

(2023) 06 CAL CK 0046
In the Calcutta High Court
Case No : Criminal Revision No.768 Of 2019

Soumajit Bag & Anr.

APPELLANT

Vs

State Of West Bengal & Anr.

RESPONDENT

Date of Decision : 21-06-2023

Acts Referred:

Indian Penal Code, 1860 — Section 188, 323, 341, 403, 405, 406, 415, 425, 427, 447, 325, 506
Code Of Criminal Procedure, 1973 — Section 250, 482

Citation : (2023) 06 CAL CK 0046

Hon'ble Judges : Shampa Dutt (Paul), J

Bench : Single Bench

Advocate : Rajdeep Bhattacharya, Sanjib Sankar Majumdar, Binoy Panda, Narayan Prarsad Agarwala, Subham Bhakat

Final Decision : Dismissed

Judgement

Shampa Dutt (Paul), J

1. The present revision has been preferred praying for quashing of the proceeding being Baruipur Police Station Case No. 13 of 2017, dated 02.01.2017 in G.R. Case No. 445 of 2017, under Sections 188/447/341/427/323/506 of the Indian Penal Code, 1860, pending before the Court of the Learned Additional Chief Judicial Magistrate, Baruipur, District-South 24-Parganas.

2. The petitioners' case is that the defacto complainant/opposite party no. 2 herein is the developer under the petitioners/landlord nos. 2 and 3 herein in respect of property under Mouza – Baruipur, J.L. No. 32, Touzi No. 250, R.S. Khatian No. 8366, R.S. Dag No. 172 and 166/998 under Police Station– Baruipur, District–South 24-Parganas.

3. It is stated by the petitioner that the opposite party/defacto complainant made a false allegation at Baruipur Police Station on 02.01.2017 against the petitioners as follows:-

"I Sri Biplab Bhattacharjee, son of Bireshwar Bhattacharjee, of Village-Sasan, Bariupur, Police Station – Baruipur, District – South 24-Parganas, am a permanent resident thereof. My submission is that I with Debabrata Ray, Son of Late Pradip Ray of Purba Tentulberia, Post Office-Garia, Police Station – Sonarpur, District – South 24-Parganas jointly entered into a development agreement dated 10.07.2017 with one Manendra Mukherjee and Arabindra Mukherjee. As per said development agreement huge amount of money was incurred thereon. But due to non-settlement with one tenant namely Sobita Mishra, wife of Doctor Abhoy Pada Mishra of Mishra Medical Hall with said Manabendra Mukherjee and Arabindra Mukherjee, we are unable to develop their portion. Therefore, we filed a Title Suit being T.S. No. 30 of 2016 before the Learned 1st Civil Judge (Junior Division) at Baruipur and after hearing, Learned Court has been pleased to pass an order that:-both sides are directed to maintain status quo in respect of possession and alienating of the suit property until further order, and the said suit is still pending. After knowing the said order of injunction, aforesaid persons have handed over possession of said portion to Soumojit Bag, son of Late Dilip Bag of Village – Madarat Road, Ward No. 3, Police Station – Baruipur, District – South 24-Parganas. But after came to know the aforesaid order of injunction said Soumojit Bag forcefully changed the nature and character of the suit shop room when I raised protest, they used very filthy languages and threatening to me. They have thrown a stone to me. They also told to me if he raised objection they will murder me, because they purchased the thana, police by money, so I pray for lodged First Information Report against the aforesaid persons.

The de facto complainant have informed the same to the Sub-Divisional Police Officer (SDPO), Baruipur Sub-Division, Madarat Road, South 24-Parganas on 22.12.2016, thereafter Baruipur Police Station started a criminal case being Baruipur Police Station Case No. 13 of 2017, dated 02.01.2017, under Sections 188/447/427/325/506 of the Indian Penal Code, 1860 against the petitioners herein."

4. The petitioners state that from the aforesaid complaint lodged by the defacto complainant/opposite party namely Sri Biplab Bhattacharjee it is can be seen that it is purely a civil dispute. The allegation of the defacto complainant/opposite party is purely civil in nature and the Civil Court is the appropriate Forum to entertain this matter, when a Title Suit is also pending. The defacto complainant has obtained an ad-interim order of injunction (ex parte) against the petitioners just to mislead the Learned Court of Civil Judge (Junior Division) at Baruipur. On the other hand the actual fact is that the said de facto complainant and said Debabrata Roy have no locus standi to file any case against the petitioners, because on 03.08.2015 said Manabendra Mukherjee and Arabindra Mukherjee cancelled the said Development Agreement as well as revoked the Power of Attorney and it was well known to the defacto complainant and Debabrata Roy but just to fulfil their illegal gain they have filed this case. It is stated that Soumyajit Bag is the owner of a certain portion of the said building.

5. Thereafter without proper investigation on 31.01.2017 the police of the Bariupur Police Station submitted Charge Sheet being C/S No. 223/2017, under Sections 188/447/341/427/323/506 of the Indian Penal Code, 1860, against the petitioners.

6. It is submitted that the allegation made in the First Information Report are completely frivolous and harassing. The disputes between the petitioners and the opposite party no. 2 are completely civil disputes and the Civil Court is the appropriate Forum to decide this matter. The allegations being completely civil in nature, there is no commission of any criminal offence.

7. The petitioners state that the petitioners are completely innocent and in no way connected with the commission of the alleged offence but have been falsely implicated in the instant case by the opposite party no. 2 with the sole purpose of coercing the petitioner nos. 1 to 3 to bow down to the illegal demands of the opposite party no. 2.

8. Mr. Rajdeep Bhattacharya, learned counsel for the petitioners has submitted that the impugned proceeding against, the petitioners are clearly bad in law and hence the same is liable to be quashed, in the instant case it is apparent that the allegations made by the opposite party do not make out any contravention of the provisions as alleged and thus the instant proceeding is clearly unwarranted and a product of non application of judicial mind to the facts as disclosed in the complaint. In such circumstances, the order issuing process against the petitioners needs to be set aside as also the proceedings is liable to be quashed.

9. Mr. Binoy Panda, learned counsel for the State has appeared for the State.

10. In spite of due service there is no representation on behalf of the opposite party no. 2.

11. From the materials on record the following facts are before this Court:-

(i) The petitioner no. 2 along with his co-owner Manabendra Mukherjee, who in spite of having a development agreement dated 10th July, 2007 in respect of the property (in dispute) with the complainant, have allegedly transferred the property in favour of the petitioner no. 1.

(ii) A Title Suit was filed by the complainant. It has been dismissed for default on 05.01.2023. The present case has been initiated on 01.01.2017.

(iii) Prima facie there has been a breach of contract after having received monetary consideration. Though the dispute is primarily a civil dispute, there is prima facie an act of criminal breach of trust (Section 406 of IPC) in the present case. And, as such, other than the civil court, the criminal court's power has been lawfully invoked.

12. Considering the nature of dispute between the parties based on a development agreement and subsequent transfer of the property to another person thereby effecting the right of the complainant, the following judgment of

the Supreme Court is relied upon:-

(a) In *M/s. Indian Oil Corporation vs. M/S Npc India Ltd. & Ors.*, Appeal (crl.) 834 of 2002 decided on 20.07.2006, the Court considered the following point among the two points decided.

"8. The High Court by common judgment dated 23.3.2001 allowed both the petitions and quashed the two complaints. It accepted the second ground urged by the Respondents herein, but rejected the first ground. The said order of the High Court is under challenge in these appeals. On the rival contentions urged, the following points arise for consideration :

(i) Whether existence or availment of civil remedy in respect of disputes arising from breach of contract, bars remedy under criminal law?

(ii) Whether the allegations in the complaint, if accepted on face value, constitute any offence under sections 378, 403, 405, 415 or 425 IPC ?

Re : Point No. (i) :

9. The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few - *Madhavrao Jiwaji Rao Scindia v. Sambhajirao Chandrojirao Angre* [1988 (1) SCC 692], *State of Haryana vs. Bhajanlal* [1992 Supp (1) SCC 335], *Rupan Deol Bajaj vs. Kanwar Pal Singh Gill* [1995 (6) SCC 194], *Central Bureau of Investigation v. Duncans Agro Industries Ltd.*, [1996 (5) SCC 591], *State of Bihar vs. Rajendra Agrawalla* [1996 (8) SCC 164], *Rajesh Bajaj v. State NCT of Delhi*, [1999 (3) SCC 259], *Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd.* [2000 (3) SCC 269], *Hridaya Ranjan Prasad Verma v. State of Bihar* [2000 (4) SCC 168], *M. Krishnan vs Vijay Kumar* [2001 (8) SCC 645], and *Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque* [2005 (1) SCC 122]. The principles, relevant to our purpose are :

(i) A complaint can be quashed where the allegations made in 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 the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with malafides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out : (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceedings are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

10. 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 break down 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 vs. State of UP* [2000 (2) SCC 636], this Court observed :

"It is to be seen if a matter, which is essentially of 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 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."

While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in

accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under section 250 Cr.P.C. more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may."

Now in the lines of the judgment under reference let us see if the allegations in the complaint in the present case, if accepted on face value, constitute any offence under Sections 188/447/341/427/323/506 of the Indian Penal Code, as alleged.

13. Section 406 of the Indian Penal Code, lays down:-

"406. Punishment for criminal breach of trust.— Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Ingredients of offence.— The essential ingredients of the offence under Sec. 406 are as follows:-

- (1) Mens rea is essential ingredient of offence.
- (2) There must be an entrustment, there must be misappropriation or conversion to one's own use, or use in violation of a legal direction or of any legal contract.
- (3) The accused was entrusted with the property or domain over it.
- (4) He dishonestly misappropriated or converted to his own use such property;
- (5) He dishonestly used or disposed of that property or willfully suffered any other person to do so in failure of-
 - (a) Any direction of law prescribing the mode in which such trust is to be discharged, or
 - (b) Any legal contract made touching upon the discharge of such trust."

14. Section 405 of the Indian Penal Code, defines:-

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

15. In M/s. Indian Oil Corporation vs. M/s Npc India Ltd. & Ors. (Supra) the Supreme Court also held:-

"18. In Chelloor Mankkal Narayan Ittiravi Nambudiri v. State of Travancore, Cochin [AIR 1953 SC 478], this Court held :

"to constitute an offence of criminal breach of trust, it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or power over it. It has to be established further that in respect of the property so entrusted, there was dishonest misappropriation or dishonest conversion or dishonest use or disposal in violation of a direction of law or legal contract, by the accused himself or by someone else which he willingly suffered to do. It follows almost axiomatically from this definition that the ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit."

[Emphasis supplied]

In *Jaswantrao Manilal Akhaney v. State of Bombay* [AIR 1956 SC 575], this Court reiterated that the first ingredient to be proved in respect of a criminal breach of trust is 'entrustment'. It, however, clarified :

".. But when S. 405 which defines "criminal breach of trust" speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event."

19. The question is whether there is 'entrustment' in an hypothecation? Hypothecation is a mode of creating a security without delivery of title or possession. Both ownership of the movable property and possession thereof, remain with the debtor. The creditor has an equitable charge over the property and is given a right to take possession and sell the hypothecated movables to recover his dues (note : we are not expressing any opinion on the question whether possession can be taken by the creditor, without or with recourse to a court of law). The creditor may also have the right to claim payment from the sale proceeds (if such proceeds are identifiable and available). The following definitions of the term 'hypothecation' in P. Ramanatha Aiyar's *Advanced Law Lexicon* (Third (2005) Edition, Vol.2, Pages 2179 and 2180) are relevant :

"Hypothecation : It is the act of pledging an asset as security for borrowing, without parting with its possession or ownership. The borrower enters into an agreement with the lender to hand over the possession of the hypothecated asset whenever called upon to do so. The charge of hypothecation is then converted into that of a pledge and the lender enjoys the rights of a pledgee."

'Hypothecation' means a charge in or upon any movable property, existing in future, created by a borrower in favour of a secured creditor, without delivery of possession of the movable property to such creditor, as a security for financial assistance and includes floating charge and crystallization of such charge into fixed charge on movable property. (Borrowed from section 2(n) of *Securitisation*

and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002)"

But there is no 'entrustment of the property' or 'entrustment of dominion over the property' by the hypothecatee (creditor) to the hypothecator (debtor) in an hypothecation. When possession has remained with the debtor/owner and when the creditor has neither ownership nor beneficial interest, obviously there cannot be any entrustment by the creditor.

20. The question directly arose for consideration in *Central Bureau of Investigation v. Duncans Agro Industries Ltd., Calcutta* [1996 (5) SCC 591]. It related to a complaint against the accused for offences of criminal breach of trust. It was alleged that a floating charge was created by the accused debtor on the goods by way of security under a deed of hypothecation, in favour of a bank to cover credit facility and that the said goods were disposed of by the debtor. It was contended that the disposal of the goods amounted to criminal breach of trust. Negating the said contention, this Court after stating the principle as to when a complaint can be quashed at the threshold, held thus :

"a serious dispute has been raised by the learned counsel as to whether on the face of the allegations, an offence of criminal breach of trust is constituted or not. In our view, the expression 'entrusted with property' or 'with any dominion over property' has been used in a wide sense in Section 405, I.P.C. Such expression includes all cases in which goods are entrusted, that is, voluntarily handed over for a specific purpose and dishonestly disposed of in violation of law or in violation of contract. The expression 'entrusted' appearing in Section 405, I.P.C. is not necessarily a term of law. It has wide and different implications in different contexts. It is, however, necessary that the ownership or beneficial interest in the ownership of the property entrusted in respect of which offence is alleged to have been committed must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit. The expression 'trust' in Section 405, I.P.C. is a comprehensive expression and has been used to denote various kinds of relationship like the relationship of trustee and beneficiary, bailor and bailee, master and servant, pledger and pledgee....."

16. The Supreme Court in *Satishchandra Ratanlal Shah vs. State of Gujarat & Anr., Criminal Appeal No.9 of 2019* (arising out of SPL (CrL.) No. 5223 of 2018), on 3 January, 2019, held that :-

"11. Coming to the aspect of quashing of the charges, it is well settled that such exercise needs to be undertaken by the High Court in exceptional cases. It is also well settled that the framing of charges being initial stages in the trial process, the court therein cannot be the decision of quashing the charge on the basis of the quality or quantity of evidence rather the enquiry must be limited to a prima facie examination[refer to *State of Bihar vs. Ramesh Singh*, 1977 CrLJ 1606].

12. Having observed the background principles applicable herein, we need to

consider the individual charges against the appellant. Turning to Section 405 read with 406 of IPC, we observe that the dispute arises out of a loan transaction between the parties. It fails from the record that the respondent no.2 knew the appellant and the attendant circumstances before the lending the loan. Further, it is an admitted fact that in order to recover the aforesaid amount, the respondent no.2 had instituted a summary civil suit which is still pending adjudication. The law clearly recognizes a difference between simple payment/investment of money and entrustment of money or property. A mere breach of a promise, agreement or contract does not, ipso facto, constitute the offence of the criminal breach of trust contained in Section 405 IPC without there being a clear case of entrustment.

13. In this context, we may note that there is nothing either in the complaint or in any material before us, pointing to the fact that any property was entrusted to the appellant at all which he dishonestly converted for his own use so as to satisfy the ingredients of Section 405 punishable under Section 406 of IPC. Hence, learned Magistrate committed a serious error in issuing process against the appellant for the said offence. Unfortunately, the High Court also failed to correct this manifest error.

14. Now coming to the charge under Section 415 punishable under Section 420 of IPC. In the context of contracts, the distinction between mere breach of contract and cheating would depend upon the fraudulent inducement and mens rea. (See *Hridaya Ranjan Prasad Verma v. State of Bihar* (2000) 4 SCC 168). In the case before us, admittedly, the appellant was trapped in economic crisis and therefore, he had approached the respondent no.2 to ameliorate the situation of crisis. Further, in order to recover the aforesaid amount, the respondent no.2 had instituted a summary civil suit seeking recovery of the loan amount which is still pending adjudication. The mere inability of the appellant to return the loan amount cannot give rise to a criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, as it is this mens rea which is the crux of the offence. Even if all the facts in the complaint and material are taken on their face value, no such dishonest representation or inducement could be found or inferred.

15. Moreover, this Court in a number of cases has usually cautioned against criminalizing civil disputes, such as breach of contractual obligations [refer to *Gian Singh v. State of Punjab*, (2012) 10 SCC 303]. The legislature intended to criminalize only those breaches which are accompanied by fraudulent, dishonest or deceptive inducements, which resulted in involuntary and in-efficient transfers, under Section 415 of IPC.

16. However, the High Court appears to have been carried away by the moral element involved in the breach of promise and made certain observations. Being a policy consideration, such suggestions need to be restricted. The aforementioned observations of the High Court were not only unnecessary for the adjudication of this matter, but the same could have been understood as

casting some kind of aspersions on the accused. This clearly reflected a loaded dice situation against the appellant herein.

17. In our considered opinion, the High Court should have maintained judicial restraint and desisted from making such general observations at this stage of the criminal proceeding, as they may have had a bearing on the adjudication of the trial. Therefore, the observations made in paragraphs 42 and 43 of the impugned judgment stand expunged.”

17. In the present case there is prima facie materials to show that there is an element of fraudulent/dishonest intention/dishonest misappropriation on the part of the petitioners no. 2 and others, who in spite of receiving monetary consideration transferred the property, in favour of the petitioner no. 1, who had knowledge of the development agreement.

Thus considering the materials on record, the case should be permitted to proceed towards trial.

18. The trial court shall consider Section 406 of the Indian Penal Code at the time of framing of charge.

19. The dispute in this case allegedly occurred due to such breach, violation, transfer etc. Thus, there being prima facie materials on record against the petitioners, the present revision is liable to be dismissed.

20. The revisional application being CRR 768 of 2019 is accordingly dismissed.

21. No order as to costs.

22. All connected applications, if any, stands disposed of.

23. Interim order, if any, stands vacated.

24. Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

25. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.