

Bijay Agarwal Vs State of West Bengal

Court: CALCUTTA HIGH COURT

Date of Decision: July 1, 2016

Acts Referred: Criminal Procedure Code, 1973 (CrPC) - Section 482
Penal Code, 1860 (IPC) - Section 120B, Section 406, Section 420, Section 506

Citation: (2016) 4 AICLR 43 : (2016) 4 CalHCN 92

Hon'ble Judges: Ranjit Kumar Bag, J.

Bench: Single Bench

Advocate: Mr. Sandipan Ganguly, Mr. Rohan Ojha, Ms. Sanandita Chakraberty, Advocates, for the Opposite Party No. 2; Mr. Imran Ali, Advocate, for the Opposite Party/State; Mr. Sabyasachi Banerjee, (Reportable) Mr. Ayan Bhattacharjee, Mr. Pratim Priya Dasgupta, Advoc

Final Decision: Disposed Off

Judgement

Ranjit Kumar Bag, J. - The petitioners have prayed for quashing of the criminal proceeding of G.R. no.1242 of 2015 arising out of Burrabazar

Police Station Case no.273 dated May 7, 2015 under Sections 120B/420/406/506 of the Indian Penal Code pending before the court of learned

Additional Chief Metropolitan Magistrate, Calcutta.

2. The opposite party no.2 filed a written complaint before the Officer-in-Charge of Burrabazar Police Station on the basis of which Burrabazar

Police Station Case no.273 dated May 7, 2015 was registered. It is alleged in the said written complaint that the opposite party no.2 gave loan of

Rs.25 lac to one Ganpat Agarwal and the present petitioners on assurance that the loan will be repaid within reasonable period of time. The loan

was given by issuing cheques in favour of the company by which Ganpat Lal Agarwal, his son and other members of the family have been carrying

on family business. The interest accrued on the principal amount of loan was Rs.16,07,580/- till March 31, 2015. Mr. Ganpat Agarwal gave last

account confirmation in connection with the loan transaction between the parties till April 1, 2013. The amount of loan or interest accrued thereon

was not repaid by the petitioners and Ganpat Lal Agarwal in spite of repeated requests by the opposite party no.2. As a result, the opposite party

no.2 filed the written complaint before the Officer-in-Charge of Burrabazar Police Station for initiating criminal proceeding against Ganpat Lal

Agarwal, his son Pawan Kumar Agarwal and others on the allegation of committing offence under Sections 420/406/120B/506 of the Indian Penal

Code. The petitioners being the accused persons in the said criminal case challenged the said criminal proceeding by filing this revision under

Section 482 of the Code of Criminal Procedure.

3. Mr. Sabyachi Banerjee, learned counsel for the petitioners submits that there is long standing business relation between the opposite party no.2

and the present petitioners. By referring to the statement of accounts in connection with the said loan confirmed by the opposite party no.2, Mr.

Banerjee submits that the company run by the petitioners received loan of Rs.35 lac from the opposite party no.2 on different dates with effect

from August 4, 2008 and substantial amount of interest accrued on the principal loan amount and also the principal amount of Rs.10 lac were

repaid from time to time by issuing cheques in favour of the opposite party no.2. According to Mr. Banerjee, the company of the petitioners repaid

loan amount along with interest till March 31, 2012, but the company of the petitioners could not make payment of the balance amount of loan for

failure of the family business and as such the petitioners had no dishonest intention from the very inception of the transaction. The sum and

substance of submission of Mr. Banerjee is that no offence is made out from the written complaint filed by the opposite party no.2, as the dispute

between the parties is purely civil in nature. He further submits that the opposite party no.2 made last confirmation of the statement of accounts in

connection with the loan on March 31, 2012 and as such the opposite party no.2 could not file civil suit against the petitioners for realisation of

balance amount of loan after March 31, 2015 and as such the opposite party no.2 has instituted this criminal proceeding against the petitioners and

others in order to create pressure for realisation of balance amount of loan. Mr. Banerjee has relied on unreported decision of this Court in CRR

no.1891 of 2013 (K.S. Oils Limited v. Srei Infrastructure Finance Limited) in support of his above contention.

4. Mr. Imran Ali, learned counsel for the opposite party/State contends that the opposite party no.2 gave loan of Rs.25 lac to the company of the

petitioners for the year 2008. By referring to the materials available in the case diary, Mr. Ali further submits that there was long standing business

relation between the opposite party no.2 and the petitioners and one Ganpat Lal Agarwal.

5. Mr. Sandipan Ganguly, learned senior counsel appearing on behalf of the opposite party no.2 contends that this Court cannot look into the

documents produced on behalf of the petitioners for coming to the conclusion that the allegations made in the written complaint are false. He further

submits that non-payment of balance amount of loan by the accused persons may give rise to criminal proceeding as well as remedy under the civil

law. He argues that the opposite party no.2 is not debarred from prosecuting the accused persons for nonpayment of balance amount of loan, even

when remedy is available under the civil law. Mr. Ganguly has relied on several decisions of the Supreme Court in support of his above contention,

which I would like to discuss subsequently. The gist of submission made by Mr. Ganguly is that the contents of the written complaint treated as

FIR disclose cognisable offence and the investigating agency should be permitted to investigate the criminal case and to submit report in final form

under Section 173 of the Code of Criminal Procedure before the appropriate court of law. He argues that this Court cannot hold mini trial for

evaluation of the allegations made by the opposite party no.2 and curtail the investigation which should be allowed to come to its logical conclusion.

6. The proposition of law laid down by the Supreme Court in paragraph 102 of ""State of Haryana v. Bhajanlal"" reported in 1992 SCC (Cri.)

426 for quashing of the criminal proceeding is laid down herein below:

102 "Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their

(1) Where the allegations made in the first information report or 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 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 cognisable 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 cognisable offence but constitute only a non-cognisable 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.

7. By applying the above test laid down by the Supreme Court in ""State of Haryana v. Bhajanlal"" (supra) in the facts of the present case I would

like to consider whether the contents of the written complaint treated as FIR disclose offences punishable under Section 120B/420/406/506 of the

Indian Penal Code. On perusal of the written complaint, I find that the opposite party no.2 has not disclosed the date, month and year of giving

loan to M/s. Ganpat Lal Pawan Kumar Traders Private Limited. What transpires from the written complaint is that the opposite party no.2 gave

loan to Ganpat Lal Agarwal and members of his family including the petitioners from time to time which amounted to Rs.25 lac. The averments

made in the written complaint by the opposite party no.2 indicate that Ganpat Lal Agarwal and members of his family including the petitioners

provided an acknowledgment and account confirmation along with interest component of the said loan from time to time and the said

acknowledgement and account confirmation includes the amount of TDS deducted out of interest accrued on the principal loan amount. It is

alleged in the complaint that on March 31, 2015 the total outstanding dues amounted to Rs.41,07,580/- including interest to the tune of

Rs.16,07,580/-. It is, thus, crystal clear from the averments made in the written complaint that the acknowledgement of outstanding dues and

account confirmation was done till April 1, 2013. The petitioners have annexed photocopy of statement of accounts acknowledged and confirmed

by both parties as annexure P/3 to the revisional application. Now, the question for consideration of the Court is whether this Court can look into

the photocopy of statement of accounts confirmed and signed by the opposite party no.2 for the purpose of formation of opinion whether

cognisable offence is made out against the present petitioners for continuation of the criminal proceeding.

7.1 Relying on the decision of the Supreme Court in ""State of M.P. v. Awadh Kishore Gupta"" reported in 2004 SCC (Cri) 353, Mr. Ganguly

submits that this Court cannot take into consideration the copy of statement of accounts signed and endorsed by the opposite party no.2 and the

accountant of the company of the petitioners for the purpose of deciding whether cognisable offence is made out in the written complaint treated as

FIR. In ""State of M.P. v. Awadh Kishore Gupta"" (supra) the Supreme Court has held in paragraph 13 as follows:

13. While exercising jurisdiction under Section 482 of the Code of Criminal Procedure, it is not permissible for the Court to

act as if it was a trial Judge. Even when charge is framed at that stage, the Court has to only prima facie be satisfied about existence of sufficient

ground for proceeding against the accused. For that limited purpose, the Court can evaluate material and documents on records but it cannot

appreciate evidence. The Court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for

convicting the accused.

By following the above decision of the Supreme Court this Court is not appreciating the evidence like the Judge of a trial court for deciding

whether the offence is made out against the petitioners. Nor this court is trying to ascertain the genuineness of the allegations made by the opposite

party no.2 in the written complaint. In ""Awadh Kishore Gupta"" (supra) the Supreme Court dealt with a case of disproportionate assets of the

accused persons who was facing charge under Section 13(1) (e) of the Prevention of Corruption Act, whereas in the instant case the allegations

have been made for committing an offence under Sections 420/406 of the Indian Penal Code by the petitioners and other accused persons who

took loan from time to time from the opposite party no.2 for running the family business and paid substantial amount of interest on the principal loan

amount. So, the facts of the reported case are clearly distinguishable from the facts of the present case and as such the ratio of ""Awadh Kishore

Gupta"" cannot be made applicable in the facts of the present case.

8. The copy of statement of accounts in connection with the loan from 1.4.2008 to 31.3.2009, from 1.4.2009 to 31.3.2010 and from 1.4.2010 to

31.3.2011 and 1.4.2011 to 31.03.2012 confirmed and signed by the opposite party no.2 (annexed to the revisional application) have been

acknowledged by the opposite party no.2 in the written complaint treated as FIR. The opposite party no.2 has never denied the existence of those

documents by filing an affidavit before this Court. Since the confirmation of the statement of accounts in connection with the loan is referred to in

the written complaint filed by the opposite party no.2, I am inclined to rely on those statements of accounts which are acknowledged and signed by

the opposite party no.2. It appears from the said statement of accounts that the opposite party no.2 issued cheques of Rs.10 lac in favour of M/s.

Ganpat Lal Pawan Kumar Traders Private Limited (hereinafter referred to as the petitioner-company) on 4.08.2008, the cheque of Rs.15 lac was

issued in favour of the petitioner-company on 8.8.2008 and cheque of Rs.10 lac was again issued in favour of the petitioner-company on

11.5.2011. It further appears from the said statement of accounts acknowledged and confirmed by the opposite party no.2 that the petitioner

company paid Rs.10 lac to the opposite party no.2 on 12.2.2009, Rs. 2,00,890/- on 16.04.2009, Rs.2,02,500/- on 25.3.2010 Rs.2,02,500/- on

3.11.2011, Rs.3,87,000/- on 29.03.2012. So, the statement of accounts acknowledged and confirmed by the opposite party no.2 in connection

with the loan indicates that there was long standing business relation between the opposite party no.2 and the members of family of the petitioners

for which the opposite party no.2 gave loan of more than Rs.35,00,000/- from time to time with effect from August 4, 2008 and substantial

amount of interest and principal amount of Rs.10,00,000/- was repaid by the petitioner-company to the opposite party no.2 till March 31, 2012.

In view of part payment of the loan amount and payment of substantial amount of interest on the principal loan amount by the petitioner-company

to the opposite party no.2 in the background of long standing business relation between the parties, the non-payment of balance amount of loan

cannot be construed as an offence of cheating punishable under the law.

9. In ""Hriday Ranjan Prasad Verma v. State of Bihar"" reported in 2000 SCC (Cri.) 786 the Supreme Court has held that mere breach of

contract cannot give rise to criminal proceeding 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. Similarly, in ""Anil Mahajan v. Bhore Industries Limited"" reported

in (2006) 1 SCC (Cri) 746 it is held by the Supreme Court that a distinction has to be kept in mind between mere breach of contract and the

offence of cheating. It is held that culpable intention right from the beginning when the promise was made cannot be presumed from mere failure of

a person to keep up promise subsequently. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not

the sole test. The court must decide on the basis of the substance of the complaint and not on the basis of mere use of the expression cheating in

the complaint. By following the above decisions of the apex court I find that in the instant case, the petitioners made payment of substantial amount

of interest on the loan amount and also repaid the principal amount of loan of Rs.10,00,000/- out of total loan amount of Rs. 35,00,000/- and as

such the dishonest intention of the petitioners from the very inception of the transaction cannot be presumed. In my view the offence of cheating

punishable under Section 420 of the Indian Penal Code is not made out from the written complaint treated as FIR. Nor can I persuade myself to

hold that an offence punishable under Sections 406/120B/506 of the Indian Penal Code is made out from the allegations made in the written

complaint treated as FIR.

10. Now, I would like to deal with the other decisions cited on behalf of the opposite party no.2. In ""Vijayander Kumar v. State of

Rajasthan"" reported in (2014) 3 SCC 389 the Supreme Court has relied on its previous decision in ""R. Kalyani v. Janak C. Mehta

reported in (2009) 1 SCC 516 and laid down in paragraph 8 the circumstances when the High Court would not exercise inherent power under

Section 482 of the Code of Criminal Procedure, which are as follows :

8Ã~Â¿Â½Ã~Â¿Â½Ã~Â¿Â½. (1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a first

information report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognisable

offence.

(2) For the said purpose the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the

defence.

(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the court shall not go

beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.

(4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to

continue.

By applying the above test of invoking inherent power under Section 482 of the Code of Criminal Procedure I have relied upon the copy of

statement of accounts which is not only acknowledged and confirmed by the defacto complainant/opposite party no.2, but the same is referred to

in the written complaint treated as FIR. On consideration of the allegations made by the opposite party no.2 in their entirety and by taking the said

allegations on the face value in the back ground facts of the case, I cannot persuade myself to hold that any cognisable offence is made out against

the petitioners and other accused persons. On consideration of the facts of the present case and in the background of long standing business

relation between the parties I consider the present case as an exceptional case where the High Court should invoke inherent power under Section

482 of the Code of Criminal Procedure. So, by applying the test laid down by the Supreme Court in ""R. Kalyani v. Janak C. Mehta"" (supra) as

quoted in ""Vijayander Kumar V. State of Rajasthan"" (supra) I would like to hold that this is a fit case where the High Court should invoke inherent

power under Section 482 of the Code of Criminal Procedure.

11. With regard to the unreported decision of ""K.S. Oils Limited v. Srei Infrastructure Finance Limited"" (CRR no.1891 of 2013 disposed of by

this Court on April 5, 2016) by which this Court quashed the criminal proceeding under Sections 406/420/471/120B of the Indian Penal Code, I

would like to observe that the facts considered by the court in the said case are clearly distinguishable from the facts of the present case and as

such I am not relying on the said unreported decision of this Court in CRR no.1891 of 2013. In ""Rajesh Bajaj v. State NCT of Delhi

reported in (1999) 3 SCC 259 the Supreme Court had set aside the order of quashing of a criminal proceeding under Section 420 of the Indian

Penal Code by Delhi High Court. In the said Report the Managing Director of a German company approached the complainant for purchase of

ready-made garments of various kinds and induced the complainant to believe that the payment will be made on receiving the invoice of the goods

within a period of fifteen days from the date of receiving the invoice of the goods which the complainant would despatch to Germany. The goods

were received and sold out, but part payment was made and as such the criminal proceeding for the offence of cheating was not quashed. The

facts of the present case are clearly distinguishable from the facts of ""Rajesh Bajaj v. State of NCT of Delhi"" (supra) and as such the ratio of the

said Report will not be applicable in the facts of the present case.

12. I have already observed that the allegations made in the written complaint treated as FIR do not disclose any cognisable offence and as such

continuation of the criminal proceeding against the petitioners and others will be an abuse of the process of the court. Accordingly, I would like to

invoke my inherent power under Section 482 of the Code of Criminal Procedure for quashing of the said criminal proceeding. However, the

opposite party no.2 is given the liberty to realise the balance amount of outstanding dues of loan from the petitioner company in accordance with

law. As a result, the criminal proceeding of G.R. no.1242 of 2015 arising out of Burrabazar Police Station Case no.273 dated May 7, 2015

pending before the court of learned Additional Chief Metropolitan Magistrate, Calcutta is quashed.

13. Criminal revision is, thus, disposed of.

14. Let a copy of this judgment and order be sent down to the learned court below for favour of information and necessary action.

15. Urgent photostat certified copies of this order, if applied for, be given to the learned counsel for the parties, upon compliance of all formalities.