

GAHC030005812023



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

Case No. : Crl.Pet./11/2023

Shri Beikrystkypacha Hlychho
New Colony Siaha
Mizoram

VERSUS

The State of Mizoram r/b the Secretary, Home Department and 5 Ors.
Aizawl

Advocate for the Petitioner : Mr. T Lalnunsiana

Advocate for the Respondent : P.P./Addl.PP, Mizoram

**BEFORE
HONOURABLE MR. JUSTICE KAUSHIK GOSWAMI**

JUDGMENT & ORDER (Oral)

Date : 06-02-2024

Heard Mr. T. Lalnunsiam, learned counsel for the petitioner. Also heard Mrs. Linda L. Fambawl, learned Addl. Public Prosecutor for the State respondents.

2. Though as per Court's Order dated 06.11.2023, notice was issued to the respondent No. 6 and A/D card in respect of the respondent No. 6 was received after due service upon respondent No. 6, there is no representative on behalf of the respondent No. 6. Since service of notice was completed in respect of respondent No. 6 and despite receiving the said notice in November, 2023, she has chosen not to appear in the criminal proceedings, the matter is taken up for hearing.

3. This petition is filed under Section 482 of Cr.PC, 1973 for quashing the FIR, which was registered as Aizawl PS (C) Case No. 472/2022 dated 07.07.2022 under Sections 420/406 IPC against the petitioner.

4. The principle of exercise of power under Section 482 Cr.PC to quash the FIR is well settled by number of cases of the Hon'ble Apex Court. These parameters are as hereunder:-

"(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 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."

5. The case of the complainant/respondent No. 6 in the FIR dated 07.07.2022 is that by the end of 2019, the petitioner said that Rs. 250 Lakhs is required for Demand Draft in respect to one project of NHIDCL (NH-54 Package-2), he being interested to take the said work deposited a sum of Rs. 10 Lakhs in the account of the petitioner's wife at Mizoram Rural Bank, Chanmari Branch. Further, it is alleged in the FIR that one Friend Construction Private Limited was formed to carry out the work together and while the complainant was preparing to initiate the work, they came to know that another company by the name of KRAM was already carrying out the work which was given to them. Though the said work could not be carried out by the complainant, the money deposited for the said work is not received back till date. It is further alleged that thereafter, by the end of 2020, the petitioner again informed the complainant that there is a work for widening of road at NH-54 Package-8 from Zero to Tuipang road and accordingly, the complainant undertook the said work and successfully completed the same in the early May, 2021. It is further alleged that though the petitioner has said that the aforesaid work was available @ Rs. 140 per cubic meter, the complainant realized after completion of the work that the rate was Rs. 125 per cubic meter. It is further alleged that the petitioner changed the name from Friends Construction to Andrea Enterprise without the consent of the complainant with the intention that all the bills in connection with the work was to be deposited in the account.

6. It is further alleged that the complainant have not received the final bill till date. It is further alleged that in this manner, the petitioner accused has deceived the complainant.

7. The FIR has been accordingly registered under Sections 406/420 IPC.

8. Mr. T. Lalnunsiam, learned counsel for the petitioner submits that the case of the complainant and the petitioner is of contractual nature, wherein the petitioner had sub-contracted some of the contract received by him. He further submits that since the petitioner's pending bills have not been realized, he is not able to pay the complainant his pending bills of Rs. 94,98,198/-. He further submits that in such similar nature, the complainant previously filed an FIR, i.e., Aizawl P.S Case No. 491/2021 dated 27.10.2021 under Sections 406/420 IPC but the same was quashed and set aside by this Court by its Judgment & Order dated 29.09.2023 in CrI.Pet. No. 1/2022.

9. Mrs. Linda L. Fambawl, learned Addl. P.P on the other hand submits that the investigation ought not to be scuttled.

10. I have heard the submissions made at the bar and have perused the materials available on record.

11. The following facts can be ascertained from a bare perusal of the FIR. (i) The complainant petitioner deposited Rs. 250 lakhs in the bank account of complainant's wife in relation to a work given by NHIDCL. (ii) However, when the complainant had gone to the work site to initiate the work, she came to know that the same work had already been given to another company. (iii) As such, the work could not be proceeded and the money deposited has not been received back (iv) By the end of 2020, the petitioner again informed the complainant that there is a work for widening of road at NH-54 Package 8 from Zero to Tuipang road and the complainant accepted the said work and

executed/completed the same successfully (v) The petitioner has changed the name of Friends Construction without the knowledge of the complainant to Andrea Enterprise with the intention that the subject bills will be deposited in the said account (vi) Due to certain disputes as regard the rate, the bills of the complainant remain unpaid.

12. Section 405 IPC defines criminal breach of trust. A reading of the aforesaid provision of law states that the basic requirements to bring home the accusations under Section 405 of the Code are the requirements to prove conjointly (i) entrustment and (ii) whether the accused was actuated by dishonest intention or not, misappropriated it or concerted it to his own use to the detriment of the persons who entrusted it.

13. In the case of *State of Gujarat Vs. Jaswantlal Nathalal*, reported in *AIR 1968 SC 700*, the Hon'ble Apex Court held in para 8 as hereunder:-

"(8) The term "entrusted" found in Section 405 I. P. C. governs not only the words "with the property" immediately following it but also the words "or with any dominion over the property" occurring thereafter-see Velji Raghavji Patel vs. State of Maharashtra, 19652 SCR 429 (AIR 1965 SC 1433). Before there can be any entrustment there must be a trust meaning thereby an obligation annexed to the ownership of property and a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner. But that does not mean that such an entrustment need conform to all the technicalities of the law of trust see Jaswantraji Manilal v. State of Bombay, 1956 SCR 483 at pp. 498-500 (AIR 1956 SC 575 at pp. 582-583). The expression, "entrustment" carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. Further the person

handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. A mere transaction of sale cannot amount to an entrustment. It is true that the government had sold the cement in question to BSS solely for the purpose of being used in connection with the construction work referred to earlier. But that circumstance does not make the transaction in question anything other than a sale. After delivery of the cement, the age No.# 5/8 government had neither any right nor dominion over it. If the purchaser or his representative had failed to comply with the requirements of any law relating to cement control, he should have been prosecuted for the same. But we are unable to hold that there was any breach of trust."

14. Section 415 of the IPC defines cheating. The essential ingredients of cheating are (i) there should be fraudulent or dishonest inducement of a person by deceiving him, (ii)(a) the person so deceived should be induced to deliver any property to any person, 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.

15. The Hon'ble Apex Court in the case of *Vesa Holdings Private Limited & Another Vs. State of Kerala & Others*, reported in (2015) 8 SCC 293 has held in paras 12 and 13 as hereunder:-

"12. From the decisions cited by the appellant, the settled proposition of law is that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In other words 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 failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Penal Code, 1860 can be said to have been made out.

13. It is true that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may be available to the complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint disclose the criminal offence of cheating or not. In the present case there is nothing to show that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 IPC. In our view the complaint does not disclose any criminal offence at all. The criminal proceedings should not be encouraged when it is found to be mala fide or otherwise an abuse of the process of the court. The superior courts while exercising this power should also strive to serve the ends of justice. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of the court and the High Court committed an error in refusing to exercise the power under Section 482 of the Criminal Procedure Code to quash the proceedings."

16. Thus, there is a fine line while making a distinction between mere contract and cheating, which is criminal one. Law has been by now well settled that breach of contract cannot give rise to criminal prosecution of cheating until and unless the fraudulent and dishonest intention of cheating is made out in the body of the complaint itself.

17. The real test is whether the allegation in the FIR discloses the criminal offence of cheating or not. There is no averment in the FIR as regard the

fraudulent and dishonest intention of cheating. In the present case, there is nothing to show that at the very inception, there was any intention on behalf of the accused petitioner to cheat which is a condition precedent for an offence under Section 420 IPC. That being so, no case of cheating is made out on the face of the averments set out in the FIR.

18. It further reveals from the averment that a sum of Rs. 250 Lakhs was not deposited in the account of the petitioner but allegedly in the petitioner's wife Bank Account. The said sum was allegedly deposited in connection to a work project. There is no allegation in the FIR that the petitioner has misappropriated or converted the said Rs. 250 Lakhs with dishonest intention. The basic essential ingredients of Section 406 IPC is also lacking in the body of the FIR.

19. Therefore, no offence under Section 406 IPC can be also said to be made out on the face of the averments set out in the FIR. In fact, bare perusal of the FIR indicates that Business transaction continued between the parties and these transactions cannot by any stretch of any imagination be construed as dishonest inducement.

20. This Court is accordingly of the opinion that even if the allegations are taken at their face value and accepted in its entirety, no offence under Sections 406/420 of the IPC is made out. Rather the matter is totally civil in nature and it is nothing but a claim of recovery of money arising out of the contractual relation between the complainant and the petitioner and relates to contractual liability and payment of bill arising out of such contractual relation. As such, the FIR appears to have been lodged with malafide intention and therefore, the same is an abuse of the process of the Court.

21. In view of the above, this Court is of the opinion that the FIR does not disclose any criminal offence whatsoever at all and has been manifestly attended with malafide and therefore, such criminal proceedings should not be encouraged.

22. Therefore, in view of the aforesaid, allowing further Police investigation to continue would amount to an abuse of the process of the Court and accordingly, the FIR which was registered as Aizawl P.S Case No. 472/2022 dated 07.07.2022 under Sections 420/406 IPC is set aside and quashed.

23. In view of the reasons stated above, the criminal petition accordingly stands allowed and disposed of.

JUDGE

Comparing Assistant