

Devendra Kumar Agarwalla Vs. The State of Jharkhand and Anr

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Court : Jharkhand

Decided On : Aug-25-2015

Appellant : Devendra Kumar Agarwalla

Respondent : The State of Jharkhand and Anr

Advocate for Pet/Ap. : Mr. Anil Kumar Sinha

Judgement :

IN THE HIGH COURT OF JHARKHAND AT RANCHI W.P.(Cr.) No. 138 of 2015
With W.P.(Cr.) No. 239 of 2015 With W.P.(Cr.) No. 241 of 2015

1. Devendra Kumar Agarwalla, Son of Late Banwari Lal Agarwalla, . Petitioner(in
W.P.(Cr.) No. 138 of 2015)

2. Adarsh Kumar Agarwalla, Son of Shri Devendra Kumar Agarwalla . Petitioner
(in W.P.(Cr.) No. 239 of 2015) 3.Asim Kumar Agarwalla,

4. Anup Agarwalla @ Anup Kumar Agarwalla Both sons of late Shri Parmeshwar
Kumar Agarwalla, 5.Udbhav Agarwalla, Son of Asim Kumar Agarwalla Petitioners(
in W.P.(Cr.) No. 241 of 2015) --Versus--

1. The State of Jharkhand

2. Jitendra Kumar Agarwalla, Son of Late B.L. Agarwalla, . . Respondents (in all
cases) For the petitioners: Mr. Anil Kumar Sinha Sr. Advocate (in W.P.(Cr.) No.-

138 of 2015) Mr. N.K.Agrawal, Sr.Advocate, M/s. Saurav Agrawal & Kumar Manish, Advocates (in W.P.(Cr.) No.- 239 of 2015) M/s. Indrajit Sinha & Ajay Kumar Sah, Advocates (in all cases) For the State: Mr. Ram Nivas Roy, G.P-III, Jalisur Rahman, JC to GP-III (in W.P.(Cr.) No. 138 of 2015), Mr. Abhya Kumar Mishra,SC-III & Manoj Kumar Choubey,J.C. to SC III (in W.P.(Cr.) No. 239 of 2015) & Mr. Bhawesh Kumar, S.C.II and Mr. Pran Pranay, J.C. to SC -II (in W.P.(Cr.) No. 241 of 2015) For the Respondent no.2:- M/s. Ashok Kumar Yadav & Rajiv Ranjan, Adv. CORAM: HONBLE MR. JUSTICE RAVI NATH VERMA C.A.V. ON:07/08/2015 PRONOUNCED ON-25/08/2015 ----- The petitioners of the above three criminal writ petitions have invoked the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India with prayer to quash the entire criminal proceeding arising out of Complaint Case No. 2703 of 2014 including the order taking cognizance dated 04.03.2015 whereby the learned Judicial Magistrate, Dhanbad has held that there is sufficient materials on the record for further proceeding against all the accused persons under Sections 323, 341, 403, 406, 417, 421, 423, 424, 465 and 120-B I.P.C. and under Section 465 of I.P.C. against one of the accused Naveen Tulsian. 2

2. The factual score as depicted in the complaint petition is that the complainant and accused persons nos. 1 to 5 of the complaint petition are own brothers and co-sharers of a joint Hindu Family and for better functional control of the ever expanding wealth of the joint family, management and control of the hotch-pot over different assets were given to different family members to act as a custodian. Adarsh Kumar Agarwalla and Devendra Kumar Agarwalla- the accused no.1 and 2 respectively were made the Directors of M/s Anup Malleables Ltd. and other Companies. Similarly, Anup Kumar Agarwalla and Asim Kumar Agarwalla were made the Directors of B.L.A. Industries and other properties. The accused persons conspired amongst themselves and made repeated attempts to alienate joint property by deceptive and fraudulent means and with that intention, created forged documents/agreements to oust the complainant from his legitimate share and misappropriated family property causing wrongful loss to the complainant. When the complainant resisted, they assured not to indulge in any such nefarious design but in furtherance of their common intention, they again resorted to create documents keeping the complainant in dark for their unlawful gains, suppressed

important materials, manipulated accounts and financial data and never placed the balance sheet. Further allegation is that the accused persons committed fraud and sold the share of companies and also violated the direction of the Honble Calcutta High Court to transfer Jharia House property of H.D. Agarwalla a joint family trust to the complainant rather the accused persons deliberately submitted a false declaration to defraud the Court and the complainant and committed an offence in the nature of criminal breach of trust. Even after assurance when the joint family property was not partitioned, the complainant instituted the partition suit in a court of Civil Judge, Sr. Division-I, Dhanbad but during pendency of the said suit also, the accused persons sold the joint family properties including M/s. Anup Melliables Ltd. by an act 3 of criminal conspiracy and misappropriated the money. The complainant when came to know of the sale of the said Company, he tried to visit the factory premises but accused persons from Sl. No. 7 to 15 restrained him from entering into the premise and assaulted him also. The shares of the joint family property have also been transferred to accused nos. 7 to 14 at a huge price of Rupees 78 crores as informed by accused no.

7. Accused nos. 1 to 5 including the petitioners have misappropriated the entire money and when the complainant requested them to give his 1/5th share, he was abused and threatened and also assaulted by the accused nos. 1 to 5. Accused nos. 2 to 4 informed him that as there was a payment of only Rs. 30 crores, most of which has been set off by liabilities, there is no question of payment of his share.

3. After examination of the complainant on S.A. and other witnesses and after examining the available documents on record, the court below found the prima facie case and sufficient materials on record to proceed against the accused persons. Accordingly, the court took cognizance of the offence and directed to issue summons against the accused persons. Being aggrieved by the order taking cognizance, the petitioners preferred this criminal writ petition before this Court.

4. Learned senior counsel Mr. N.K. Agarwal appearing on behalf of the petitioners of W.P.(Cr.) No. 239 of 2015 and W.P.(Cr.) No. 241 of 2015 after taking the Court through the entire complaint petition and the allegations made in it and all other

relevant materials on record seriously contended that even if all the allegations made in the complaint are taken at their face value as true, no case under any provision of the Indian Penal Code, in which cognizance has been taken, is made out. It was further contended that the dispute between the parties are confined to the extent of their respective shares and for that a partition suit has been filed, such right even if denied by other co-sharers for any reason, the civil remedies are available and criminal proceedings cannot be taken recourse to for enforcing such a civil right. It was also submitted that a criminal proceeding between 4 the co-sharers of a joint family property should not be allowed to proceed rather it is mere an abuse of process of court and it would be unfair, even if there is any breach of an agreement. Learned senior counsel Mr. Agarwalla further submitted that the court below while taking cognizance of the offence failed to appreciate that now-a-days, there is a growing tendency to convert purely civil dispute into the criminal cases and before issuing process, it was the duty of the court to follow the mandates given by the Honble Supreme Court in several pronouncements. Learned counsel further dealing with the principles relating to exercise of jurisdiction of this court either under Section 482 of the Code of Criminal Procedure or under the extra ordinary jurisdiction as envisaged in Article 226 of the Constitution of India to quash the entire criminal proceedings including order taking cognizance specially when the dispute relates to civil nature submitted that the Honble Supreme Court in several cases have considered the similar issues and have given a clear guidelines. Some of them are mentioned herein below: (i) G. Sagar Suri and another Vs. State of U.P. and others; (2000) 2 SCC636 (ii) Indian Oil Corporation Vs. NEPC India Ltd. and others; (2006) 6 SCC736 (iii) Mohammed Ibrahim and others Vs. State of Bihar and others; (2009) 8 CCC751 (iv) GHCL Employees Stock Option Trust Vs. India INFOLINE Ltd.; (2013) 4 SCC505 and (v) Chandran Ratnaswami Vs. K.C. Palanisamy and others; (2013) 6 SCC740 Learned senior counsel relying upon the principles laid down in the above judgments submitted that when the matter, which is essentially of a civil nature, has been given a cloak of criminal offence, the criminal courts have to exercise a great deal of caution and proceeding should be quashed when the allegations made in the complaint do not prima facie constitute any offence. Learned counsel further submitted that when there is a criminal breach of contract or cheating or a

civil wrong and criminal offences are also available, 5 under such situations, if the act alleged would predominantly be a civil wrong, such an act does not constitute a criminal offence and, that too, when a partition suit is also pending between the parties. It was also submitted that the complainant has not produced or given details of any document/agreement which have been alleged to be forged or created to oust the complainant and all the allegations are bald and vague and do not constitute any offence so as to initiate a criminal proceeding against the accused persons. Lastly, it was submitted that the very initial ingredients of criminal breach of trust, which is entrustment is completely missing and there is no order of Calcutta High Court directing the petitioners to transfer the Jharia House to the complainant.

5. Besides the above submissions, learned senior counsel Mr. Anil Kumar Sinha appearing for the petitioner of W.P.(Cr.) No. 138 of 2015 adopting the above submissions further added that the entire criminal proceedings including the order taking cognizance is fit to be quashed as the allegations made in the complaint do not prima facie constitute any offence and it is a sheer abuse of the process of the court when the criminal proceeding has been initiated with malafidies/malice and the allegations are absurd and improbable.

6. Contrary to the aforesaid submissions, learned counsel appearing for the respondent-complainant submitted that a mere pendency of a civil action between the parties, can be no ground to quash the criminal proceeding, as between the civil and criminal proceedings, the criminal matters should be given precedence. Relying upon a judgment of the Honble Supreme Court in the case Kamala Devi Agarwal Vs. State of W.B. and others as reported in (2002) 1 SCC555 learned counsel contended that in the said case, the Honble Supreme Court has held that criminal prosecution cannot be thwarted at the initial stage merely because civil proceedings are also pending and almost similar view has been taken in almost all the judgments relied upon by the learned counsel for the petitioners. It 6 was also submitted that a civil proceeding has to be decided on the basis of probabilities while the criminal case has to be decided by adopting the standards of proving of beyond reasonable doubt. There is a very thin line of distinction between mere breach of contract and offence of cheating and it depends upon the intention of the

accused, which is the gist of the offence, and may be judged by his subsequent conduct. At this initial stage, truthfulness or otherwise of the allegations levelled by the complainant against the accused cannot be meticulously examined. Even if the accused is successful in creating some doubt or suspicion, it would not be proper to quash the entire proceedings or the order taking cognizance as the same would result in giving finality without allowing the complainant to adduce evidence to substantiate the allegations.

7. In the light of the factual position and allegations made in the complaint, the question that falls for consideration is as to whether on the facts disclosed in the petition of complaint, any criminal offence whatsoever is made out much less offences under Section 403, 406, 417, 421, 465 and 120-B of I.P.C. and other provisions of the Indian Penal Code. Before I enter into the veils of submissions of the counsels and the factual aspect, I would like to discuss the principles laid down by Honble Supreme Court in cases relied upon by the parties to see as to when the continuance of criminal proceeding would amount to abuse of the process of the court and if civil remedies are available to a party, can a criminal prosecution be completely barred.

8. In *Pratibha Rani Vs. Suraj Kumar* ; (1985) 2 SCC370 a similar question was raised. In this case, the matter was related to Stri Dhan Property. The complainant alleged that her husband, father-in-law and other relatives misappropriated her jewelry and other valuable articles entrusted to them by her parents at the time of marriage and that these dowry articles were meant for her exclusive use and that the accused misbehaved and maltreated her and 7 ultimately they turned her out without returning the dowry articles. The accused contended that the dispute was of a civil nature and no criminal prosecution would lie. Under that circumstance, the Honble Supreme Court held in para 21 as under:-

21. There are a large number of cases where criminal law and civil law can run side by side. The two remedies are not mutually exclusive but clearly coextensive and essentially differ in their content and consequence. The object of the criminal law is to punish an offender who commits an offence against a person, property or the state for which the accused, on proof of the offence, is deprived of his liberty

and in some cases even his life. This does not, however, affect the civil remedies at all for suing the wrong doer in cases like arson, accidents etc. It is an anathema to suppose that when a civil remedies is available, a criminal prosecution is completely barred. The two type of actions are quite different in content, scope and import.

9. Learned counsel for the petitioners has relied on a judgment of the Honble Supreme Court in the case Indian Oil Corporation Vs. NEPC India Ltd.(supra) wherein the Honble supreme Court considering several judgments, including the judgments relied upon by the petitioners, laid down the principles, which are give herein below for proper appreciation of the issue involved in this case: (i) A complaint can be quashed where the allegations made in 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 the case alleged against the accused. For this purpose, the complainant has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint. (ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal 8 proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently and with abundant caution. (iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution. (iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warrant only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence. (v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the

mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

10. In the above mentioned case, the Honble Supreme Court has taken a view that when the complaint does not disclose any criminal offence, the proceeding is liable to be quashed but the Honble Court has also held that when a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegation in the complaint disclose a criminal offence or not. However, in the instant case, the situation is different. Let me examine the matter keeping the said 9 principles in mind. The court of learned Magistrate has taken cognizance of the offence under Sections 323, 341, 403, 406, 417, 421, 423, 424, 465 and 120-B I.P.C. Since the question relates to dispute of a civil nature but as it contains the ingredients of criminal offences also, let the consideration be restricted to Sections 403, 406, 417, 421 and 465 of I.P.C. only.

11. Section 403 I.P.C. provides that whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. From mere perusal of the provision, it appears that there are two things necessary before an offence under Section 403 I.P.C. can be established- (i) that the property must be misappropriated or converted to the use of the accused and (ii) that he must appropriate or convert it dishonestly. In the instant case, the complainant claiming himself to be a co-sharer along with the accused persons including the petitioners has claimed that though the property has not been partitioned by metes and bounds, the accused persons are selling the property including the Flag Bearer Company M/s. Anup Malleables Ltd. and dishonestly misappropriated the property and converting the same for their use and have also sold the joint family shares of different companies. This has been done during pendency of the partition suit. Obviously, the ingredients responsible to constitute the offence prima facie appears to be available. However, learned counsel for the petitioners submitted that the complainant had already sold his

shares of those Companies long back and nothing has been brought on record to show that the accused persons by any illegal act or deceitful means have cheated the complainant.

12. Another Section in which cognizance has been taken is Section 406 I.P.C., which deals with the punishment for criminal breach of trust. Section 405 of I.P.C. defines criminal breach of trust. The offence of criminal breach of trust involves the acts of (i) entrustment of the property; or (ii) a dishonest misappropriation or conversion of the property by the agent to his own use; or (iii) dishonest use or disposal of the property in violation of mandate of law prescribing the mode in which the entrustment is to be discharged; or (iv) dishonest use or disposal of the property in violation of the terms of any legal contract either express or implied regarding the discharge of the entrustment or willfully allowing some other person to do so. The complainant in paragraph 1 of the complaint petition has stated that for better financial control of the ever expanding wealth of the joint family, the management and control over different assets were entrusted to different family members to act as a custodian. Accordingly accused persons were made Directors of the M/s. Anup Melliabes Ltd. and B.L.A. Industries Ltd. besides other properties. The burden of proving the entrustment and dishonest intention is undoubtedly on the prosecution but this is not the stage to make a meticulous examination of the ingredients responsible to constitute the offence. It is true that a mere breach of contract or breach of trust cannot give rise to a criminal prosecution unless fraudulent or dishonest intention is shown right at the beginning of the transaction. A Memorandum Of Understanding (MOU) was also created by the accused persons with promise with complainant to transfer him 4 acres of land in lieu of 35 acres of joint family land but without taking any step for transfer of the said land, the entire 35 acres of joint family except 2 acres were sold to accused no. 7 Manoj Agrawalla and the accused persons misappropriated the entire sale proceeds. Learned counsel for the petitioners submitted that the alleged breach of purported MOU cannot be a criminal breach of trust as there was no entrustment or allegation of fraudulent entrustment and misappropriation against the accused persons in the complaint petition and in absence of any allegation of entrustment, no offence of criminal breach of trust is made out. In support of his contention, the learned counsel has relied on the case Indian Oil 11

Corporation Vs. NEPC India Ltd. and others (supra) wherein at para 31, it has been held as follows:-

31. We accordingly hold that the basic and very first ingredient of criminal breach of trust, that is, entrustment, is missing and therefore, even if all the allegations in the complaint are taken at their face value as true, no case of criminal breach of trust as defined under Section 405 I.P.C. can be made out against NEPC India. In the instant case, prima facie there appears to be entrustment of the joint family property, hence, the defence taken by the petitioners has to be put forth and considered during the trial. Even if the defence taken by him may lead to acquittal, it is no ground to quash the complaint at the very beginning of the criminal proceeding. At this stage, the only concern is whether the averment made in the complaint speaks of the ingredients of a criminal offence or not. It is not necessary or expecting from the complainant that he would reproduce all the ingredients of offence in the complaint.

13. Section 417 I.P.C., which relates to punishment for cheating, is in fact dealt with in Section 415, which defines or states the essential ingredients of the offence of cheating. The essential ingredients responsible to constitute offence of cheating are- (i) deception of a person either by making a false or misleading representation or by other action or omission; (ii) fraudulently or dishonestly inducing that person to either deliver any property to any person; or to consent that any person shall retain any property; or intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. In order to establish the offence of cheating, it is essential to prove that the accused persons had fraudulent or dishonest intention at the time of making the promise or from very beginning. 12 14. In Hridaya Ranjan Prasad Verma and others Vs. State of Bihar and another; (2000) 4 SCC168 the Honble Supreme Court in para 15 has held as follows:-

15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may

be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating, it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.

15. In the instant case, there is a clear allegation in the complaint that by entering into MOU, it was promised to hand over 4 acres of land in lieu of 35 acres of joint family land by Devendra Agrawalla, one of the accused, but with dishonest or fraudulent intention, the entire land was sold to accused no. 7 Manoj Agarwalla and the accused no.2 misappropriated the entire said proceeds and also transferred two acres in the name of his daughter-in-law. Now, it has to be seen on the basis of that allegation as to whether the necessary allegations exist in the complaint to bring the accused within four corners of Section 415 of I.P.C. or not. In my opinion, the allegations in the complaint prima facie constitute the offence as alleged.

16. Section 465 I.P.C. deals with punishment for forgery and in fact the word forgery is defined in Section 463 of the I.P.C. While Section 464 I.P.C. defines making of a false document. The basic elements of forgery are (i) the making of a false document or part of it; and (ii) such making should be with such intention as is 13 satisfied in the Section, viz-a-viz (a) to cause damage or injury to the public or any person or (b) to support any claim or title; or (c) to cause any person to part with property; or (d) to cause any person to enter into an express or implied contract; or (e) to commit fraud or that fraud may be committed.

17. In a case Kamala Devi Agarwal Vs. State of W.B. and others (supra) while considering a similar issue the Honble Supreme Court held as follows:- The High Court was not justified in quashing the proceedings initiated by the appellant against the respondents. We are also not impressed by the argument that as the

civil suit was pending in the High Court, the Magistrate was not justified to proceed with the criminal case either in law or on the basis of propriety. Criminal cases have to be proceeded with in accordance with the procedure as prescribed under the Code of Criminal Procedure and the pendency of a civil action in a different court even though higher in status and authority, cannot be made a basis for quashing of the proceedings.

18. I would like to mention here that the allegation in the complaint clearly stipulates that the accused persons, who were the members of joint family and to whom the joint family property was entrusted and were custodian, by creating documents sold the property and even the shares of the joint family property. It is true that no forged document has been brought on record by the complainant to show that the accused persons had created forged documents but at this stage, I am not concerned with proof of such allegation or ultimate outcome of the trial but the Court has only to see firstly whether all the allegations, if conjointly read, disclose any criminal offence or not. It is a well settled position of law that the nature and scope of civil and criminal proceedings and the standard of proof required in both matters is different and distinct. The disputed and controversial facts cannot be made the basis for the exercise of the jurisdiction. If there are prima facie materials available 14 on record, a petition for quashing the criminal proceedings cannot be entertained.

19. While considering the facts of the instant case, I am of the considered opinion that the present case is not one of those cases where criminal prosecution can be quashed at the very threshold. It is true that a defence case is pleaded but such defence is required to be considered at a later stage. The petitioners would have ample opportunities to raise all the issues raised here at an appropriate later stage.

20. In view of the aforesaid discussions, I find that it would not be proper for this Court to interfere with the criminal proceeding at this stage and also in the order taking cognizance by the court below. The three Writ Petitions (Cr.) are consequently dismissed. (R.N. Verma, J.) Jharkhand High Court, Ranchi Dated, 25th August, 2015 Ritesh/N.A.F.R.

