. 1 to deliver the cash amount as mentioned in the complaint and hence they cheated the complainant and witness No. 1 and as such they committed offence under Section 420 of IPC. The learned court below also recorded that the accused persons have by their initial as well as subsequent conduct have made themselves liable for an offence of cheating. In the process, they have also in criminally misappropriated the amount of the complainant and witness No. 1 as mentioned in the complaint petition and also the property of plant in question and have accordingly made themselves liable to be prosecuted under Section 406 of IPC. In this background, the learned court below was of the considered view that accused persons have made themselves liable to be prosecution under Sections 420, 406 and 120-B of IPC. The learned court below also considered the various documentary evidences which were produced by the complainant as annexures to the complaint petition and after considering the materials on record, the learned court below passed a well-reasoned order and was of the view that a prima- facie case has been made out against the accused persons.

19. So far as the judgment referred to by the learned counsel for the petitioners reported in (2005) 10 SCC 336 (Uma Shankar Gopalika vs. State of Bihar and Ors.) is concerned, the same does not apply to the facts and circumstances of this case. The said case arose out of a petition filed under Section 482 of the Code of Criminal Procedure for quashing the First Information Report when the case was registered under sections 420/120B of IPC and the same was dismissed by the High Court. In the said case, it has been recorded by the Hon'ble Supreme Court that the only allegation in the complaint petition against the accused persons was that they assured the complainant that when they receive the insurance claim amounting to Rs. 4,20,000/-, they would pay a sum of Rs. 2,60,000/- to the complainant out of that, but the same has never been paid. It was pointed out on behalf of the complainant that the accused fraudulently persuaded the complainant to agree so that the accused may take steps for moving the Consumer Forum in relation to claim of Rs. 4,20,000/-. The Hon'ble Supreme Court held that it is well settled 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 and in the said case nowhere it was stated that at the very inception there was any intention on behalf of the accused persons to cheat which is condition precedent for an offence under Section 420 of the Indian Penal Code.

In this background, the Hon'ble Supreme Court was of the view that the allegation disclosed in the complaint did not disclose any criminal offence at all much less any offence either under Section 420 or 120-B of IPC and the said case was also found to be a case of purely civil dispute between the parties and accordingly, the entire criminal proceedings including the F.I.R. was quashed.

In the present case, as discussed above, the allegations of fraudulent intention since beginning have been made and there are also allegations of criminal misappropriation. Consequently, the cognizance has been taken under section 420 IPC as well as section 406 read with section 120-B of IPC.

20. Similarly, the judgment passed by the Hon'ble Supreme Court reported in (2015) 8 SCC 293 (Vesa Holdings P. Ltd. and Ors. Vs. State of Kerala and Ors.), also does not apply to the facts and circumstances of this case. In that case also the petition under Section 482 of Cr.P.C. seeking quashing of F.I.R. registered under sections 120-B, 417, 418 and 420 IPC was dismissed by the High Court which was subject matter of consideration by the Hon'ble Supreme Court.

In the said case, there was a letter containing the offer of the appellants of the case and the acceptance of the offer by the respondent in connection with settlement of certain dues of the bank. In the said case, no allegation whatsoever was made against the appellants in the correspondence between the parties and it was only mentioned that the consultation fee remained unpaid and the company was delaying the payment on the one pretext or the other .The Hon'ble Supreme Court was of the considered view that 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. It was also held that if the intention to cheat has developed later on, the same cannot amount to cheating.

The Hon'ble Supreme Court also held that 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.

21. In the present case, if the complaint is taken on its face value also, there are sufficient materials to constitute a prima-facie case under sections 420/406/120-B of IPC and there are allegations of fraudulent intent even at the time of entering into the agreement dated 13.11.2006. This Court is of the prima-facie view at this stage that merely because the plant in question was handed over to the complainant and witness No.1, the same by itself cannot be conclusive of absence of criminal intent at the time of entering into agreement. Moreover, there are further allegations of misappropriation of hard coke from the plant against the present two petitioners when they were given access to the plant in question.

22. In view of the aforesaid facts and circumstances, this court is of the considered view that the arguments of the learned senior counsel for the petitioners, that no criminal case is made out against the petitioners on the face of the allegations in complaint petition, is devoid of any merits.

23. This Court further finds that the petitioners have not annexed the copy of the examination of any of the four witnesses who were examined before the learned

court below prior to taking cognizance by the learned court below by the impugned order. The learned court below has considered the complaint, examination of the complainant on solemn affirmation as well as examination of four witnesses in support of the complaint and also the documents produced before the learned court below. In absence of deposition of the four witnesses and other materials on record of learned court below, this Court is not in a position to examine their statements. No endeavour has been made to file the aforesaid materials before this Court from the side of the petitioners and the entire arguments have been advanced only on the allegations made in the complaint petition. This Court finds that the learned court below has passed a detailed order taking cognizance taking into consideration all the materials which were brought on record before the learned court below including the examination of the four witnesses.

24. In the judgement passed by the Hon'ble Supreme Court reported in 1992 Suppl. (1) SCC 335 (State of Haryana and Ors. Vs. Bhajan Lal and Ors.), it has been held in Para-102 and 103 as follows:

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(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) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(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.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and

inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

25. In view of the aforesaid circumstances and considering the law laid down by the Hon'ble Supreme Court in the case reported in 1992 Suppl. (1) SCC 335 (State of Haryana and Ors. Vs. Bhajan Lal and Ors.), this Court is not inclined to interfere with the order taking cognizance and quash the criminal proceedings against the petitioners. Accordingly, the present petition is dismissed.

26. However, it is observed that dismissal of this petition will not prejudice the case of the petitioners before the learned court below in any manner whatsoever and it will be open to the petitioners to take all points as available under law.

27. Interim order, if any, stands vacated.

28. Pending interlocutory applications, if any, is dismissed as not pressed.

29. Let a copy of this order be communicated to the learned court below through 'e-mail/FAX'.

