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IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC Nos.340 & 2002 of 2017

CRLMC No.340 of 2017

Malaya Kumar Lenka

....

Petitioner

Mr. G.M. Rath, Advocate

-Versus-

State of Odisha and others

....

Opposite Parties

Mr. D.R.Parida, ASC

Mr. D.Panda(OP No.4)

CRLMC No. 2002 of 2017

Subhasis Biswas

....

Petitioner

Mr. A.N. Das, Advocate

-Versus-

State of Odisha and others

....

Opposite Parties

Mr. D.Panda(OP No.4)

CORAM:

JUSTICE R.K. PATTANAİK

DATE OF HEARING 15.12.2021 : DATE OF ORDER 19.01.2022

1. In fact, the petitioners by invoking inherent jurisdiction under Section 482 Cr.P.C. have questioned the legality and judicial propriety of the impugned order dated 23.09.2016 i.e. Annexure-1 passed in ICC Case No.259 of 2016 by the learned S.D.J.M., Panposh, Rourkela besides the sustainability of the criminal proceeding itself on various grounds.

2. Since the parties have raised similar grounds, both the applications have, therefore, been taken up together for disposal by a common order.

3. OP No.4 filed ICC Case No.465 of 2015 before the learned court below which was directed to be investigated upon in terms of Section 156(3) Cr.P.C. and accordingly, a case was registered vide G.R. Case No.1449 of 2015 which, however, resulted in submission of a closure report, where after, a protest petition was filed and the same was registered as ICC Case No.259 of 2016 and then, the learned counsel below, after recording the initial statement of its representative and conducting an enquiry as per Section 202 Cr.P.C. passed the order of cognizance under Annexure-1 in respect of offence punishable under Section 408/120-B/34 IPC and summoned the petitioners, which is being questioned at present.

4. As is revealed from the record, the petitioner (in CRLMC No. 340 of 2017) is an ex-employee of OP No.4, whereas, the other petitioner (in CRLMC No. 2002 of 2017) to be a senior official of a company, namely, Heraeus Technologies India Pvt. Ltd. (in short 'HIT') against whom OP No.4 filed ICC Case No.465 of 2015, whereupon, a case was registered by the order of the leaned court below and as stated earlier, it led to the submission of the closure report, where after, ICC Case No.259 of 2016 has been filed. In sum and substance, the petitioner of HIT is alleged of having conspired with OP No.4's said ex-employee in procuring certain confidential documents lying at its disposal and utilized the same in the suit vide C.S. No.1 of 2015 instituted by Heraeus Electro-Nite International N.V. (hence called 'HEN') before the court of learned District Judge, Sundargarh on trade mark infringement vis-à-vis OP No.4, thereby, having committed an offence of criminal breach of trust.

5. As is made to understand, the ex-employee worked with OP No.4 at its Rourkela branch from January, 2004 and resigned

on 25th September, 2015 and joined another company by name IFGL Refractories Ltd. where he continued till February, 2018 and again left the job due to ill health and at last, joined HIT. In the meanwhile, HEN instituted CS No.1 of 2015 against OP No.4 and to put forth its claim of infringement of trade mark and passing off relying upon certain invoices. Thereafter, OP No.4 by leveling allegations that the invoices in question being confidential documents had been in custody and entrustment during the service days of its ex-employee, who conspired with the other petitioner and utilized it to institute the suit and hence, committed the breach of trust. In other words, the allegation is that the petitioners managed to secretly procure and pass on the invoices in order to facilitate institution of the suit by HEN, hence, are liable for the offence.

6. The action of the learned court below is claimed to be based on no cogent reason, basis and justification as against the backdrop of a closure report being filed for insufficiency of evidence. In fact, the grounds of challenge are that (i) no case at all has been made out besides dispute being predominantly civil in nature; (ii) the alleged invoices are no property since no value is attached to them and moreover when said documents, which are only the photocopies and not the originals, in no way to be treated as confidential material; (iii) invoices being once issued and delivered, OP No.4, who raised it, cannot lay any claim over the same as its exclusive property, in order to sustain a charge of entrustment and breach thereof; (iv) the learned court below disregarded the closure report without examining the material on record in order to reach at a conclusion, whether, OP No.4 would be able to succeed in bringing the charge home etc.

7. OP No.4's contention is that the decision under Annexure-1 is absolutely justified and in accordance with law. Further claimed

that its ex-employee petitioner being the custodian of the alleged invoices parted with it so as to enable HEN to institute the suit, inasmuch as, such documents are confidential in nature and could not have fallen in the hands of the official of the HEN which did happen on account of breach of trust and a criminal conspiracy. It is alleged that the investigation was not properly conducted which, therefore, led to the submission of the closure report, in reply, OP No.4 filed the protest petition basing upon which the learned court below proceeded to take cognizance of the offence which does not suffer from any infirmity. It is also claimed that the learned court below had to confine itself to the facts alleged in the complaint for the purpose of taking cognizance and rightly, therefore, passed the cognizance order dated 23.09.2016 despite a closure report being received. It has further been claimed that the circumstances under which the alleged invoices were procured through OP No.4's ex-employee in order to institute the suit, prima facie, substantiate an act of criminal breach of trust, the fact which was correctly appreciated by the learned court below. The stand of the State is in line with that of OP No.4 justifying the criminal action vis-a-vis the petitioners.

8. For better appreciation, the law on the powers envisaged in Section 482 Cr.P.C. vis-à-vis quashment of criminal proceedings is required to be precisely stated. There is no tenebrosity in the settled position of law that criminal proceedings, under certain circumstances, may be quashed exercising inherent jurisdiction under Section 482 Cr.P.C. A judgment legal classicus on the above point is the Supreme Court's dictum in *State of Haryana and others Vs. Ch. Bhajan Lal and others* reported in AIR 1992 SC 604, wherein, it is held and observed that such power could be exercised in some categories of cases either to prevent abuse of 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 formula and to give an exhaustive list of myriad kinds of cases and lastly concluded that (i) in cases where considering the FIR or the complaint, even if accepted at their face value, do not constitute any offence; or(ii) where the uncontroverted allegations made therein do not disclose commission of any offence or make out a case against the accused; or(iii) where the allegations are so absurd and inherently improbable on the basis of which no prudent person can ever reach at a just conclusion that there is sufficient ground for proceeding against the accused; or(iv) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive to wreck vengeance on the accused and with a view to spite him due to private and personal grudge; or(v) in case there is any express legal bar or prohibition to the institution and continuation of the proceeding as engrafted in Cr.P.C. or any special Act. To sum up, under any of the circumstances narrated above and in such similar situations, a criminal prosecution, if assailed, inherent jurisdiction may have to be exercised in order to meet the ends of justice. Referring to the above decision, it is contended for the petitioners that a case of such kind is clearly made out for quashing of the criminal proceeding set in motion at the instance of OP No.4.

9. As already mentioned, cognizance of the alleged offence under Annexure-1 was taken after receiving the protest petition in the shape of a complaint. At this juncture, the learned counsels appearing for the petitioners strongly contended that the learned court below miserably failed to examine the facts of the complaint and without any foundation, proceeded by taking cognizance of offence, which is not in accordance with the law laid down by the Supreme Court in *Pepsi Foods Ltd. and another Vrs. Special Judicial*

Magistrate and others reported in (1998) 5 SCC 749. In the decision (supra), it has been observed that a Magistrate summoning an accused has to apply his mind to the facts of the case and the law applicable thereto and furthermore to consider the nature of allegations and also oral as well as documentary evidence and then, to take a decision, if the complainant could produce sufficient material to bring home the charges. So to say, there has to have a judicial application of mind and only after carefully scrutinizing the facts and evidence brought on record, a Magistrate to decide as to if cognizance of the offence is to be taken or otherwise. In the present case, the learned court below despite a closure report, on the basis of the complaint by way of a protest petition was apparently satisfied to take cognizance of offence under Annexure-1. It is well established procedure that the view expressed by the police and submission of closure report does not prevent or preclude a court from proceeding by taking cognizance of offence in one of the ways prescribed in law. So, the pertinent question is, whether, in the instant case, an offence of breach of trust with conspiracy is, prima facie, made out against the petitioners for the purpose of an enquiry and trial?

10. The learned counsels for the petitioners argued that the essential ingredients of Section 408 IPC are to be fulfilled which is conspicuously absent in the case and therefore, the learned court below grossly erred in taking cognizance of the offence. In response, the learned counsel for OP No.4 contended that since the ex-employee petitioner was the in-charge and custodian of the alleged invoices which he parted with the other to enable HEN in instituting the suit, there was indeed a breach of trust and rightly, therefore, the learned court below took cognizance of offence under Section 408/120-B IPC. As understood, the essential elements of Section 408 IPC are that entrustment must be in respect of a

property or with any dominion over the property and the person entrusted dishonestly misappropriates or converts the subject to his own use or uses it or disposes of the same either to himself or to somebody. It is contended for the petitioners that the above conditions which are sine qua non to invite a prosecution under Section 408 IPC are not at all in existence. It is further contended that the alleged invoices are no property as no value is attached to them in order to attract Section 408 IPC, since for breach of trust a property which would be something moveable or immoveable must be transferable or consumable or capable of being spent which is a fundamental requirement, a condition which is conspicuously lacking and besides that, such documents cannot be treated as confidential and a valuable property capable of entrustment, moreover, when the originals of it are shown to be in possession of OP No.4. On the contrary, the learned counsel for OP No.4 would contend that an invoice is a property and there was evidence to conclude that the ex-employee petitioner besides a whole lot of materials had been entrusted with two of the alleged invoices which were subsequently handed over to the other petitioner of HIT so as to enable HEN to institute the suit and in such view of the matter, not only entrustment but also the dishonest means in sharing the confidential information was prima facie established and therefore, the order under Annexure-1 is unassailable. No doubt, an invoice is a crucial document for conducting business but it primarily evidences a transaction inter se parties and enforceable by law. It is, indeed, a document whereby payment is requested for the goods supplied or services offered containing details of the information as to the transaction made and at times, in regular course of business, as is experienced, found unsigned which is also honoured by the buyer without any objection being raised. Question is, whether, an invoice can really be a property for the purpose of Section 408 IPC? The invoices are

the extracts of the originals said to have been utilized in a suit which has been instituted by HEN. Since the invoices relate to transactions between the parties involved, in the humble view of the Court, it cannot be treated as an entrusted property for the purpose of a criminal prosecution. That apart, an invoice once issued and delivered to a purchaser for obtaining payment, as is rightly pointed out by the learned counsel for the petitioners, OP No.4 cannot lay any claim over the same as its exclusive property. Since the documents are of such nature, it is always parted with and delivered to the buyers and therefore, it would not be correct to say that the invoices remained the exclusive property of OP No.4 which also do not contain any confidential information, so to speak. To base a claim with the invoices that it was being entrusted to one of the petitioners, who shared it with the company concerned and hence, the trust was breached cannot be the foundation for a criminal prosecution. The extracts of the invoices could be procured from different sources once the transactions are over and therefore, to fix the liability on an ex-employee would be totally unjustified. Perhaps, for the fact that the ex-employee joined HIT and before that, the business tie up between OP No.4 and HEN had been terminated, which was also a subject matter of dispute in C.S. No. 154 of 2013 and thereafter, the suit was filed in 2015 by HEN for infringement of trade mark, under the impression that the alleged invoices and extracts thereof might have been procured through him, the complaint was filed alleging conspiracy but according to the Court, such a criminal action is having no sound basis or foundation to sustain a charge of breach of trust. In other words, it can be said that OP No.4 merely on surmises and conjectures assumed the involvement of the ex-employee. There is also no material, prima facie, to establish the role which has been played by the other petitioner, in so far as the charge of conspiracy is concerned. Having acquaintance with an ex-employee of OP

No.4, who later joined HIT, without any adverse conduct and joint mischief being attributed, cannot by itself be sufficient to sustain an allegation of criminal conspiracy. Moreover, on the strength of the alleged invoices, a charge of criminal breach of trust cannot survive and be made to stand.

11. An argument is advanced from the side of the petitioners that all the admitted documents besides the complaint can be gone through while exercising jurisdiction under Section 482 Cr.P.C. as the correct position of law has been laid down by the Supreme Court in *All Cargo Movers (India) Pvt. Ltd. and others Vrs. Dhanesh Badarmal Jain and another* reported in (2007) 14 SCC 776. In fact, learned counsel for OP No.4 contended that the learned Magistrate was only required to consider the complaint and not to go through the materials collected during investigation and also the closure report for proceeding with the case. In the aforesaid decision, the Supreme Court held that admitted facts may be taken into account including the pleadings of a suit to form an opinion, whether, the criminal proceeding stands or succumb to any inherent improbabilities. It was observed therein that for the purpose of finding out as to if the allegations, prima facie, made out a case, in exercise of jurisdiction under Section 482 Cr.P.C., the admitted facts on record may be examined with the observation that it is one thing to say that the Court at this juncture would not consider the defence of the accused but it is another thing to say that exercising the inherent jurisdiction of the Court, it is impermissible also to look to the admitted documents. That being so, for the purpose of proceeding with a complaint, a Magistrate may be required to consider the facts alleged therein and examine the materials produced against the background of a closure report being filed but while exercising jurisdiction under Section 482 Cr.P.C., the authority is not in any way limited or circumvented

from considering the admitted facts and documents on record even though it forms a part of a civil suit, the purpose being to ascertain, if the criminal proceeding can withstand the rigor of law. In any case, a court is always required to examine, whether, a case for an offence is made out perusing the facts alleged in the complaint. Looking at the closure report and taking cognizance of the relevant materials on record and even by examining the facts of the complaint, this Court reaches at a logical conclusion that simply by relying upon the extracts of the alleged invoices and that too when, the documents only evidences about some transactions taking place between the parties involved, entrustment and breach thereof cannot be alleged and as a consequence, the petitioners could not have been proceeded with at the instance of OP No.4. It is a case where against a backdrop of a litigation on infringement of trade mark between OP No.4 and HEN that the petitioners have been roped in may be to impact the commercial dispute and/or possibly to wreck personal or professional vengeance, which according to the Court, is not entirely misplaced in the given set of facts and circumstances of the case.

12. Factually, the complaint does not even remotely suggest any kind of conspiracy in sharing confidential information which belonged to OP No.4. On a consideration of the materials on record, the Court finds that there is no prima facie evidence to show and satisfy existence of any criminal conspiracy being hatched by the petitioners so as to enable HEN to institute the suit. The engagement of an ex-employee with HIT and in the meanwhile, the arrival of the commercial dispute vis-à-vis OP No.4 and HEN seems to have raised some amount of suspicion about conspiracy, which according to the Court, is totally misconceived and moreover when, the alleged documents could be procured from any source. The claim of the petitioners that the prosecution is

maliciously instituted with an ulterior motive is on account of absence of any materials is not totally without substance. The learned counsel for the petitioners relied upon a decision of Supreme Court in *Vineet Kumar and others Vs. State of U.P. and another* reported in (2017) 13 SCC 369 to contend that where the criminal proceeding is actuated with mala fide or maliciousness, it should be quashed in exercise of High Court's jurisdiction under Section 482 Cr.P.C. Having regard to the facts of the present case especially pendency of a commercial litigation between OP No.4 and HEN and the fact that there is no material to substantiate conspiracy between the petitioners for having shared any such confidential information much less the invoices which could be accessible from number of sources, the Court is of the view that the criminal proceeding is not manifestly attended with any good intention rather seems to have been instituted with some ulterior motives.

13. Another decision of the Supreme Court in the case of *Rajiv Thapar and others Vs. Madan Lal Kapoor* reported in (2013) 3 SCC 330 is relied upon from the side of the petitioners. In the decision (supra), it is observed that certain steps are to be followed to determine the veracity of the claim for quashment of a proceeding which are to the effect that (i) whether the material relied upon by the accused appears sound, reasonable and of sterling and impeccable quality; (ii) if the material so relied upon is sufficient to reject and overrule the factual assertion of the complaint, if by such material, it would rather persuade a reasonable person to dismiss and condemn the accusation made; (iii) whether the material as defence has not been refuted by the prosecution and/or the material is such that it cannot justifiably be refuted by the prosecution; (iv) whether the proceeding with the trial would result in abuse of process of the court and not serve the ends of justice;

and (v) if the outcome of the decision confirming to the tests is in the affirmative, the judicial conscience of the Court should be in favour of invoking the vested powers under Section 482 Cr.P.C. to quash the criminal proceeding. In the instance case, the proceeding is initiated by OP No.4 on the strength of alleged invoices, which as earlier discussed, could not be a material to hold entrustment besides being confidential and that apart, to allow the enquiry and trial to continue with such a foundation would certainly be an abuse of process of the court especially when there is no clear assertion as to in what manner the petitioners engaged themselves in a conspiracy and therefore, the Court reiterates that it is a fit case where inherent jurisdiction under Section 482 Cr.P.C. should be exercised.

14. The learned counsel for OP No.4 cited two decisions, namely, *Lakshman Jena Vs. Sudhakar Paltasingh* :AIR 1969 Orissa 149 and *India Carat Pvt. Ltd. Vs. State of Karnataka and another*. AIR 1989 SC 885 while advancing an argument that the learned court below rightly proceeded against the petitioners uninfluenced by the closure report as no any extraneous material could have been examined and gone through for the purpose of taking cognizance since it was to confine to the complaint and not beyond. The above decisions are primarily with regard to the powers of a Magistrate, as has been correctly pointed out by the learned counsel for the petitioners. As earlier discussed, this Court while exercising jurisdiction under Section 482 Cr.P.C. does have the authority to consider all such material which are admitted by the parties even arising out of a civil or commercial litigation to determine as to if a criminal proceeding is to survive or be terminated on the premise that it would lead to abuse of process of the court or necessary to secure the ends of justice. So, therefore, according to the Court, said authorities cited by the learned counsel

for the OP No.4 are of no help or render any kind assistance since they do not relate to inherent jurisdiction of the High Court under Section 482 Cr.P.C.

15. So the end result of the above discussions is that the Court is inclined to accept the contentions in favour of quashment and to hold that the criminal proceeding in ICC Case No.259 of 2016 as against the petitioners is not sustainable in law and therefore, it deserves to be terminated so as to do substantial justice and accordingly, it is ordered.

16. Resultantly, applications under Section 482 Cr.P.C. stand allowed for the reasons discussed herein before. As a necessary corollary, ICC Case No.259 of 2016 pending before the court of learned S.D.J.M., Panposh, Rourkela and the proceedings arising therefrom including the impugned order under Annexure-1 is hereby quashed.

(R.K. Pattanaik)
Judge

Dated 19th January, 2022/KCBisoi/Secretary