

Niren Moitra and anr. Vs. Protap Kumar Ghosh and anr.

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Court : Kolkata

Decided On : Feb-07-2008

Reported in : 2008CriLJ2142

Judge : Arunabha Basu, J.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 155(2), 156(1), 401 and 482; [Indian Penal Code \(IPC\), 1860](#) - Sections 120B, 415 and 420

Appeal No. : C.R.R. No. 432 of 2007

Appellant : Niren Moitra and anr.

Respondent : Protap Kumar Ghosh and anr.

Advocate for Def. : Himangshu De, Sr. Counsel and ;Suman De, Adv.

Advocate for Pet/Ap. : P.P. Das, Adv.

Judgement :

ORDER

Arunabha Basu, J.

1. The revisional application under Section 482 read with Section 401 of the Code of Criminal Procedure is directed for quashing the proceeding being Complaint Case No. 56/2004 under Section 420/120B of Indian Penal Code now pending

before the Court of learned 5th Judicial Magistrate at Barrackpore.

2. Petitioners herein are arrayed as accused in connection with the said case, as mentioned above. The petitioners are facing trial for commission of offence punishable under Section 420/120B of the Indian Penal Code and from the certified copies of the order annexed along with the application, it appears that the case is now pending at a stage for evidence before charge.

3. It is the contention of the petitioners that opposite party No. 1 is a practising advocate at Alipore. The said opposite party No. 1 was professionally engaged by the petitioners in connection with ULC Case No. 6(1)/18/V-17/76. The said opposite party No. 2 instituted the complaint case under challenge on the ground that he was engaged in his professional capacity by the petitioners in connection with the vesting proceeding being ULC Case No. 6(1)/18/V-17/76. The opposite party No. 1 in his capacity as an Advocate rendered legal advice and assistance and the petitioners executed vakalatnama in favour of the opposite party No. 1. At para 10 of the petition of complaint, it is specifically averred that it was agreed between the parties that if the property is released by the land ceiling authority then the opposite party No. 1 will receive a sum of Rs. 5 lakhs inclusive of his professional fees. The opposite party No. 1 stated that the said property was ultimately released after prolonged hearing and the opposite party No. 1 spent considerable amount in connection with the said proceeding. It is also averred in the petition of complaint that petitioner issued two Account Payee cheque In favour of the opposite party No. 1 spent considerable amount in connection with the said proceeding. It is also averred in the petition of complaint that petitioner issued two Account Payee cheque in favour of the opposite party No. 1 respectively dated 6-11-2001 and 12-11-2001, each amounting to Rs. 2,50,000/-.

4. It is also averred in the petition of complaint that the petitioners requested the opposite party No. 1 not to present those cheques for encashment unless the entire property is being sold. The opposite party No. 1 being so assured did not encash the said cheques by depositing the said cheques for encashment before the bank. It is also alleged in the petition of complaint that the opposite party No. 1 demanded the payment of the amount and ultimately a lawyer notice was issued.

But the amount remained unpaid and it is the allegation in the petition of complaint that petitioners cheated the opposite party No. 1 for an amount of Rs. 5 lakhs.

5. In order to attract Section 420 of the Indian Penal Code, which is the penal section for cheating and dishonestly inducing delivery of property, the case must come within the purview of Section 415 of the Indian Penal Code.

The section is set out below:

415. Cheating: Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived 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, is said to 'cheat'.

6. The Section 415 of the Indian Penal Code consists of two distinct parts, each part dealing one way of cheating. The first part contemplates whereby deception practiced upon a person, the accused fraudulently or dishonestly induces that person so deceived to deliver any property to any person, or to consent that any person shall retain, any property. The second part, on the other hand, envisages whereby deception practiced upon a person, the accused intentionally induces that person to do or omit to do anything which he would not do or omit to do, if he were not so deceived and which act or omission caused or was likely to cause damage or harm to that person in body, mind, reputation or property.

7. Learned Advocate for the petitioner submitted that the petition of complaint does not disclose any offence within the four corners of the Indian Penal Code. In the petition of complaint, according to learned Advocate for the petitioner, it is disclosed about the relationship between client and Advocate. If the petition of complaint is taken as a whole then it appears that petitioners engaged opposite party No. 1 as their advocate by executing Vaklatnama in connection with the legal proceeding pending before the authority.

8. It was agreed between the parties that the opposite party No. 1 would be paid an amount of Rs. 5 lakhs as his legal remuneration if the property could be released from the authority. The petition of complaint further shows that after the property is released, opposite party No. 1 paid the amount of Rs. 5 lakhs as the petitioners issued two cheques each amounting to Rs. 2,50,000/.

9. Learned Advocate for the opposite party No. 1 submitted that this is not a fit case where the proceeding now pending before the learned Court below should be quashed. It is the contention of the learned Advocate for the opposite party No. 1 that the power to invoke the inherent jurisdiction of this Court should be sparingly used and only in rarest of rare case, High Court shall exercise its inherent powers.

10. In support of his contention, learned Advocate has referred to the following decisions:

1. Shiva Nath Prasad v. The State of West Bengal (2006) 1 C Cr LR (Cal) 231.
2. Medchl Chemicals and Pharma P. Ltd. v. Biological E. Ltd. 2000 C Cr LR (SC) 488 : 2000 Cri LJ 1487.
3. State of Karnataka v. M. Devendrappa 2002 SCC (Cri) 539 : 2002 Cri LJ 998.
4. Lalmuni Devi (Smt.) v. State of Bihar 2001 SCC (Cri) 275 : 2001 AIR SCW 2504.
5. M. Narayandas v. State of Karnataka 2004 SCC (Cri) 118 : 2004 Cri LJ 822.
6. State of Haryana v. Jagbir Singh 2004 SCC (Cri) 126 : 2003 Cri LJ 5054.
7. S.M.S. Pharmaceuticals Ltd. v. Seeta Bhalla 2005 SCC (Cri) 1975 : 2005 Cri LJ 4140.
8. State of M.P. v. Dayal Sahu 2005 SCC (Cri) 1988 : 2005 Cri LJ 4375.
9. Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi : 1976 CriLJ1533 .
10. Narendrakumar J. Modi v. Commissioner of Income-tax, Gujarat II : [1976]105ITR109(SC) .

11. Kamaladevi v. State of W.B. 2002 SCC (Cri) 200 : 2001 Cri LJ 4733.
12. Panchdeo Singh v. State of Bihar 2002 SCC (Cri) 211 : 2002 Cri LJ 973.
13. Rashmi Kumar (Smt.) v. Mahesh Kumar Bhada 1997 SCC (Cri) 415.
14. Government of A.P. v. G. Lakshman Reddy 1997 SCC (Cri) 427 : 1997 Cri LJ 3127.
15. K.G. Premshanker v. Inspector of Police 2002 C Cr LR (SC) 1041 : 2002 Cri LJ 4343.

11. It may be pointed out in this context that decision will be applicable only on a facts situation of the particular case. So far as the legal proposition as sought to be argued by the learned Advocate appearing for the opposite party No. 1 about the scope of inherent power under Section 482 of the Code of Criminal Procedure, the same came up for consideration before the Hon'ble Supreme Court in State of Haryana v. Bhajan Lal reported in 1992 Supp (1) SCC 335 : 1992 Cri LJ 527.

12. Two Judges Bench of the Hon'ble Supreme Court considered the scope of inherent powers of High Court and issued certain guidelines.

13. It is fruitful to reproduce the relevant portion of the said judgment at para 102.

102...

(1) Where the allegations made in the first information report or the complainant, 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 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.

14. The said decision as referred to above, is followed in number of other judgments passed by the Hon'ble Supreme Court.

15. In *Didigam Bikshapathi v. State of A.P.* reported in 2007 AIR SCW 7411 : 2008 Cri LJ 724, the Hon'ble Supreme Court quoted with approval the earlier decisions in *Bhajan Lal 1992 Cri LJ 527 (supra)* case. It is now more or less settled position of law that the power vested under Section 482 of the Code of Criminal Procedure is required to be exercised only in rarest of rare cases. While exercising its power under Section 482 of the Code of Criminal Procedure, High Court shall not weigh the evidence to examine whether the evidence is sufficient to establish the charge against the accused persons.

16. So far as the present case is concerned, the petitioner has raised an interesting proposition by challenging the proceeding, now pending before the

learned Court below, whether the client can be fastened with criminal liability by the lawyer, even if the fees agreed between the parties remains not paid. This point is required to be examined in the facts situation of the particular case and also keeping in view about the ingredients to constitute the offence of cheating as provided under Section 415 of the Indian Penal Code.

17. The entire allegation as disclosed in the petition of complaint, does not show that the opposite party No. 1 being deceived parted with any property, as such the first part of Section 415 will not be applicable here, Opposite party No. 1 in his capacity as an advocate entered into a contract with his clients to do a particular professional act and it was agreed that a certain amount will be paid to opposite party No. 1 as his legal remuneration. The said remuneration being Rs. 5 lakhs and according to the recital in the petition of complaint, it is admitted by the opposite party No. 1 that cheques bearing No. 231436 and 231439 dated 6-11-2001 and 12-11-2001, both amounting to Rs. 2,50,000/- was issued by the petitioner No. 1 to opposite party No. 1. So it is evident that the petitioners completed their part of the contract by issuing the cheques of total amount of Rs. 5 lakhs. It is not the case of opposite party No. 1 that the cheque issued was presented before the bank for encashment but could not be encashed due to insufficient fund or otherwise. It is the specific case of the opposite party No. 1 that he did not present the cheque to bank being so requested by the petitioners.

18. It may be pointed out that cheque, if the same is not revalidated, becomes ineffective after expiry of certain period and that period is already over. So far as the present case is concerned, the allegation in the petition of complaint appears to be that being requested by the petitioners, the opposite party No. 1 did not present the cheque for encashment.

19. It is the categorical case of the opposite party No. 1 that the amount agreed to be paid as his professional fee was Rs. 5 lakhs and the same were paid by issuing two account payee cheques in favour of opposite party No. 1.

20. The petition of complaint is altogether silent about not presenting the cheque before the bank immediately after the same was received by the opposite party No. 1. The reason for not presenting of the cheque, as recited in the petition of

complainant, appears to be an attempt on the part of the opposite party No. 1 only to rope in the petitioners in connection with the criminal charge. The transaction that was entered between the parties is a purely civil transaction and the criminal case appears to have been instituted only to fasten the petitioners with a trampled up charge. There is no ingredient to attract the offence under Section 420 of the IPC. The conduct of the opposite party No. 1 shows that he has initiated the criminal case against the petitioners only to force them to dance according to his tunes and such criminal case, which is only instituted to harass the petitioners, cannot be allowed to continue.

21. A lawyer is of course entitled to his legal remuneration and in his case that legal remuneration was in fact paid by the petitioners by issuing account payee cheques. There is no question about the legality and validity of the cheques issued by the petitioners to opposite party No. 1. Could be raised in the petition of complaint, save and except that opposite party No. 1 was requested not to present the cheque to the bank. The opposite party No. 1, being a lawyer could have easily asked for revalidation of the cheque before the expiry of its period but there is nothing to show that he did anything which any normal prudent man will do.

22. It may be pointed out that the contractual relationship between the petitioners as client with opposite party No. 1 was complete, as and when the petitioners issued the cheques amounting to Rs. 5 lacs in favour of opposite party. It is not the case of the opposite party as disclosed in the petition of complaint, that cheques issued by the petitioners could not be encashed due to shortage of fund or such other reasons. It is the categorical case of the opposite party in his petition of complaint that for the professional service rendered by opposite party, it was agreed that he will be paid remuneration of Rs. 5 lacs. If that be so, then, there is no earthly reason as to why the opposite party in his capacity as lawyer to the petitioners will wait for encashment of the cheque. The opposite party was paid his legal fees, as agreed between the parties and as such the contract between the petitioners and the opposite party is terminated, when the petitioners issued two cheques amounting to Rs. 5 lacs.

23. It is evident that the opposite party No. 1 did nothing about recovery of his legal remuneration and only filed the complaint case under challenge in the year 2004. It is also evident from the certified copies of the order that before the Court, opposite party No. 1 moved an application praying for direction before the learned Court below (which is exercising criminal jurisdiction) to restrain the petitioners from transferring the property at 6B, Iron Side Road. The application was rightly rejected by the learned Court below but it further shows the conduct of opposite party No. 1, who is an Advocate about his real intention of filing the complaint case before the learned Court below.

24. In view of my above findings, none of the decisions as referred to learned Advocate appearing for the opposite party No. 1 will be applicable in this case. A bare perusal of the petition of complaint will show that no offence within the four corners of Indian Penal Code is committed in this case by the petitioners. It is really unfortunate that the complaint case has been instituted without any materials only to harass the petitioners in a make shift charge. The inherent power of this Court is required to be exercised only in these types of rarest of rare cases.

25. The proceeding being complaint case No. 56/2004, now pending before the Court of learned 5th Judicial Magistrate at Barrackpore under Section 420/120B of the Indian Penal Code stands quashed. There shall be no order as to costs.

26. Criminal section is directed to send a copy of the order to learned Court below immediately.

27. Criminal section is also directed to supply certified copies of the order as and when applied for.