



THE GAUHATI HIGH COURT AT GUWAHATI

(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Petition No. 1290/2023

Shri Shiv Kumar Agarwal,
S/o Late Kishan Lal Agarwal,
Village – Nuniamati, A.M. Co Road,
P.S. – Dhubri,
Dist – Dhubri, Assam.

..... Petitioner.

-Versus-

- 1.** The State of Assam,
Represented by the Public Prosecutor of Assam.
- 2.** Rofiqu Ekbal Hassan,
S/o Abdul Kashem,
Village – Jhowdanga,
P.S. – Mankachar,
District – South Salmara Mankachar, Assam.

..... Respondents.

Advocates for the petitioner : Mr. R.K. Jain.
Advocate for the Respondent No. 1 : Mr. B. Sharma, Addl. P.P.
Respondent No. 2 : Mr. A.T. Sarkar.

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN

Date of Hearing : 29.02.2024
Date of Judgment : 19.04.2024

JUDGEMENT AND ORDER

Heard Mr. R.K. Jain, learned counsel for the petitioner; Mr. B. Sharma, learned Additional Public Prosecutor for the State respondent No. 1; and Mr. A.T. Sarkar, learned counsel for the respondent No. 2.

2. In this petition, under Section 482 of the Cr.P.C., the petitioner, namely, Shri Shiv Kumar Agarwal has put to challenge the correctness or otherwise of the order, dated 22.02.2023, passed by the learned Addl. Chief Judicial Magistrate, South Salmara Mankachar in C.R. Case No. 06/2023. It is to be noted here that vide impugned order dated 22.02.2023, the learned Addl. Chief Judicial Magistrate, South Salmara Mankachar, took cognizance of the offences under Sections 448/420/406/506 of the IPC, against the present petitioner and issued process to him to appear before the court and to stand trial.

3. The background facts leading to filing of the present petition are adumbrated as under:-

“The petitioner is a businessman by profession of Dhubri. He is the proprietor of M/S Annapurna Trading. The said firm had supplied goods of worth Rs. 5,58,521/-, vide Invoice No. 379, on 07.08.2021, to the firm of the respondent No. 2, in the name and style, M/S Suman Enterprise. The respondent No. 2 had issued one cheque, being cheque No. 555752, dated 24.09.2021, for a sum of Rs. 3,00,000/- of State Bank of India, Mankachar, Chowk Bazar Branch. The petitioner then presented the said cheque in his bank for encashment. But, the said cheque returned dishonoured on 28.09.2021, with the endorsement that “Fund Insufficient”. Then after issuing statutory Notice, the petitioner had lodged one Complaint Case, being Complaint Case No. 462/2021, under Section 138 of the N.I. Act. Thereafter, the respondent No. 2 had filed a Criminal Petition, being Criminal Petition No. 526/2022, under Section 482 of the Cr.P.C. for quashing and setting aside the said complaint. But, this court, vide order dated 20.10.2022 was pleased to dismiss the same.

Thereafter, as a counterblast, the respondent No. 2 had filed one complaint against the present petitioner, under Sections 148/448/420/406/506 of the IPC, before the court of learned Chief Judicial Magistrate, South Salmara Mankachar, alleging inter-alia amongst others that the petitioner in the month of March 2021, took a sum of Rs. 1,00,000/- as advance money for supply of goods, but the

petitioner did not supply the goods to him despite several request and thereafter on 11.12.2022, the petitioner along with three other persons came to his shop and asked him for some money to provide goods and when he refused to pay money, as he could not supply goods nor he refunded the money, on earlier occasion then the petitioner had threatened him and also told him that he will misappropriate the money advanced to him. Then the learned Chief Judicial Magistrate, South Salmara Mankachar registered a case, being C.R. Case No. 06/2023, and made over the same to the court of learned Additional Chief Judicial Magistrate, South Salmara Mankachar for disposal. Upon the said complaint, the learned Additional Chief Judicial Magistrate, South Salmara Mankachar on the basis of the statement of the complainant and two other witnesses, recorded under Section 200 of the Cr.P.C., took the cognizance of the offences under Sections 448/420/406/506 of the IPC, against the present petitioner and issued process to him to appear before the Court and to stand trial."

4. Being highly aggrieved by the order of taking cognizance, dated 22.02.2023, the petitioners approached this court questioning the correctness or otherwise of the said order, on the following grounds:-

- (i) That, the learned Court below had committed manifest illegality by issuing process against the present petitioner without there being any *prima-facie* case made out against him;

- (ii) That, as a counterblast, of the case lodged by the petitioner being C.R. case No. 462/2021, under Section 138 of the N.I. Act the respondent No. 2 had filed the present complaint, being C.R. Case No. 06/2023, against the present petitioner.
- (iii) That, the allegations levelled in the complaint is total false, fabricated and concocted and baseless and the petitioner did not received any sum from the respondent No. 2 for supplying goods.
- (iv) That, the respondent No. 2 had lodged the complaint only to wreck vengeance on the petitioner for instituting the Complaint Case No. 462/2021.
- (v) That, the Complaint Case No. 06/2023 was instituted with *mala-fide* intention and with ulterior motive only to harass the petitioner for no fault of him.
- (vi) That, taking cognizance of the offence and issuing process to the petitioner is an abuse of the process of the court as well as law and on such count the entire proceeding is liable to be quashed.
- (vii) That, the learned court below did not apply his mind while taking cognizance of the offences and issuing process to the petitioner without ascertaining the genuineness of the allegations made in the complaint;
- (viii) That, institution of the case itself is without jurisdiction and contrary to the provision of law;

5. Mr. R.K. Jain, learned counsel for the petitioner, has reiterated the points mentioned above during argument. But, Mr. Jain, has mainly stressed upon two points. Firstly, Mr. Jain submits that Complaint Case No. 06/2023, lodged by the respondent No. 2 is the counterblast against Complaint Case No. 462/2021, lodged by the petitioner, and the same has been lodged with *mala-fide* intention and ulterior motive. The second point, so canvassed by Mr. Jain is that the learned court below without application of mind had taken cognizance of the offence and issued process to the petitioner without ascertaining the veracity of the allegation by a cryptic order. Referring to a decision of Hon'ble Supreme Court in **Kunti and Another vs. State of Uttar Pradesh & Another**, reported in **(2023) 6 SCC 109**, Mr. Jain submits that mere breach of contract does not gives rise to criminal prosecution, unless there is fraudulent and dishonest intention shown right from the beginning of the transaction. Therefore, Mr. Jain has contended to allow the petition and quash the Complaint Case No. 06/2023.

6. Whereas, Mr. B. Sharma, the learned Addl. P.P. has supported the impugned order. Mr. Sharma submits that the learned court below has taken cognizance of the offence after taking into account the materials placed before him and issued process to the petitioner and veracity of the allegations can be ascertained only after the trial, not at this stage. Therefore, Mr. Sharma has contended to dismiss the petition.

7. On the other hand, Mr. A.T. Sarkar, the learned counsel for the respondent No. 2 also subscribed the submissions advanced by

the learned Addl. P.P. and also submits that the petition may be dismissed.

8. Having heard the submission of learned counsel for both the parties I have carefully gone through the petition and the documents placed on record and the scanned copy of the record and also gone through the case laws, referred by Mr. R.K. Jain, learned counsel for the petitioner.

9. A bare perusal of the complaint petition in C.R. Case No. 6/2023 indicates the following:-

The respondent No. 2 is a businessman by profession and he resides at Jhowdanga Bazar, under Mankachar P.S. in the district of South Salmara Mankachar. Whereas, the petitioner is also a businessman by profession and he is the proprietor of M/S Annapurna Trading, situated at Dhubri. The petitioner, in the month of March 2021, took a sum of Rs. 1,00,000/-, as advance money for supplying goods to the respondent No. 2. But, the petitioner did not supply the goods to him despite several requests. Thereafter, on 11.12.2022, the petitioner, along with three other persons came to the shop of the respondent No. 2 and asked him to provide some money to supply goods. The respondent No. 2 then refused to pay any money as the petitioner neither supplied goods nor did he refund the earlier sum of Rs. 1,00,000/-. Then the petitioner had threatened the respondent No. 2 by stating that he will misappropriate the money advanced to him and has to face dire consequences

in his business. Thereafter, the respondent No. 2 had lodged one FIR with the O.C. of Mankachar P.S., but the O.C. had suggested him to lodge one complaint case.

10. It also appears that upon the said complaint the learned Chief Judicial Magistrate, South Salmara Mankachar had registered a case, being C.R. Case No. 06/2023, and made over the same to the court of learned Addl. Chief Judicial Magistrate, South Salmara Mankachar for disposal. Then, the learned Addl. Chief Judicial Magistrate, South Salmara Mankachar had examined the respondent No. 2 and two other witnesses under Section 200 of the Cr.P.C. and on the basis of the statement of the complainant and two witnesses, recorded under Section 200 of the Cr.P.C., took the cognizance of the offences under Sections 448/420/406/506 of the IPC, against the present petitioner and issued process to the petitioner to appear before the Court and to stand trial.

11. What is apparent from a bare perusal of the complaint petition that the petitioner herein this case is residing at Dhubri, which is beyond the area, in which the learned Addl. C.J.M. has exercised his jurisdiction. And as such, the learned Addl. C.J.M. ought to have postpone issue of process to the petitioner and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding or not in view of provision of Section 202 of the Cr.P.C., which is read as under:-

202. Postponement of issue of process.

*(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192 may, if he thinks fit, **[and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction]** **[Inserted by Act 25 of 2005, Section 19 (w.e.f. 23-6-2006).]** postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of **deciding** whether or not there is sufficient ground for proceeding :*

Provided that no such direction for investigation shall be made,

-

(a)where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b)where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.

(2)In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath :

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Court on an officer-in-charge of a police station except the power to arrest without warrant.

12. This exercise appears to be mandatory as the word 'shall' is used in the section. But, the learned court below had not undertaken such an exercise despite being mandatory. The learned court below had simply examined the complainant and two other witnesses, and thereafter, taken cognizance of the offences under Sections 448/420/406/506 of the IPC and issued process to the petitioner. Thus, it had failed to comply with the mandatory provision of law. As the order impugned order was passed in contravention of the mandatory provision of law, by no stretch of imagination it can be said that the impugned order withstand the legal scrutiny.

13. In this context it is worth mentioning that Hon'ble Supreme Court in **Udai Shankar Awasthi vs. State of U.P.**, reported in **(2013) 2 SCC 435**, while dealing with the issue, has clearly held that the provision Section 202 of the Cr.P.C. is mandatory. It is apt to reproduce the following passage from the said judgment:-

"40. The Magistrate had issued summons without meeting the mandatory requirement of Section 202 of the Cr.P.C., though the appellants were outside his territorial jurisdiction. The provisions of Section 202 of the Cr.P.C. were amended vide the Amendment Act, 2005, making it [Ed.: The matter between the two asterisks has been emphasised in original as well.] mandatory to postpone

the issue of process [Ed.: The matter between the two asterisks has been emphasised in original as well.] where the accused resides in an area beyond the territorial jurisdiction of the Magistrate concerned. The same was found necessary in order to protect innocent persons from being harassed by unscrupulous persons and making it obligatory upon the Magistrate to enquire into the case himself, or to direct investigation to be made by a police officer, or by such other person as he thinks fit for the purpose of finding out whether or not, there was sufficient ground for proceeding against the accused before issuing summons in such cases."

14. Again, in the case of **Vijay Dhanuka vs. Najzma Mamta**, reported in **(2014) 14 SCC 638**, Hon'ble Supreme Court has held as under:-

"11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process "in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.

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" were inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23-6-2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far off places in order to harass them. The note for the amendment reads as follows:

"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 a 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."

15. Besides, from a bare perusal of the complaint, Annexure - A, and the averments made therein and the statement of the witnesses, examined under Section 200 of the Cr.P.C., this court is unable to agree with the learned court below that factual foundation of the offences, under Sections 420/406 of the IPC, are being laid in the complaint. The averments made against the present petitioner in the complaint, even if taken at their face value and accepted as true in its entirety, the same fails to disclose even a prima facie case against the present petitioner under Sections 420/406 of the IPC, as alleged in the Annexure - A. It is well settled by Hon'ble Supreme Court in a catena of decisions that a breach of contract does not give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction. Merely on the allegation of failure to keep up promise will not be enough to initiate criminal proceedings. Reference in this context can be made to the decisions of Hon'ble Supreme Court in the case of **Sarabjit Kaur vs. State of Punjab**, reported in **(2023) 5 SCC 360** and also in the case of **Kunti** (Supra). In **ARCI vs. Nimra Cerglass Technics (P) Ltd.**, reported in **(2016) 1 SCC 348**, Hon'ble Supreme Court, while

deliberating upon the difference between mere breach of contract and the offence of cheating, observed that the distinction depends upon the intention of the accused at the time of the alleged incident. If dishonest intention on the part of the accused can be established at the time of entering into the transaction with the complainant, then criminal liability would be attached.

16. In the case of **Vijay Kumar Ghai v. State of W.B.**, reported in **(2022) 7 SCC 124** : it has been observed as under:-

"24. This Court in G. Sagar Suri v. State of U.P. [G. Sagar Suri v. State of U.P., (2000) 2 SCC 636 : 2000 SCC (Cri) 513] observed that it is the duty and obligation of the criminal court to exercise a great deal of caution in issuing the process, particularly when matters are essentially of civil nature."

17. In the case in hand, the allegation between the petitioner and the respondent is essentially of civil nature as well as breach of promise and contract. This aspect has eschewed consideration of the learned court below at the time of taking cognizance. Besides, no proof of giving the petitioner a sum of Rs. 1,00,000/- was enclosed with the complaint to substantiate the averments made in the complaint.

18. Further, a careful perusal of the impugned order, dated 22.02.2023, also fails to disclose the role played by the present petitioner. In a criminal proceeding, for issuing summons to the accused persons, the Magistrate has to derive satisfaction from the record that a prima facie case is made out and also he has to indicate the role played by each of the accused in the order. Mere

mentioning of the sections and the language of those sections are not sufficient to issue summon, as held by the Hon'ble Supreme Court in the case of (i) **Neelu Chopra and Another vs. Bharti**, reported in **(2009) 10 SCC 184**; (ii) **Pepsi Foods Ltd. vs. Special Judicial Magistrate**, reported in **(1998) 5 SCC 749**; and (iii) **GHCL Employees Stock Option Trust vs. India Infoline Limited**, reported in **(2013) 4 SCC 505**, Hon'ble Supreme Court held that summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is held in paragraph No. 28 as under:

"28. summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

19. Further, it appears that the respondent No. 2 is an accused in one of the Complaint Case No. 462/2021, under Section 138 of the N.I. Act, instituted by the petitioner for dishonour of cheque.

The petitioner, being the proprietor of M/S Annapurna Trading had supplied goods of worth Rs. 5,58,521/-, vide Invoice No. 379, dated 07.08.2021, to the firm of the respondent No. 2, in the name and style of M/S Suman Enterprise. The respondent No. 2, in order to discharge his liability, had issued one cheque, being cheque No. 555752, dated 24.09.2021, for a sum of Rs. 3,00,000/- of State Bank of India, Mankachar, Chowk Bazar Branch, which returned dishonoured, when the petitioner had presented the said cheque in his bank for encashment, on 28.09.2021, with the endorsement "Fund Insufficient". Then issuing statutory Notice, the petitioner had instituted the aforementioned Complaint Case.

20. Further, it appears from the record that thereafter, the respondent No. 2 had filed a Criminal Petition, being Criminal Petition No. 526/2022, under Section 482 of the Cr.P.C. But, this court, vide order dated 20.10.2022, was pleased to dismiss the same. Thereafter, the petitioner had instituted the C.R. Case No. 06/2023 before the learned Addl. Chief Judicial Magistrate South Salmara, Mankachar upon which the learned Addl. Chief Judicial Magistrate had taken cognizance of the offence under Sections 448/420/406/506 of the IPC. If the chronology of events are considered in the given background, then it fortified to a considerable extent, the submission of Mr. Jain, the learned counsel for the petitioner that the Complaint Case No. 06/2023, so instituted by the respondent No. 2 is the counterblast of Complaint Case No. 462/2021, lodged by the petitioner, and the same has been lodged with *mala-fide* intention and ulterior motive.

21. In the given facts and circumstances and also in absence of a prima-facie case, being not made out against the present petitioner, the ratio laid down in the case of **State of Haryana And Ors. vs. Ch. Bhajan Lal And Ors.**, reported in **1992 SCC (SUPP) 1 335**, by the Hon'ble Supreme Court, especially in point Nos. 1 and 7 of Para No. 102, are squarely applicable herein this case.

22. It is to be mentioned here that in the said case in Para No. 102, Hon'ble Supreme Court has observed as under:-

"In the exercise of the extra-ordinary power under Article 226 or the inherent powers under Section 482 of the Code of Criminal Procedure, the following categories of cases are given 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 channelised and inflexible guide- in 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 F.I.R.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;

23. As observed and held by Hon'ble Supreme Court in catena of decisions, inherent jurisdiction under Section 482 of the Cr.P.C. is designed to achieve salutary purpose that criminal proceedings ought not to be permitted to degenerate into weapon of harassment. When the Court is satisfied that criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon accused, in exercise of inherent powers, such proceedings can be quashed. In the case of **Parbatbhai Aahir v. State of Gujarat**, reported in **(2017) 9 SCC 641**, Hon'ble Supreme Court has held that Section 482 of the Cr.P.C. is prefaced with an overriding provision. The statute saves the inherent power

of the High Court, as a superior court, to make such orders as are necessary (i) to prevent an abuse of the process of any Court; or (ii) otherwise to secure the ends of justice. Same are the powers with the High Court, when it exercises the powers under Article 226 of the Constitution of India. This being the legal position, the argument, so advanced by Mr. Sharma, the learned Addl. P.P. and Mr. A.T. Sarkar, the learned counsel for the respondent No. 2 left this Court unimpressed. Here in this case, abuse of the process of the Court is writ large from the record, and as such this Court is duty bound to exercise its jurisdiction under Section 482 of the Cr.P.C., to prevent such misuse.

24. In the result, I find sufficient merit in this petition, and accordingly, the same stands **allowed**. The impugned order stands set aside and quashed. The parties have to bear their own costs.

JUDGE

Comparing Assistant