

GAHC040000332021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Case No. : Crl.Petn./2/2021

Shri Kanailal Mukherjee
S/o Lt. Nani Gopal Mukherjee
Resident of Nabagram, P.O.-Panchpota,
Kolkata-152,
P.S.-Sonapur, West Bengal.

...Petitioner

-VERSUS-

1. Shri Toko Teji,
S/o Lt. Jotam Toko Takam,
Permanent Address-Yazali,
P.O. & P.S.-Yazali,
Dist.-Lower Subansiri, A.P.

Presently residing at P-Sector, Itanagar,
P.O./P.S.-Itanagar,
Papumpare Dist., A.P.

2. State of Arunachal Pradesh.

....RESPONDENTS

Advocates for the Appellant : Mr. K. Bhattacharjee, Ld.Adv.

Assisted by Mr. R. B. Yadav.

Advocates for the respondents : Mr. T. Torum, Ld.Adv. R-1

Mr. J. Tsering, Ld.P.P. R-2

:::BEFORE:::

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 31.07.2023

Date of Judgment & Order : 11.08.2023

JUDGMENT & ORDER (CAV)

Heard Mr. K. Bhattacharjee, the learned counsel assisted by Mr. R. B. Yadav, the learned counsel for the petitioner. Also heard Mr. T. Torum, learned counsel representing the respondent No.1 and Mr. J. Tsering, learned Public Prosecutor for the respondent No.2.

2. This is an application filed under Section 482 of Code of Criminal Procedure, 1974 praying for quashing the criminal proceeding in Complaint Case No.131/2018, which is pending before the Court of learned Judicial Magistrate 1st Class (In short 'JMFC'), Yupia.

3. The brief fact of the case is that the complainant/respondent No.1, Shri Jotam Toko Takam in the Complaint Case No.131/2018,

registered under Section 120(B)/420/34 of IPC, *inter alia* had stated that during the year 2008' the accused persons (one is present petitioner) were executing project work at JNKV (Jawaharlal Navodaya Kendra Vidyalaya) compound and approached before the complainant for financial help in order to complete the ongoing construction work and he lend a sum of Rs.75,00,000/-(Rupees Seventy five lakhs) only by executing Deed of Settlement dated 02.04.2008 registered before the Court of the learned JMFC on 30.05.2008. The accused persons promised to return the loan amount after completion of the project work, however, even after getting the bill amount, they started avoiding the complainant and did not repay the loan amount. Thereafter, the complainant served a legal notice upon both the accused persons through Advocate for recovery of the loan amount, but even after service of notices, the accused persons avoided the complainant, by frequently changing their telephone numbers, which shows the intention of the accused persons was to deceive the complainant. Accordingly, the complainant lodged a complaint, which was registered before the Court of learned JMFC, Yupia and also the complaint was examined under Section 200 Cr.P.C. and took cognizance against the accused namely Shri. Madhab Shaha and Shri. Kanilal Mukherjee/present petitioner, under Sections

120(B)/420/34 of IPC and issued summons for their appearance.

4. It is submitted by the learned counsel for the petitioner, Mr. K. Bhattacharjee that the allegation made in the complaint petition if taken at their face value, do not constitute any criminal offence to take cognizance against the present petitioner. More so, the FIR and evidence collected in support of the same do not disclose the commission of any criminal offence and thus, it is a purely civil case for which the complainant had already issued pleaders notice. Despite of having various legal remedy providing efficacious redress for the grievance of the aggrieved party, the complainant filed this criminal proceeding with mala fide intention with ulterior motive to pressurize the accused persons to pay the money as demanded.

5. He also submitted that it is a case of breach of contract simpliciter, not attracting any criminal liability and there was no *prima facie* case for offences under Section 120(B)/420/34 of IPC. More so, the complaint does not make any averment so as to infer any fraudulent or dishonest inducement made by the petitioners pursuant to which the respondent lend money. No case for prosecution under Section 120(B)/420/34 of IPC was made out even *prima facie* under those Sections. He further submitted that to hold a person guilty of the offence of cheating, it has to be

shown that his intention was dishonest at the time of making the contract. A false promise and such a dishonest intention cannot be inferred from a mere fact that he subsequently could not fulfil the promise.

6. It is stated that during the pendency of this case the respondent No.1/complainant died and his legal heir has already been impleaded in place of him.

7. Mr. Bhattacharjee, the learned counsel for the petitioner has submitted that the question of criminal proceeding does not arise at all, if there is no any criminal offence, mere dispute of taking loan and non-refund cannot be construed as an offence under Section 420 of IPC or 120 (B) of IPC. He also raised the point of jurisdiction stating that the Power of Attorney has been executed within the State of West Bengal and thus, the learned JMFC has no jurisdiction to try the case of the present petitioner. Accordingly, it is also submitted that the learned JMFC without compiling the provision under Section 202 of Cr.P.C and without considering the facts of the case took cognizance against the accused persons without any material to *prima-facie* establish the case under Section 120(B)/420/34 IPC. In this regard, the learned counsel for the petitioner prays for quashing the complaint Case No.131/2018 by invoking Section 482 of Cr.P.C.

8. In addition to his submission, he relies on the decision rendered by the Hon'ble Apex Court in the case of **Mitesh Kumar J. Sha Vs. State of Karnataka & Others, reported in 2021 (0) SCC 628**, wherein, he stressed mainly in paragraph-41 of the said judgment, which read as under;

“41. Having considered the relevant arguments of the parties and decisions of this court we are of the considered view that existence of dishonest or fraudulent intention has not been made out against the Appellants. Though the instant dispute certainly involves determination of issues which are of civil nature, pursuant to which Respondent No. 2 has even instituted multiple civil suits, one can by no means stretch the dispute to an extent, so as to impart it a criminal colour. As has been rightly emphasised upon by this court, by way of an observation rendered in the case of M/s Indian Oil Corporation Vs. M/s. NEPC India Ltd & Ors.7, as under: -

“14. 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.”

9. In view of above judgement, it is stated that the present case is civil in nature and only to harass the present petitioner, the criminal colour has been given, whereas, regarding the point of jurisdiction, the learned counsel for the petitioner relies on another decision of this Court passed in the case of **Dr. Subramanian Swamy Vs. the State of Assam reported in 2021 (0)**

Supreme (Gau) 588, wherein, para 12 of the said judgment read as under:

“12. The words "and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" have been inserted in Section 202 of the Code by Section 19 of the Code of Criminal Procedure [Amendment] Act, 2005 [Central Act 25 of 2005] w.e.f. 23.06.2006. The note for the amendment reads as under :-

“False complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section [1] of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused.”

10. The learned counsel for the petitioner also submitted that only on the ground of refusal to return the money after the completion of the construction work cannot be a sole criterion to fulfil component of Section 420 IPC. He also submitted that an offence of cheating would be constituted only when the accused had fraudulent or dishonest intention at the time of making promise. However, here in this case the present petitioner has not committed any such criminal offence, and therefore, it is a fit case

where the exercise of the jurisdiction under Section 482 Cr.P.C can be invoked.

11. In support of his argument, he further relies on the decisions rendered by the *Hon'ble Apex Court in the case of Supreme Court of India S.B. Sinha and Cyriac Joseph V.Y. Jose vs. State of Gujarat reported in 2008 (0) Supreme (SC) 1851* as well as relied on another decision of this Court in the case of *Jimmy Duyu & Anr. Vs. Techii Katum & Anr. reported in 2018 (1) GLT 723* and another decision of this Court passed in the case of *Pran Jyoti Buyan vs. State of Assam & Anr. passed in Crl.Petn.No.268/2012*, wherein, it has been held that the dispute purely civil in nature arising out of breach of contract, and subsequent refusal of making payment does not satisfy the ingredients of cheating inasmuch as dishonest intention at the time of initial transaction is lacking. An offence of cheating would be constituted when the accused had fraudulent or dishonest intention at the time of making promise. In this regard, the respondent can seek appropriate remedy from the civil forum and hence, the complaint filed by the respondent is liable to be set aside and quashed.

12. In this context, Mr. T. Torum, the learned counsel for the private respondent has submitted that the respondent

No.1/complainant has taken Rs.75,00,000/-(Rupees Seventy five lakhs) only from the Arunachal Pradesh Cooperative Bank, Nirjuli Branch at the request made by the present petitioner on a good faith to carry out their pending contract work at Yachuli with a condition to repay the loan amount by the petitioner to the Bank directly or through private respondent. However, no such repayment has been made till date and also the petitioner has not disclosed his residential address and had obtained interim order dated 21.08.2019 from this Court by misleading the material facts.

13. He also submitted that the money which was given to the petitioner was public money and public interest is also involved in the said construction work. Despite of serving legal notice upon both the accused persons, they were frequently changing their residential address as well as the contact number. Further, the complaint was filed against the accused persons out of which one accused is already contesting the case. As the complaint case No.131/2018 was initiated by the learned JMFC and had issued summon to the accused persons but without appearing before the said Court, he filed the present petition which is bad in law, as such this is not at all a fit case where the criminal proceeding can be quashed by exercising the power under Section 482 Cr.P.C.

14. The contract initially may be is of civil in nature, but if there is an element of cheating and fraud it is always open for a party in a contract, to prosecute the other side for the offences alleged. In support of his submission, he relies on the decision passed by the Hon'ble Apex Court in the case of ***Dr. Lakshman vs. the State of Karnataka & others reported in Criminal Appeal Nos.1573-1575 of 2019***, wherein he stressed mainly on para-9 of the said judgment, which read as under: -_

“9. It is not seriously disputed by the parties with regard to the entering of the agreements for procuring the land in favour of the appellant in Ballur Village, Anekal Taluk, Bangalore Urban District and respondents have received the amount of Rs.9 crores by way of demand drafts and cheques. It is the specific case of the appellant that there are schedules mentioned to the agreements as per which respondents have agreed to procure the land covered by Survey Nos.115 and 117 of Ballur Village apart from other lands. In a petition under Section 482, Cr.P.C. it is fairly well settled that it is not permissible for the High Court to record any findings, wherever there are factual disputes. Merely on the ground that there is no pagination in the Schedule, the High Court has disbelieved such Schedule to the Agreements. It is the specific case of the appellant that the lands covered by Survey Nos.115 and 117 CrI.A.@ SLP(CrI.)Nos.6115-6117/2017 of Ballur Village were sold even prior to the first agreement, as such respondents have committed an act of cheating. It is also the specific case of the appellant that two cheques were issued by respondents-accused by way of security for the amount of Rs.9 crores which is advance but the account of such cheques was closed even prior to entering into the Agreement itself. The second complaint

filed by the appellant is self-explanatory and he is forcefully made to sign the sale deed which were executed subsequently for the lands covered by Survey Nos.115 and 117 of Ballur Village. Mere filing of the suits for recovery of the money and complaint filed under Section 138 of the N.I. Act by itself is no ground to quash the proceedings in the complaints filed by the appellant herein. When cheating and criminal conspiracy are alleged against the accused, for advancing a huge sum of Rs.9 crores, it is a matter which is to be tried, but at the same time the High Court has entered into the disputed area, at the stage of considering the petitions filed under Section 482, Cr.P.C. It is fairly well settled that power under Section 482 Cr.P.C. is to be exercised sparingly when the case is not made out for the CrI.A.@ SLP(CrI.)Nos.6115-6117/2017 offences alleged on the reading of the complaint itself or in cases where such complaint is filed by way of abuse of the process. Whether any Schedules were appended to the agreement or not, a finding is required to be recorded after full fledged trial. Further, as the contract is for the purpose of procuring the land, as such the same is of civil nature, as held by the High Court, is also no ground for quashing. Though the contract is of civil nature, if there is an element of cheating and fraud it is always open for a party in a contract, to prosecute the other side for the offences alleged. Equally, mere filing of a suit or complaint filed under Section 138 of the N.I. Act, 1881 by itself is no ground to quash the proceedings. While considering the petition under Section 482 of Cr.P.C., we are of the view that the High Court also committed an error that there is a novation of the contract in view of the subsequent agreement entered into on 08.11.2012. Whether there is novation of contract or not and the effect of such entering into the contract is a matter which is required to be considered only after trial but not at the stage of considering the application under Section 482, Cr.P.C. CrI.A.@ SLP(CrI.)Nos.6115-6117/2017.”

- 15.** Mr. J. Tsering, learned Public Prosecutor, has submitted that the Court of learned JMFC, Yupia has the jurisdiction for trial any

kind of case as per law. Though, it is an admitted fact that the accused petitioner is a resident of West Bengal and further, Section 202 Cr.P.C. has not complied with, but, only due to noncompliance of Section 202 Cr.P.C cannot vitiate the trial after passing the cognizance order. Further, he submitted that dishonest or fraudulent inducement etc. can be decided only at the stage of evidence and while dealing with the petition under Section 420 Cr.P.C. Accordingly, he submitted that from the statement in the complaint as well as in the statement made by the complainant u/s 200 Cr.P.C, it is seen that there is prima-facie case against the accused petitioner under Section 120(B)/420/34 IPC. Hence it is not at all a fit case, where the criminal proceeding can be quashed by exercising the power under Section 482 CrPC.

16. Hearing the submissions made by the learned Advocates of both sides, and I have perused the impugned order passed by the learned JMFC, Yupia. It is seen that the Trial Court had passed the cognizance order against the present petitioner under Sections 120(B)/420/34 IPC after recording the statement of the complainant under Section 200 Cr.P.C. and after his satisfaction. It is a fact that the present petitioner is a permanent residence of West Bengal, but, only for non-compliance of Section 202 Cr.P.C., the trial cannot be vitiated and the cognizance can be taken if

Court is satisfied recording the statement of the complainant and materials available before the Court. In the same time, it is also a fact that the respondent can take resort of civil forum for the recovery of the said money. But, it cannot be denied that *prima facie* there are materials to attract Section 420 of the IPC and hence, it is open for the parties to prosecute the other side for the alleged offence.

17. Considering the materials in the complaint petition as well as the statement made by the complainant under Section 200 Cr.P.C, it is further seen that though the complainant had served the legal notice, but it could not be served properly as after completion of the construction work the petitioner was frequently changing his residential address as well as his contact number, only to avoid the complainant/respondent No.1. Further, the allegation that the accused petitioner with an intention to deceive the present respondent No.1 from the very inception of his promise etc. are the matters to be decided or to be looked into at the time of trial. While exercising the power under Section 482 Cr.P.C., the Court is not required to conduct the mini trial. Further the learned Court below has took cognizance after going through materials on record and accordingly, finding *prima facie* case, the cognizance was taken under the said Sections of law. Further, the charges are

required to be proved only during trial on the basis of evidence led by the parties. In this regard, a decision of ***Hon'ble Apex Court in the case of Central Bureau of Investigation Vs. Aryan Singh etc, reported in (2003) SCC online 379***, can be relied on wherein, the para 9, 10, 11 & 12 of the said judgment, read as under:

“9. Having gone through the impugned common judgment and order passed by the High Court quashing the criminal proceedings and discharging the accused, we are of the opinion that the High Court has exceeded in its jurisdiction in quashing the entire criminal proceedings in exercise of the limited powers under Section 482 Cr.P.C. and/or in exercise of the powers under Article 226 of the Constitution of India.

10. From the impugned common judgment and order passed by the High Court, it appears that the High Court has dealt with the proceedings before it, as if, the High Court was conducting a mini trial and/or the High Court was considering the applications against the judgment and order passed by the learned Trial Court on conclusion of trial. As per the cardinal principle of law, at the stage of discharge and/or quashing of the criminal proceedings, while exercising the powers under Section 482 Cr.P.C., the Court is not required to conduct the mini trial. The High Court in the common impugned judgment and order has observed that the charges against the accused are not proved. This is not the stage where the prosecution / investigating agency is/are required to prove the charges. The charges are required to be proved during the trial on the basis of the evidence led by the prosecution / investigating agency. Therefore, the High Court has materially erred in going in detail in the allegations and the material collected during the course of the investigation against the accused, at this stage. At the stage of discharge and/or while exercising the powers under Section 482 Cr.P.C., the Court has a very limited jurisdiction and is required to consider "whether any sufficient material

is available to proceed further against the accused for which the accused is required to be tried or not”.

11. One another reason pointed by the High Court is that the initiation of the criminal proceedings / proceedings is malicious. At this stage, it is required to be noted that the investigation was handed over to the CBI pursuant to the directions issued by the High Court. That thereafter, on conclusion of the investigation, the accused persons have been chargesheeted. Therefore, the High Court has erred in observing at this stage that the initiation of the criminal proceedings / proceedings is malicious. Whether the criminal proceedings was/were malicious or not, is not required to be considered at this stage. The same is required to be considered at the conclusion of the trial. In any case, at this stage, what is required to be considered is a prima facie case and the material collected during the course of the investigation, which warranted the accused to be tried.

12. In view of the above and for the reasons stated above, when the High Court has exceeded in its jurisdiction in quashing the entire criminal proceedings and applying the law laid down by this Court in catena of decisions on exercise of the powers at the stage of discharge and/or quashing the criminal proceedings, the impugned common judgment and order passed by the High Court quashing the criminal proceedings against the accused is unsustainable and the same deserves to be quashed and set aside.

18. Thus, to frame charges, only *prima facie* case has to be established and in the present case, it is seen that there are *prima facie* materials to take cognizance against the present petitioner and accordingly, I find that the learned Trial Court has not committed any error while taking cognizance against the present petitioner under the said sections of law. It is also not supposed to conduct any mini trial, as observed by the Hon’ble Apex Court,

while dealing with the petition under Section 482 of Cr.P.C. and to frame the charge or took cognizance the requirement is to have a *prima facie* case.

19. The Hon'ble Supreme Court in the case of **State of Haryana & Ors. Vs. Bhajan Lal & Ors.**, reported in **1992 Supp (1) SCC 335**, has held as under:

“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 channelized 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.”*

20. In view of the entire discussions made above, *prima facie* material and in view of the guideline of Hon'ble Supreme Court, I find that the learned trial Court has not committed any error by passing the cognizance order against the present petitioner in complaint case No.131/2018, registered under Section 120(B)/420/34 IPC and in my opinion this is not a fit case, where Section 482 of Cr.P.C. can be invoked. Thus, this criminal petition stands dismissed.

21. In terms of above, this criminal petition stands disposed of.
No order as to costs.

JUDGE

Comparing Assistant