(2009) 09 JH CK 0038

In the Jharkhand High Court

Zee Interactive Learning Systems Limited and Others	APPELLANT
Vs	
The State of Jharkhand and Sitaram Agarwal	RESPONDENT

Date of Decision : 03-09-2009

Acts Referred:
Penal Code, 1860 (IPC) — Section 406, 420, 482

Citation : (2011) 6 RCR(Criminal) 443

Hon'ble Judges : Prashant Kumar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Prashant Kumar, J.—This is an application for quashing the entire criminal proceeding in connection with Adityapur P.S. Case No. 252 of 2004 dated 8.11.2004 (G.R. No. 815 of 2004) under Sections 406 and 420 of the IPC pending in the court of CJM, Seraikella.

2 The case of complainant in short is that in pursuant to an advertisement published in the Newspaper the complainant entered into an agreement with the petitioners for starting IT Enabled Education through Zed Career Academy. It is further alleged that the said project based on Computer Education and a sum of Rs. 3 lakhs was charged as franchisee fee besides an amount of Rs. 44,000/-for start up kits and the duration of the said agreement was for five years. It is further stated that the said project of the Zed Career Academy was inaugurated on 4.6.2000 with complete arrangements and requirements after incurring huge expenses by the complainant. It is further alleged that in the meanwhile another advertisement issued in the daily Telegraph by the petitioners for launching zee Livewire Project. It is further stated that the complainant and the petitioners signed a memorandum of understanding for the second project i.e. Zee Livewire on 01.09.2000. Thereafter as demanded, complainant paid Rs. 4, 00,000/-to the petitioners for Zee Livewire Project vide Demand Draft No. 010853. It is further stated that the petitioners refunded Rs. 65,000/-to the complainant as an excess amount paid to him towards franchisee fee of Zee Livewire Project and retained a

total sum of Rs. 3,55,000/-. It is further alleged that as required by the petitioners, complainant had build up the entire infrastructure for launching of the project Zee Livewire but in spite of the same, the petitioners had delayed the installation of Zee Livewire project in the complainant''s company. It is stated that even on several reminder, the petitioners did not launch aforesaid Zee Livewire project and ultimately in the end of January 2002, terminated the current I-Cell service. It is alleged that due to failure of the petitioners in launching Zee Livewire/I-Cell Project, complainant sustained huge loss, therefore asked the petitioners to return the franchisee fee. It is further stated that out of Rs. 3,55,000/-, the accused-petitioners returned Rs. 1,92,600/-in three consecutive dates, but still Rs. 1,62,400/-is due with the petitioner which has not been refunded to the complainant. It is further alleged that due to the non fulfillment of promise by the petitioners, the complainant sustained huge loss. Accordingly, it is alleged that the accused- petitioners committed an offence u/s 406 and 420 of the IPC.

3. It is submitted by learned Counsel for the petitioners that from the allegations made in the FIR; a civil dispute is made out for non performance of contractual obligation by the petitioners. It is further submitted that in order to avoid civil litigation and huge court''s fee, the complainant has adopted a circuitous method by filing a complaint petition and with a view to blackmail the petitioners. It is further submitted that from the perusal of complaint petition, it is clear that there is no allegation against any of the petitioners that they have criminally misappropriated any money of the complainant (O.P. No. 2). On the contrary, there are materials to show that the petitioners returned the parts of franchisee money to the complainant (O.P. No. 2) and they are still ready to return the rest of the amount, but the complainant is refusing to take back the said amount in the guise of the present FIR for extorting more money. It is further submitted that there is no allegation in the entire complaint petition that the petitioners had induced the complainant and thereby fraudulently taken delivery of property which are the essential ingredients of the offence of cheating. Hence offence u/s 420 of the IPC is also not made out.

4. On the other hand, learned Counsel for the Opposite Party submits that still the petitioners were not refunding Rs. 1,62,400/-to the complainant which they have misappropriated for their own use. Therefore an offence u/s 406 of the IPC is made out. It is further submitted that the petitioners had given the attractive and impressive advertisement in the Newspaper for launching Zee Livewire Project and thereby induced the complainant for paying Rs. 4, 00,000/as franchisee fee. The said promise has not been fulfilled by the accused petitioners; therefore the offence of cheating is made out against accused-petitioners.

5. Having heard the submission, I have gone through the record of the case. From the perusal of FIR, it is apparent that there was an agreement between the parties for launching Zee Livewire Project at Jamshedpur. It further appears that

for the said purpose, complainant had initially paid Rs. 4, 00,000/-to the petitioners. It is stated in the complaint petition that the petitioners'' company returned Rs. 65,000/-to the complainant as an excess amount paid to it and retained only an amount of Rs. 3,55,000/-with it for launching the new project, namely, Zee Livewire. It further appears that due to some reason, the said Zee Livewire project has not been launched. In the complaint petition itself, it is mentioned that the complainant had sent a letter on 17.9.2002 to the petitioner No. 3 stating the details of franchisee fee paid by the complainant. It is further stated in the complaint petition that the petitioners had returned altogether Rs. 1, 92,600/-out of Rs. 3, 55,000/paid to the petitioners as franchisee fee and still the amount of Rs. 1, 62,400/-is due with the accused -petitioners.

6. Thus, from the plain reading of entire complaint petition, it appears that there is dispute between the party regarding the non fulfillment of contractual obligation as mentioned in the agreement which, in my view, involves a dispute of civil nature. From the complaint petition, it does not transpire that at the time of signing agreement, the petitioners have no intention to implement the Zee Livewire project, rather the correspondences between the parties, the details of which given in the complaint petition, shows that till the termination of the project both the parties are taking active interest for launching the Zee Livewire Project. It is admitted by complainant at paragraph 22 that on 21.2.2002 the petitioners had sent to the complainant an operational manual related to Zee Livewire project. Thus, the aforesaid statement of the complainant shows that at the time of agreement between the parties, the petitioners have no fraudulent or dishonest intention to deceive the complainant (O.P. No. 2).

7. It has been held by their Lordships of Supreme Court in V.Y. Jose v. State of Gujrat reported in 2009(2)JLJR 1 (SC) that ;-" 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 the failure on the part of the accused to keep his promise, in absence of a culpable intention at the time of making initial promise being absent, no offence u/s 420 of the IPC can be said to have been made. "

In my view, the aforesaid decision of their Lordship of Supreme Court covers the case in hand. In the instant case, as noticed above, the accused-petitioners had no fraudulent or dishonest intention at the time of agreement. Hence, in my view, the offence u/s 420 of the IPC is not made out.

8. So far the offence u/s 406 of the IPC is concerned, the complainant himself admitted at paragraph 34 that after termination of Zee Livewire Project the petitioners had refunded Rs. 1, 92,600/-to the complainant and Rs. 1,62,400/-is still due. It further appears from annexure-4 to the supplementary affidavit that on 19th January,2005 the accused-petitioners had refunded Rs. 25,000/-to the complainant vide Cheque No. 023592 dated 31.1.2005 and had acknowledged that still an amount of Rs. 1,25,358/-is payable to the complainant by the I-Cell.

9. Under the said circumstance, it can not be said that the accused-petitioners had misappropriated the franchisee amount paid by the complainant to the petitioners. In the present Cr. Misc. Application, at paragraph No. 19, it is stated by the petitioners that they are ready to pay Rs. 1, 37,400/-to the complainant, but the complainant is refusing to receive the same.

10. For constituting an offence of criminal breach of trust it is mandatory for the prosecution to show that the accused person to whom the property was entrusted had dishonestly misappropriated or converted the said property to his own use. Dishonest intention is the gist of the offence. Any breach of trust is not an offence. The offence of criminal breach of trust is completed only when the misappropriation or the conversion of the property, dishonestly, took place.

11. In the instant case, as noticed above, the complainant himself admitted that out of Rs. 3,55,000/-paid to the petitioners, till the date of the filing of the complaint petition, he received Rs. 1,92,600/-. It further appears from annexure-4 that in the year 2005 another Rs. 25,000/-has been paid to the complainant. In the present petition, the petitioners stated that they are ready to return the remaining of Rs. 1, 37,400/-but the complainant himself is refusing to take back the said amount. Under the said circumstance, I find that the accused-petitioners have no dishonest intention to misappropriate the remaining franchisee fee deposited by the complaint. In that view of the matter, in my considered opinion, offence u/s 406 of the IPC is not made out.

12. In the aforesaid V.Y Jose Case (Supra) their Lordships of Supreme Court has further held that "Section 482 of the Code of Criminal Procedure saves the inherent power of the court. It serves the salutary purpose vig. a person should not undergo harassment of litigation for a number of years although no case has been made out against him. It is one thing to say that a case has been made for trial and as such criminal proceeding should not be quashed but it is another thing to say that a person should undergo a criminal trial despite the fact that no case has been made out at all.

13. As discussed above, in my view, no offence u/s 406 and 420 of the IPC is made out from the allegation made in the complaint petition. In my view, dispute between the parties appears to be civil in nature for non fulfillment of promise made in the agreement which resulted into huge loss to the complainant. For resolution of the said dispute the venue is not the criminal court.

14. Accordingly, this application is allowed. The entire criminal proceeding arising out of Adityapur P.S. Case No. 252 of 2004 dated 8.11.2004 corresponding to G.R. No. 815 of 2004 u/s 406 and 420 of the IPC pending in the court of CJM, Seraikella is hereby quashed.