

(2010) 08 JH CK 0014

Jharkhand High Court

Case No: Criminal M.P. No. 670 of 2010

Indrajit Banerjee, Jeet Banerjee
and Malavika Banerjee

APPELLANT

Vs

The State of Jharkhand,
Mahendra Singh Dhoni and The
Investigating Officer, Doranda
Police Station

RESPONDENT

Date of Decision: Aug. 27, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 250, 482
- Penal Code, 1860 (IPC) - Section 34, 406, 409, 420

Hon'ble Judges: D.G.R. Patnaik, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

D.G.R. Patnaik, J.

Heard learned Counsel for the Petitioners learned Counsel for the State and the learned Counsel for the opposite party No. 2 and with their consent, this case is taken up for disposal at the stage of admission.

2. Petitioners have filed the present petition for quashing the entire criminal proceeding which has been initiated against them on the basis of an FIR lodged by the opposite party No. 2 and registered as Doranda P.S. Case No. 208 of 2010 dated 15.6.2010 corresponding to G.R. No. 2477 of 2010, for the offences under Sections 406, 409, 420/34 IPC.

3. Facts relevant for the disposal of this case as appearing from the the contents of the FIR, are as follows:

The informant is a reputed well known cricketer having acquired substantial goodwill in this country and abroad.

The Petitioners, being the directors of a private limited company namely, M/s Game Plan Sports Private Limited, having their Head Office at Kolkata, approached the informant at his house at Ranchi and by representing themselves to be experts in managing marketing affairs, offered to represent the informant as his Agent in commercial contracts entered into between the informant and the various companies / advertisers for endorsing their products. Believing the Petitioners in bonafide good faith, the informant entered into an agreement with the Petitioners on 1st February 2005 for a period of three years, expiring on 31st January 2008, under which, the company represented by the Petitioners was engaged as the sole Manager-cum-Agent of the informant.

While entering into the agreement with the informant, the Petitioners had agreed and undertaken to enter into marketing contracts with the various commercial establishments on behalf of the informant for endorsing and marketing their products and to receive the the contract amounts from the various companies and to remit all such amounts received by them to the informant promptly.

Between 1st of February 2005 to 31st January 2008, the accused persons had received substantial amounts from the various companies/advertisers.

After expiry of the period of agreement, the Petitioners were informed by the informant that the period was not extended and thereby, they had lost their status to represent the informant as his sole Manager-cum-Agent. However, the informant had permitted them to act as his Agent on freelance baste only in connection with three companies with whom contracts were entered into during the subsistence of the agency namely, Bharat Petroleum, M/s Titan Industries and M/s Lafarze Cement.

The informant has alleged that on the basis of the tripartite agreements entered into before 31st January 2008, the accused/Petitioners had received substantial amounts from the various companies of which a sum of Rs. 8,44,20,169/- was payable to the informant, but the Petitioners have illegally and dishonestly misappropriated the money. Furthermore, during the period when the Petitioners were engaged by the informant as his Manager-cum-Agent on freelance basis after 31st January 2008, they had received a total sum of Rs. 2,02,50,000/- from the three companies, but they had intentionally and dishonestly failed to account for the money and to hand over the money to the informant The failure of the accused Petitioners to respond to the numerous calls made by the informant, had led him to institute a money suit for realization of his dues from the Petitioners and being aggrieved with the alleged criminal conduct of the accused persons, the present FIR was filed.

4. Petitioners have assailed the FIR and the continuation of the criminal proceeding against them basically on the ground that no criminal offence is made out from the

entire allegations in the FIR. Rather, the facts would indicate that the dispute arose on account of non-accounting of the sums received by the Petitioners from the various companies and such dispute is exclusively a civil dispute and the informant has already instituted a civil proceeding in the High court at Kolkata for realization of money.

5. Elaborating the grounds, Shri B.M. Tripathy, learned Senior Advocate representing the Petitioners, would submit that even as admitted in the terms of the agreement referred to by the informant in his FIR, the Petitioners had authority to receive the contract amounts from the various companies /advertisers whose products the informant had agreed to endorse for marketing. During the three years period of agreement, the Petitioners had entered into several contracts with the various companies and the period of such contracts had extended even beyond 31st January 2008 and therefore, the mere termination of the agreement entered into between the Petitioners and the informant on 31st January 2008, could not have abrogated the rights of the Petitioners to realize money from all such companies/advertisers with whom the contract period had continued to operate.

Learned Counsel explains further that when on the plea that the contract period had expired on 31st January 2008, the informant engaged other Agents who had entered into a fresh negotiation with some of the companies, the Petitioners raised their objections on the ground that the tripartite agreement which was entered into between the Petitioners and the various companies / advertisers, on behalf of the informant, had not ceased and till the period of operation of such contracts, the Petitioners could not possibly be ousted by the informant, nor deprived from the benefits of such contracts by the informant. Learned Counsel adds that even as admitted in the terms of agreement, the Petitioners are entitled to retain their commission @30% irrespective of the fact that the agreement with the informant had ended on 31st January 2008. When the informant by his unilateral decision, had engaged other Agents to represent him with the various companies, the Petitioners had declared their right of exercising their lien on the ground that they are entitled to get 30% commission in the amounts which may have been collected by the newly appointed Agents of the informant from some of the clients. Learned Counsel adds that the informant has already instituted a Civil Suit before the Kolkata High Court vide C.S. No. 100 of 2010 for a decree of sum of Rs. 8,18,61,718/- and for rendition of accounts and also for interim interest and interest on judgment @12% per annum.

On an interim application filed by the complainant/Plaintiff, the Kolkata High Court had passed an ex-parte order restraining the Petitioners' company namely, Game Plan Sport Private. Limited from operating its Bank Account without keeping part of the sum of Rs. 8,18,61,718/-. When the Petitioners brought to the knowledge of the court certain material evidence which were intentionally suppressed by the complainant/Plaintiff, the court had reduced the amount to Rs. 5.21 crores. Learned Counsel adds that even otherwise, the allegation in the FIR do not confirm that

there was any dishonest intention on the part of the Petitioners from the very inception i.e. from the date on which they had entered into the agreement with the informant in 2005 and neither can it be said that the Petitioners had committed any act of criminal misappropriation or criminal breach of trust" since the dispute relates to rendition of account and is purely of a civil nature.

Learned Counsel submits further that the present criminal proceeding has been filed by the informant only to harass the Petitioners and to cause insult and loss of prestige to the company owned by the Petitioners and the FIR has been filed with malafide intention to avenge the private and personal grudge against the Petitioners.

6. To buttress his argument, learned Counsel would refer to and rely upon the following judgments of the Supreme Court:

I. V.Y. Josh v. State of Gujarat and Anr. (2009) 1 SCC 996

II. Vir Prakash Sharms v. Anil Agarwal (2007) 3 SCC 370

III. Ajay Mitra v. State of M.P. 2003 SCC 1 703

IV. I.O.C v. NEPC India Ltd (2006) 3 SCC 188

7. Counsel for the opposite party No. 2 and counsel for the State, on the other hand, would submit that the grounds advanced by the Petitioners are totally misconceived, misleading and not maintainable.

Shri Indrajeet Sinha, learned Counsel for the opposite party No. 2 would submit that merely because the dispute arose on account of breach of contract and a civil remedy is available to the aggrieved party, this, in itself, would not give any immunity to the Petitioners from criminal prosecution on the same fact for which criminal offence is made out

8. Reading out the contents of the FIR, learned Counsel explains that the acts of the Petitioners as alleged in the FIR, would indicate that the Petitioners, acting as Agents of the informant, had realized substantial amounts of money from the various companies/advertisers and instead of promptly delivering the amounts to which the informant was entitled, have illegally retained the same and have criminally misappropriated the money on the false and misleading plea that they are entitled to retain the amount for the purposes of realizing their own commission even against future expected unascertained amounts which may be payable by the various companies, on the basis of contracts entered into with them not by the Petitioners, but by other Agents engaged by the informant after 31st January 2008. Such illegal retention of money not only amounts to criminal misappropriation but also to criminal breach of trust, and for which the Petitioners are criminally liable. To buttress his arguments, learned Counsel would refer to and rely upon the following judgments of the Supreme Court: (i) Indian Oil Corporation v. NEPC India Ltd and

Ors. (2006) 3 SCC 188, (ii) [Mahesh Choudhary Vs. State of Rajasthan and Another](#), and (iii) [M. Krishnan Vs. Vijay Singh and Another](#), .

9. From the rival arguments, the issue which arise for determination are:

i. Whether in a case of dispute arising from breach of contract, when civil remedy is available and is availed of by the aggrieved party, can criminal liability be attached on the same facts?

ii. What is the scope of the inherent powers of this Court under provisions of Section 482 of the Code of Criminal Procedure for quashing the criminal complaint in such cases?

iii. Whether, the facts of the present case do disclose prima facie" any offence justifying the criminal prosecution against the Petitioners?

10. The legal position in regard to exercise of jurisdiction by the High Court for quashing of a FIR, is now well settled by a catena of judgments of the Supreme Court. To mention a few, the judgments in the following cases may be mentioned:

(i). [Madhavrao Jiwajirao Scindia and Others Vs. Sambhajirao Chandojirao Angre and Others](#), , (ii.) State of Haryana v. Choudhary Bhajan Lal 1992 SCC 426, (iii.) [Mrs. Rupan Deol Bajaj and another Vs. Kanwar Pal Singh Gill and another](#), and (iv.) [Zandu Pharmaceutical Works Ltd. and Others Vs. Md. Sharaful Haque and Others](#), .

11. The principles which have been enunciated by the Supreme Court in each of the above mentioned cases may be quoted in the following terms:

... The inherent powers for quashing the proceedings at the initial stage can be exercised only where the allegations made in the complaint or the first information report, even if taken on their face value and accepted in their entirety, do not prima facie disclose the commission of an offence or where the uncontroverted allegation made in the FIR or complaint and the evidence relied in support of the same do not disclose the commission of any offence against the accused, or the allegations are so absurd and inherently improbable that on the basis of which no prudent person could have reached a just conclusion that there was sufficient grounds in proceeding against the accused or where there is an express legal bar engrafted in any provisions of the Code or any other statute to the institution and continuance of the criminal proceedings or where a criminal proceeding is manifestly actuated with mala fide and has been initiated maliciously with the ulterior motive for wrecking vengeance on the accused and with a view to spite him due to private and persons grudge.

12. On the issue as to whether in the case of dispute arising from breach of contract where civil remedy which was available and has already been availed of, the remedy under the criminal law is barred?

13. While reiterating the ratio decided in earlier cases, the Supreme Court in the case of [M. Krishnan Vs. Vijay Singh and Another](#), has held in the following terms.

The mere pendency of the civil suit between the parties, cannot be a ground for quashing the criminal proceedings against the accused and if permitted, such practice would be an easy way out for accused to avoid criminal proceedings.

In the case of [Rajesh Bajaj Vs. State NCT of Delhi and Others](#), Supreme Court has observed as follows:

It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions. One of the illustration.

In the case of Indian Oil Corporation v. NEPC India Ltd and Ors. (2006) 3 SCC 188 while laying down the principles, the Supreme Court has observed in the following terms:

If the allegation in the complaint taken at their face value disclose a criminal offence, complaint cannot be quashed merely because it relates to a commercial transaction or breach of contract for which civil remedy is available or has been availed of - A commercial transaction or dispute may also involve criminal offence - if it is found that a frivolous criminal complaint had been filed knowing well that remedy lay only in civil law, person who filed such complaint should himself be made accountable in accordance with law at the end of such proceeding -- court should exercise power u/s 250 Code of Criminal Procedure frequently where there is malice or frivolousness or ulterior motives on the part of the complainant.

14. I have carefully gone through the judgments referred to by the counsel for the Petitioners and I find that none of the judgments would apply in the facts and circumstances of the present case.

In the cases of V.Y. Josh (Supra), Ved Prakash Sharma (Supra) and Ajay Mitra v. State of M.P. and Ors. (Supra), the Apex Court while considering the facts of the individual cases, has drawn a distinction between mere breach of contract and the offence of cheating and after analyzing the facts of the cases, has held that the mere breach of contract does not necessarily involve cheating.

In the case of Indian Oil Corporation v. NEPC India Ltd and Ors. (Supra), the Supreme Court has reiterated the well settled principles which guide the exercise of inherent powers of the High Court u/s 482 Code of Criminal Procedure while considering as to whether the criminal proceeding should be quashed in view of the pendency of the civil proceeding. While analyzing the facts of the case, the court had also taken note of the pleadings raised in defence by the Petitioner therein and has observed as follows:

Such defence shall have to be put forth and considered during the trial. Defences that may be available or facts/aspects when established during the trial, may lead to acquittal, are not grounds for quashing the complaint at the threshold. At this stage, the only question relevant is whether the averments in the complaint spell out the ingredients of a Criminal offence or not.

15. As to the question whether the facts of the present case would disclose prima facie any offence justifying the criminal prosecution against the Petitioners, the contents of the FIR May once again be referred to.

The gist of the allegation in the FIR in the present case is that the Petitioners being the directors of the private limited company, had approached the complainant with their offer to represent him as his marketing Agents to enter into contract on behalf of the informant with the various companies/advertisers for marketing of their products to be endorsed by the informant. The Petitioners have allegedly convinced the informant that they would receive the contract amounts from the various companies/advertisers for and on behalf of the informant, and handover all such sums to the informant to which he was entitled under the contract. Believing the representation of the Petitioners in good faith, the informant had entered into an agreement with them for a period of three years. The Petitioners, under the agreement, obtained authority from the informant to enter into contracts and receive monies on behalf of the informant during the contract period, from the several companies/advertisers, The period had continued till three years and after lapse of the period, the contract was not renewed or extended.

It was inherent in terms of the agreement that the Petitioners being the Agents, should promptly account for each and every money received by them on behalf of the informant to" which he was entitled. Thus, the agreement between the Petitioners and the informant was that the Petitioners upon receiving the contract amounts from the various companies, would hold such amounts in trust for and on behalf of the informant and would promptly deliver to him all such monies.

The allegation against the Petitioners is that having received substantial amounts of money from the various companies/advertisers, the Petitioners have failed and neglected to account for and to pay the money to which the informant was entitled and that the Petitioners were illegally retaining such money with them for more than two years, from the date of receiving such monies and even after the lapse of the period of agreement. The further allegation is that the Petitioners are illegally continuing to represent the informant before the various companies/advertisers even after lapse of the period of agreement, without being authorized by him and continued to receive money from several companies in his name and on on his behalf, but had neither accounted for nor delivered the money to him. On such allegation, the informant has accused the Petitioners of having committed not only criminal breach of trust, but also criminal misappropriation of his money.

16. The fact that the Petitioners had, by representing themselves as the Agent of the informant, had received substantial amounts of money from the various companies, is not denied. The money so received by them, was on behalf of and in trust for the benefit of the informant.

17. From the averments contained in the present application and the submissions made by the counsel for the Petitioners, it appears that after the informant had instituted the civil proceeding and the present criminal case, the Petitioners have raised a ground of defence that since under the terms of agreement, they are entitled to 30% of the realized amount by way of their commission, they have a right of lien to retain the amount for realization of their share of commission. Such plea could perhaps be appreciated by reference to the documents relied upon by the Petitioners but only by the trial court. Such plea could also perhaps be appreciated, had the Petitioners accounted for the monies received by them on behalf of the informant truly and faithfully to him and had responded to the numerous calls during the period of two years. According to the informant's allegation, the Petitioners had no right to represent themselves as his marketing Agent before any company, except the three companies for which he had permitted the Petitioners to work on freelance basis. The fact that the Petitioners have intentionally retained the money belonging to the informant, is factually acknowledged by them. This inference may legitimately be drawn from the fact that even in the civil proceedings, the Kolkata High Court has restrained the Petitioners company from operating their Bank Account without keeping the amount of 5.21 crores. The Petitioners would want to explain that such retention of the informant's money was willful for the purpose of appropriation by way of adjustment of their share of commission in the commercial transaction against future unascertained payments yet to be received.

18. The above facts do suggest a reasonable inference that the Petitioners, having received the money from the various companies/advertisers for and on behalf of the informant, in trust for the benefit of the informant, but have breached the trust by willfully refusing to deliver all such amounts to which the informant was entitled and have been continuing with such willful retention for more than two years from the date of receiving the amounts. The allegation of the informant that the Petitioners have dishonestly retained his money for making wrongful gain for themselves and wrongful loss to him, is not without a reasonable basis.

The allegation in the F.I.R., in my opinion, do lay down a factual prima facie case for the offences of criminal breach of trust and criminal misappropriation of money belonging to the informant. The allegation made in the FIR do require thorough investigation and adjudication. The FIR cannot, therefore, be aborted in the manner as prayed for by the Petitioners, in exercise of inherent jurisdiction of this Court u/s 482 Code of Criminal Procedure.

19. In the light of facts and circumstances of the case and the discussions made above, I do not find any merit in this application. Accordingly, this application is

dismissed. The interim order of protection granted to the Petitioners, is hereby vacated.