
(2013) 09 JH CK 0080

In the Jharkhand High Court

Case No : Criminal Revision No. 2473 of 2012

U.S. Parekh @ U.S. Prakash and Others

APPELLANT

Vs

State of Jharkhand and M/s. Samridhi Sponge Limited

RESPONDENT

Date of Decision : 02-09-2013

Acts Referred:

Citation : (2014) 1 AJR 281

Hon'ble Judges : Rakesh Ranjan Prasad, J

Bench : Single Bench

Advocate : Kalyan Roy, for the Appellant; Indrajeet Sinha, Advocate for O.P. No. 2, for the Respondent

Judgement

Rakesh Ranjan Prasad, J.—Initially this application had been filed for quashing of the first information report of Sonari P.S. Case No. 120 of 2012, registered under Sections 420/406/34 of the Indian Penal Code. While the matter was pending for consideration, charge sheet was submitted upon which cognizance of the offences punishable under Sections 406/420/34 of the Indian Penal Code was taken vide order dated 28/01/2013, against petitioner Nos. 2 to 5. That order was challenged by way of interlocutory application (I.A. No. 1763/2013). Since, the cognizance was not taken against petitioner No. 1 U.S. Parekh, prayer was made that this application be allowed to be confined to petitioner Nos. 2 to 5 only. Before advertng to the submissions advanced on behalf of the parties, the case of O.P. No. 2-complainant-informant needs to be taken notice of. It appears that the complainant O.P. No. 2 filed a complaint stating therein that petitioner Nos. 2 to 5 being the Directors of a Company (Garg Group) approached the complainant, an authorized signatory and representative of a Company known as M/s. Samridhi Sponge Limited being run by Chandra Group of Companies for sell of the shares held by the petitioners" company and his associate. The proposal given by the petitioners was accepted by the complainant and, hence, agreed to purchase the shares of the Company (Garg Group) on a condition that the complainant"s Company would be entitled to nominate its Director in the Board

of the said Company. Accordingly, they entered into an Agreement-cum-Memorandum of Understanding (AMOU) on 10/11/2007, stipulating therein that Garg Group will indemnify the complainant for any types of loan related with the Union Bank or Bank of India or any other liability arising out the assessment proceeding under the Income Tax, Vat Tax, Service Tax etc. Further stipulation is that the Garg Group of Company agreed to discharge any kind of contingent and hidden liabilities of the Company up to the date of the agreement and, thereby, both the parties tender to keep post dated cheques of Rs. 50 lakhs in Escrow account to be operated by U.S. Parekh with further stipulation that if the liabilities exceeds Rs. 50 lakhs than the Garg Group of the Company will further pay the balance amount to the complainant-Company and if the liability would be lesser from the aforesaid amount of Rs. 50 lakhs, rest of the amount would be refunded. Further case is that after execution of the Memorandum of Understanding, a demand notice dated 30/10/2008, issued by the Assistant Commissioner, Commercial Taxes, Chaibasa Circle, was received, whereby a demand of Rs. 1508302/- was raised on account of cancellation of the claim of set off for the financial year 2005-06. Similarly, a demand notice for payment of the amount to the tune of Rs. 11,18,624/- was received against the assessment of the financial year 2005-06 similarly, other demand notices were received for the financial years 2006-07, 2007-08. Thus, total demand, which was raised by the Commercial Tax Department for the financial years 2005-06 to 2007-08 was to the tune of Rs. 4670959/-. Thereupon, the complainant contacted with the accused persons for clearance of the dues but they did not care for it as a result of which the complainant, on account of none issuance of road permit and other permits suffered huge loss.

2. On such allegations, a complaint was lodged, which was registered as C/1 Case No. 2596 of 2012. The said complaint was sent before the concerned police station u/s 156(3) of the Code of Criminal Procedure for its registration and investigation. Upon investigation, charge sheet was submitted against the petitioner Nos. 2 to 5, as stated above, whereupon, Court took cognizance of the offences as aforesaid vide order dated 28/01/2013, which is under challenge.

3. Mr. Kalyan Roy, learned counsel appearing for the petitioners submits that accepting the entire allegations made in the complaint/F.I.R., to be true, no offence is made out either u/s 406 or u/s 420 of the Indian Penal Code as the necessary ingredients for constituting offence either u/s 405 or u/s 415 of the Indian Penal Code are completely lacking.

In this regard, it was further submitted that the petitioners have never been alleged to have induced the complainant fraudulently or dishonestly to enter into an Agreement-cum-Memorandum of Understanding, whereby it had been agreed upon that for discharging the liabilities existing prior to the date of Agreement, a post dated cheque of Rs. 50 lakhs would be kept with Mr. Parekh in an Escrow account, to be operated by him. Similarly, as per the agreement, the complainant was also supposed to give a post dated cheque of Rs. 50 lakhs to Mr. Parekh, but

the complainant never gave cheque of such amount to Mr. Parekh, whereas the petitioners had deposited the said cheque with Mr. Parekh and, thereby, the petitioners can never be said to have had any intention right from the beginning to defraud the complainant.

In this regard, it was further submitted that though according to the case of the complainant, certain liabilities were there, which were supposed to be discharged by the petitioners, which have not been discharged by the petitioners, but for that the petitioners would not be liable to be prosecuted criminally as it becomes a case of mere breach of agreement, which can be enforced by the complainant by bringing civil suit and under the circumstances the order taking cognizance is fit to be quashed.

4. As against this, Mr. Sinha, learned counsel appearing for O.P. No. 2 submits that it is not a simple case of breach of the terms and conditions of MOU as the petitioners had had dishonest intention right from the beginning to deceive the complainant as the petitioners never did disclose about the liabilities of which the petitioners were having knowledge but they suppressed it and by suppressing this fact they made the complainant to enter into an agreement. Further, the fraudulent intention get surfaced from the facts that when the complainant did receive the demand notices, whereby demand had been raised, which was prior to the date of the agreement, the complainant asked the petitioners to make payment but they refused. From which it can easily gathered that inner intention of the petitioners was to deceive the complainant.

In this regard, learned counsel placed his reliance upon the observations made in paragraphs 105, 106 and 107 of a decision rendered in a case of Sahara India Real Estate Corporation Ltd. and Others Vs. Securities and Exchange Board of India and Another, Learned counsel has further placed his reliance over a decision rendered in a case of R. Venkatakrishnan Vs. Central Bureau of Investigation,

5. In the context of the submissions advanced on behalf of the parties, it is to be considered as to whether the allegations made in the complaint do constitute offence of cheating and misappropriation or not?

6. 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.

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.

7. Thus, the first element necessary for constituting the offence of cheating is 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?

8. 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 it is also necessary that deception should be right from the beginning of the contract. Applying the principle constituting a criminal offence of cheating 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 petitioners in any manner.

9. In this regard, it may further be stated that the parties were aware of the liabilities of the complainant and, therefore, they had agreed that both the parties would be paying post dated cheques to be kept in Escrow account to be operated by U.S. Parekh. The cheque of the said amount, according to the petitioners, had already been deposited. To be more specific on this point, it would be better to refer to para-7 of the complaint, which reads as follows:-

Garg Group has agreed to bear any kind of contingent and Hidden liabilities of the company upto the date of agreement cum memorandum of understanding and the third party, as agreed by both (Escrow A/c with Sri U.S. Parekh) shall retain post dated cheques of Rupees fifty lacs only due making aforesaid liabilities of the company. It has further been agreed by both the parties that if the aforesaid liabilities will exceeds Rs. 50,00,000/- Then the Gary Group will further pay the balance amount of the Chandra Group but if the aforesaid liabilities is less than Rs. Fifty Lacs then the Garg Group is entitled to get refund.

10. Aforesaid statements, made in the complaint petition does suggest that the petitioners were aware of the liabilities including the hidden liabilities and, therefore, question of suppressing any fact on the part of the petitioners does not arise. In this situation, I am constrained to hold that nothing is there in the complaint to show about the fraudulent or dishonest act on the part of the

petitioners right from the beginning except the fact that certain liabilities, which were to be discharged by the petitioners were not discharged in spite of promise being made, but that would not constitute offence of cheating in absence of any fraudulent or dishonest act on the part of the petitioners, rather non payment of the amount would entail the petitioners with civil consequences.

11. The issue which was involved in a case of "Sahara India Real Estate Corporation" (supra) was altogether different, wherein in the context of the fact of that case it has been observed by Their Lordships" hat that a person"s inner intentions are to be read and understood from his acts and omissions. Here the question, which is involved in this case is as to whether any promise made, if breached, would entail the persons to be prosecuted criminally. It has been repeatedly held by the Hon"ble Supreme Court and the various High Courts that only on account of deception if a party has been put to loss, one can be held liable for the offence of cheating and that too the persons should have had intention right from the beginning to cheat him.

12. Thus, I do find that the necessary ingredients are lacking constituting offence of cheating.

13. So far as the offence u/s 406 of the Indian Penal Code is concerned, that also does not appear to have been made out against the petitioner. 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 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".

14. On reading of the said provision, the following ingredients should be there for constituting the offence u/s 405 of the Indian Penal Code:-

(a) a person should have been entrusted with property or entrusted with dominion over property;

(b) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or willfully suffer any other person to do so;

(c) that such misappropriation, conversion, use or disposal should be in violation of any direction of laws prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.

15. The same proposition seems to have been laid down by the Hon"ble

Supreme Court in the case of Onkar Nath Mishra and Others Vs. State (NCT of Delhi) and Another, wherein Their Lordships have held as follows:-

In the commission of the offence of criminal breach of trust, two distinct parts are involved. The first consists of the creation of obligation in relation to the property over which dominion or control as acquired by the accused. The second is of misappropriation or dealing with the property dishonestly and contrary to the terms of the obligation created.

16. In the background of the allegations made in the complaint, the ingredients necessary for constituting offence of criminal breach of trust, seems to be lacking and, therefore, I do not find it to be a case of criminal breach of trust, rather it is a pure case of breach of agreement which could have been enforced in the competent court of civil jurisdiction. Accordingly, the entire criminal proceeding of Sonari P.S. Case No. 120 of 2012 (G.R. No. 3087/2012), arising out of C/1 Case No. 2596 of 2012, including the order dated 28/01/2013, taking cognizance, is hereby set aside.

In the result, this revision application stands allowed.