

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL REVISIONAL JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRR 2096 of 2010

CRAN 1 of 2010

CRAN 2 of 2010

CRAN 3 of 2010

CRAN 4 of 2010

SUSANTA KUMAR PAL

VS.

THE STATE OF WEST BENGAL & ANR.

For the Petitioner : Mr. Kamalesh Chandra Saha, Adv.

For O.P. No. 2 : Mr. Sandip Kumar Bhattacharyya
Ms. Mamata Khatun, Adv.
Mr. Satyam Mukherjee, Adv.
Ms. Sayani Ahmed, Adv.

For the State : Mr. Sanjoy Bardhan, Adv.
Ms. Debjani Dasgupta, Adv.

Hearing concluded on : 25th January, 2023

Judgement on : 2nd February, 2023

Siddhartha Roy Chowdhury, J.:

1. By filing this application under Section 482 of Cr.P.C., the petitioner is seeking an order quashing the proceeding in Complaint Case No. 2980 of 2010 pending before the learned 9th Court of Judicial Magistrate at Alipore under Section 94 read with Section 99 of the Code of Criminal Procedure, 1973.
2. From the attending facts of the case it is admitted that the petitioner before this Court is an advocate by profession and opposite

party no. 2 was his client who took service of the petitioner in lieu of professional fees. However, there was loss of faith and confidence and opposite party no. 2 being the client decided to take back briefs and documents etc. That apart the opposite party no. 2 claimed to have given money to the petitioner on his demand in addition to what has been paid towards his professional fees. Money was even taken in the name of his daughter and wife as well. The opposite party no. 2 with his well wisher one Doctor D.P. Mukherjee had been to the residence of the petitioner to take back the documents, relevant papers as well as money but the petitioner refused to entertain them and even sought for assistance of police. Thereafter, notices were given to the petitioner, by the opposite party no. 2 through her agent calling upon him to return the papers, money and other valuable documents but in vain.

3. Thereafter, a petition of complaint was filed before the learned Chief Judicial Magistrate, Alipore by the opposite party no. 2 which was registered as Case No. C/2980 of 2010. Learned Chief Judicial Magistrate was pleased to take cognizance on 30th April, 2010 and transferred the case for disposal to the Court of learned Judicial Magistrate, 9th Court at Alipore. Learned 9th Court of Judicial Magistrate invoked the provision of Section 200 of Cr.P.C. and was pleased to issue process under Section 420/406/468/471 of the I.P.C. A separate petition was also filed with a prayer to issue search warrant for the purpose of recovery of certain documents which was heard on a subsequent date and on 14th June, 2010 search warrant was issued by the learned Trial Court.

4. Mr. Kamalesh Chandra Saha, learned Counsel representing the petitioner submits that the petitioner himself is an advocate by profession and he is being harassed by his erstwhile client the opposite party no. 2 with an ulterior motive. Drawing my attention to the photocopy of charge sheet filed by police in connection with Ghola P.S. Case No. 64 dated 6th March, 2009, Mr. Saha submits that pursuant to information given by Susanta Kumar Pal, the petitioner of this proceeding, police registered F.I.R. and after investigation submitted charge sheet against the opposite party no. 2 as sole accused person under Section 406/420/307/506/120B of the I.P.C. on 28th February, 2010.
5. While Charu Market P.S. Case No. 63 dated 17th May, 2009 registered at the behest of the opposite party no. 2, after due investigation was closed for want of evidence. Subsequent thereto as a counter blast to the case registered at the instance of the petitioner, this petition of complaint was filed. It is further contended by Mr. Saha that the opposite party no. 2 gave a declaration before the Notary Public stating inter alia that she has received all the documents and also gave an undertaking to pay a sum of Rs. 9,25,000/- within 7 days to the petitioner towards the expenses incurred by the petitioner on behalf of the opposite party no. 2. Therefore, the case filed on 30th April, 2010 is nothing but an afterthought, and it has been filed with the sole purpose to harass the petitioner and to harm his reputation as an advocate.

6. Mr. Saha further submits that learned Trial Court issued process mechanically without taking into consideration the ingredients required to constitute offence within the meaning of Section 403 or 415 of the I.P.C. to make one culpable and being punished under Section 406/420 of the I.P.C. Even learned Trial Court failed to appreciate the provision of Section 468/471 of the I.P.C. in its proper perspective. According to Mr. Saha, the order passed on 14th June, 2010 is bereft of any reason. Learned Magistrate ought to have issued the search warrant upon considering statement made on solemn affirmation by complainant and her witnesses on 4th May, 2010 but it was not done. The proceeding according to Mr. Saha is but an abuse of process of law and therefore should be quashed.
7. Refuting such argument of Mr. Saha, Mr. Sandip Kumar Bhattacharyya learned Senior Counsel representing the opposite party no. 2 submits that the petitioner being an advocate by profession has been arrayed as an accused in the complaint case registered under Section 406/420/468/471 of the Indian Penal Code and not under Section 94 read with Section 99 of the Indian Penal Code. The petitioner being accused has affirmed the affidavit flouting the mandate of law as laid down in the Oaths Act, 1969, particularly in violation of Sub-Section 2 of Section 4 of the said Act. According to Mr. Bhattacharyya, if there is any deficiency in the order passed by learned Trial Court on 14th June, 2010 while issuing search warrant, that can be considered taking lumen from the provision of Section 460 of Criminal Procedure Code. The irregularities, even for the sake of

argument, is found to have crept in, the same cannot vitiate the proceeding. It is further contended that a professional man is not supposed to take money from his client in the name of his wife and daughter. The petitioner wants to throttle the proceeding to escape from the clutches of law.

8. Upon perusal of the petition filed on 12th July, 2010, I find that Susanta Kumar Pal himself has affirmed the petition challenging a proceeding, where he has been arrayed as an accused, before the Commissioner of Affidavit, Appellate Side, High Court, Calcutta.

9. Section 4 of Oaths Act, 1969 enunciates :-

“Section 4 in The Oaths Act, 1969

4. Oaths or affirmations to be made by witnesses, interpreters and jurors.—

(1) Oaths or affirmations shall be made by the following persons, namely:—

(a) all witnesses, that is to say, all persons who may lawfully be examined or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;

(b) interpreters of questions put to, and evidence given by, witnesses; and

(c) jurors: Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any

evidence given by such witness nor affect the obligation of the witness to state the truth.

(2) Nothing in this section shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.”

10. A plain reading of the statute indicates that an oath or affirmation to the accused person in a criminal proceeding shall be unlawful unless of course he is examined as a witness for the defence or unless it is necessary to administer to the official interpreter of any Court after he has entered on the execution of the duties of his office and Oath or affirmation that he will faithfully discharge his duties.

11. With all fairness Mr. Bhattacharyya submits that in the matter of *Bonneswar Dutta & Ors.* (1998 SCC Online 13) while deciding an application under Section 438 of the Criminal Procedure Code, Division Bench of this Hon’ble Court relied upon the judgement of Hon’ble Apex Court in ***Laxmipat Choraria & Ors. vs. State of Maharashtra*** reported in **AIR 1968 SC 938** and observed that provision of Sub-Section 2 of Section 4 of Oaths Act is confined to criminal proceeding, meaning thereby in course of trial and not in course of investigation. Therefore, the person apprehending arrest should file application under Section 438 of the Cr.P.C. supported by the affidavit affirmed by the petitioner himself. It will not be an act of testimonial compulsion.

12. I have perused the judgement of Hon'ble Division Bench, where the exclusionary clause in Section 5 of the Oaths Act, was taken into consideration, relying upon the judgement of Hon'ble Supreme Court pronounced in the case of **LAXMIPAT CHORARIA & ORS. VS. STATE OF MAHARASHTRA** reported in **AIR 1968 SC 938**. In the said case Hon'ble Apex Court held that:-

"The expression "criminal proceeding" in the exclusionary clause of Section 5 of the Indian Oaths Act cannot be used to widen the meaning of the word accused."

13. While passing the said judgement, in *Bonneswar Dutta (supra)* Hon'ble Division Bench did not consider the judgement pronounced in the case of **S.A.L. Narayan Row (supra)** wherein Hon'ble Apex Court held:-

"A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property. It also includes proceedings in which in the larger interest of the State, orders to prevent apprehended breach of peace, orders to bind down persons who are a danger to the maintenance of peace and order, or orders aimed at preventing vagrancy are contemplated to be passed. But the whole area of proceedings, which reach the High Courts is not exhausted by classifying the proceedings as civil and criminal."

14. Therefore, since the decision of S.A.L. Narayan Row was not taken into consideration by the Hon'ble Division Bench of this Court while answering the issue of affirmation of affidavit by the petitioner in a proceeding under Section 438. It goes without saying the judgement of

S.A.L. Narayan Row (supra) shall prevail over the judgement pronounced in *Laxmipat Choraria (supra)* so far the concept of criminal proceeding is concerned, being the judgement pronounced by larger bench.

15. That apart in *Bonneswar Dutta (supra)* Section 5 of the Oaths Act was considered and not Sub-Section 2 of Section 4.
16. Therefore, the criminal revision should be brought within the ambit of criminal proceeding and the accused is debarred from affirming any affidavit in view of the embargo as laid down under Sub-Section 2 of Section 4 of the Oaths Act.
17. Learned Trial Court after considering the statement made on solemn affirmation by the complainant Munmun Roy and her witnesses, having found prima facie case to proceed against the accused person, issued summon. I do not find any strong reason to smother the said proceeding at this zygotic stage. It should be allowed to reach a logical conclusion after trial.

In my humble opinion this is not fit case to invoke the provision of Section 482 of the Cr.P.C. to quash the proceeding. This power is given with purpose and object of advancement of justice.

18. True it is learned Trial Court failed to consider the amended provision of Section 202 of the Cr.P.C. while issuing process upon the accused person in the complaint case. Mere non-compliance of provision of Section 202 of Cr.P.C. cannot be said to have the potential to vitiate the proceeding. It is a mere irregularity which is amenable to the protection of Section 460 of Cr.P.C.

19. The revisional application merits no consideration and is dismissed, however, without any cost. With the disposal of the revisional application order of stay, if any, stands vacated and pending application if any stands disposed of.
20. Let a copy of this judgement be sent down along with lower Court record, to the learned Trial Court for information and necessary compliance.
21. Urgent photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)