(2012) 03 JH CK 0065

In the Jharkhand High Court

Case No : Criminal M.P. No. 448 of 2010

S.K. Srivastava @ Shailendra Kumar Srivastava APPELLANT

Vs

The State of Jharkhand and Another RESPONDENT

Date of Decision : 28-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 398, 482
Penal Code, 1860 (IPC) — Section 120B, 406, 415, 420

Citation : (2012) 4 JCR 281 : (2012) 3 JLJR 163

Hon'ble Judges : Rakesh Ranjan Prasad, J

Bench : Single Bench

Advocate : S.D. Sanjay, for the Appellant;

Final Decision : Allowed

Judgement

R.R. Prasad, J.—Heard learned counsel appearing- for the petitioner and learned counsel appearing for the State. This application has been filed for quashing of the order dated 11.1.2010 passed by the learned Sessions Judge, Jamshedpur in Cr. Revision No. 333 of 2009, whereby the learned Sessions Judge, having set aside the order dated 14.10.2009, dismissing the complaint passed an order for further inquiry and, thereby, cognizance of the offence punishable under Sections 406, 420 and 120B of the Indian Penal Code, was taken vide order dated 5.3.2010 by the Judicial Magistrate, 1st Class, in C/1 Case No. 1360 of 2009, which order has also been sought to be quashed.

2. Before adverting to the submission, facts giving rise to this application need to be taken notice of.

3. The complainant-Opp. Party No. 2 lodged a case stating therein that on his request, he was appointed as authorized dealer of ''Kinetic Motor Co. Ltd. on a condition of deposit of Rs. 10,50,000/- towards security, which was deposited by him. Thereupon, 24 (Twenty Four) vehicles were sent by the Company to the complainant for its sale. Since, those vehicles were of old model, he raised

objection before the Company. However, those vehicles were sold at the instance of the Company in the State of Orissa and a sum of Rs. 3,94,379/- was deposited in the account of the complainant. Thereupon, the complainant made a request to return that amount of Rs. 10,50,000/- which had been kept as security but the petitioner never returned that amount nor did he return the amount of commission which the petitioner was entitled to have and, thereby the petitioner, by retaining a sum of Rs. 12,74,000/- committed offence of cheating and misappropriation.

4. Learned counsel appearing for the petitioner submits that in course of inquiry of the complaint case, the legal notice sent by the complainant to the petitioner and reply to the legal notice were brought on the record and the court having, taken into account all the facts, came to the conclusion that the matter relates to civil dispute and hence, he refused to take cognizance of the offence.

5. That order was challenged before the learned Sessions Judge, Jamshedpur and the learned Sessions Judge vide order dated 11.1.2010, set aside the order, passed by the learned Judicial Magistrate, 1st Class and remanded the matter for further inquiry in terms of the provision as contained in Section 398 Cr.P.C.

6. Thereupon, the learned Magistrate, Jamshedpur vide its order dated 5.3.2010, took cognizance of the offences-punishable under Sections 406, 420 and 120B of the Indian Penal Code. Those order passed by the learned Sessions Judge and also by the Magistrate on 5.3.2010 are under challenge.

7. Learned counsel appearing for the petitioner further submits that taking the entire allegations made in the complaint to be true, no offence either of criminal breach of trust or of cheating is made out rather it is out and out a case of civil dispute and hence, the order taking cognizance is fit to be set aside.

8. As against this, learned counsel appearing for the State submits that the petitioner, by retaining a sum of Rs. 12,74,000/- has certainly committed offence of criminal breach of trust and cheating.

9. At the very outset, I may refer to a decision of the Hon''ble Supreme Court rendered in the case of R.S. Raghunath Vs. State of Karnataka and another, wherein the Hon''ble Supreme Court has been pleased to lay down certain categories of the cases by way of illustrations wherein inherent power u/s 482 of the Code can be exercised either to prevent abuse of the process of any Code or otherwise to secure ends of justice. One of such categories is:--

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.

10. In the context of the principle laid down, one needs to consider as to whether allegation made in the complaint does constitute offence of cheating or not?

11. The offence of cheating has been defined u/s 415 of the Indian Penal Code

which reads as follows:--

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 persons 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''.

12. From its reading, it appears that following ingredients should necessarily be there for constituting offence of cheating:--

(1) there should be fraudulent or dishonest inducement of a person by deceiving him.

(2) (a) the person so deceived should be induced to deliver any property to any persons, or to consent that any person shall retain any property, or

(b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived.

(3) in cases covered by 2(b) the Act or omission should be one which causes or is likely to cause damage or harm to the person induced in bodily or reputation or property.

13. Thus, the first element necessary for constituting the offence of cheating is a deception of the complainant by the accused. Unless there is deception, the offence of cheating never gets attracted. After deception has been practiced the persons deceived should get induced to do or omit to do something. Then, the question arises as to what is the deception?

14. In the ordinary sense, deception has in it the element of misleading or making a person believe something that is false or inculcating of one so that he takes the false as true, the unreal as existent, the spurious as genuine and at the same time, it is also necessary that deception should be right from the beginning of the contract. Applying the principle in context of the allegation it does appear that first element of deception constituting an offence of cheating is lacking as nowhere the allegations made in the complaint do indicate about the complainant being deceived by the petitioner in any manner.

15. In a case of Indian Oil Corporation Vs. NEPC India Ltd. and Others, , the Hon''ble Supreme Court taking notice of Section 415 of the Indian Penal Code has been pleased to hold that deception is a necessary ingredient for the offence of cheating under both parts of the Section. It would be relevant to state that if the facts constitute civil liability as well as criminal liability, then the remedy available for civil law cannot be a ground for quashing of the criminal proceeding which proposition of law has also been laid down by the Hon''ble Supreme Court in the case referred to above, but at the same time, it has also been observed by the Hon''ble Supreme Court that there is a growing tendency in business circle to

convert purely civil dispute into criminal cases. This is obviously on account of the prevalent impression that civil law remedies are time consuming and do not adequately protect the interest of lenders/creditors. Such tendency is seen in several family dispute also leading to irretrievable brake down of marriages/ families. There is also an impression that if a person could somehow be entangled into a criminal prosecution, there is likelihood in imminent settlement. It has emphatically been said by the Hon''ble Supreme Court in the said decision that any effort to settle civil dispute and claims which do not involve any criminal offence by applying pressure through criminal prosecution should be deprecated and discouraged.

16. Thus, it does appear that no offence of cheating is made out.

17. Similar is the situation with respect to offence punishable u/s 406 of the Indian Penal Code as on the face of allegation made in the complaint, the said offence never gets constituted.

18. The provision of criminal breach of trust has been defined in Section 405 of the Indian Penal Code which reads as under.--

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 discouraged, or of any legal contract, express or implied, which he has made touching the discharge off such trust, or willfully suffers any other person so to do, commits "criminal breach of trust.

19. Here in the instant case, it does appear that the petitioner has retained the money, which was deposited with the petitioner, even accepting the case of the complainant that he has retained the money, he cannot be said to have dishonestly misappropriated as there was no intention right from the beginning to cheat or to misappropriate the amount, rather at best it can be said to be a case of civil dispute.

20. Having come to the conclusion that the allegations made in the complaint do not constitute offence of cheatin g or misappropriation, the entire criminal proceeding including the order dated 5.3.2010, taking cognizance, is hereby quashed. In the result, this application is allowed.