

GAHC010044702019



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./222/2019

URMIMALA BARUAH AND 2 ORS.
W/O LATE SHYAMAL BARUAH, PERMANENT R/O CITY REGENCY,
SHYAMAL BARUAH ASSOCIATES, R.K.B. PATH, DIBRUGARH, P.S.-
DIBRUGARH, DIST-DIBRUGARH, ASSAM, PIN NO-786001, PRESENTLY
RESIDING AT D-13, SECOND FLOOR, PANCHSEEL ENCLAVE, NEW DELHI-
110017, INDIA

2: RITURAJ HAZARIKA
S/O LATE NARENDRA NATH HAZARIKA
R/O GANOHI NAGAR
P.O.-NIZ KADOMONI
P.S.-DIBRUGARH
DIST-DIBRUGARH
ASSAM
PIN-786001

3: AMIT ROY
S/O SRI SUNIL ROY
R/O SANTOSHI MAA MANDIR PATH
CHIRING CHAPORI
MILANPUR
DIBRUGARH
P.O.-DIBRUGARH
P.S.-DIBRUGARH
ASSAM
PIN-78600

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2:NIZAMUDDIN AHMED
S/O LATE ANWARUDDIN AHMED

R/O KHANIKAR TEA ESTATE NEAR T.V.CENTRE
P.O.-C.R. BUILDING
ASSAM
PIN-78600

Advocate for the Petitioner : MR. S SARMA

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE MIR ALFAZ ALI**

JUDGMENT & ORDER (CAV)

Learned counsel for the petitioners, Mr. S. Sharma and learned senior counsel for the respondents Mr. N. Dutta were heard.

2. By this application u/s 482 CrPC, the petitioners have prayed for setting aside the order dated 17-11-2018, whereby, the learned Judicial Magistrate took cognizance of offence u/s 120(B)/420/506/34 IPC against the petitioners and also for quashing the criminal proceeding in CR Case No. 145/2018.

3. The complainant/respondent No. 2 lodged a complaint against the petitioners alleging commission of offence u/s 120(B)/420/506/34 IPC. On receipt of the complaint, learned Judicial Magistrate took cognizance and having examined two witnesses u/s 200 CrPC issued process against the petitioners.

4. Aggrieved by the action of the Magistrate in taking cognizance and issuing process on the basis of the complaint lodged by the respondent, the petitioners have approached this Court for invoking the inherent power u/s 482 CrPC to quash the complaint and the criminal proceeding.

5. Mr. S. Sharma, learned counsel for the petitioners would submit that the averment made in the complaint did not make out any ingredient of criminal offence and disclosed only a civil dispute pertaining to breach of contract. Mr. Sharma further submits, that the

complainant has taken recourse to criminal action only to harass the petitioners and to pressurize them for resolution of the civil dispute, and as such, the criminal proceeding against the petitioners is abuse of the process of court, which is required to be quashed. To bolster his submission, Mr. Sharma has placed reliance on the following decisions :-

- (i) Pratibha Rani Vs. Suraj Kumar (1985) 2 SCC 370
- (ii) V.Y. Josh and Anr. Vs. State of Gujrat and Anr. (2009) 3 SCC 78
- (iii) Devendra Vs. State of U.P. (2009) 7 SCC 495.

6. Mr. Niloy Dutta, learned senior counsel appearing for the respondents would submit, referring to the allegations made in the complaint, more particularly, the paragraph 5 & 6, that the complaint prima facie makes out criminal offence, and as such, the criminal proceeding cannot be quashed. Mr. Dutta further contends that in a proceeding u/s 482 CrPC for quashing a criminal proceeding at the initial stage, the High Court cannot embark upon an enquiry as to the merit of the case or to find out whether the criminal proceeding would end in conviction or not. The court is only required to see whether the allegations made in the complaint in its face value prima facie makes out any offence. Mr. Dutta in support of his contention, strongly relied upon a decision of the Supreme Court in *Sau Kamal Shivaji Pokarnekar Vs. State of Maharashtra and Anr.* reported in 2019 (14) SCC 350 as well as two decisions of this Court, viz., *Promod Adhikari and Ors. Vs. State of Assam* reported in MONU/GH/0724/2018 and *Achyut Gogoi and Ors. Vs. State of Assam* reported in MONU/GH/0287/2018.

7. There is no dispute at the bar on the legal proposition as contended by Mr. Dutta, that if the averments made in the complaint or FIR taken at its face value and accepted in its entirety makes out a criminal offence, the inherent power u/s 482 CrPC cannot be invoked to quash a criminal proceeding at the initial stage and that the High Court while exercising inherent jurisdiction u/s 482 CrPC, cannot embark upon an enquiry as to the merit of the case or truthfulness of the allegations made in the complaint, which is an exercise to be undertaken only by the trial court at the appropriate stage. It is therefore, felt unnecessary to burden the judgment by discussing the authorities cited by Mr. Dutta.

8. In *Pratibha Rani Vs. Suraj Kumar* (supra), the Apex Court observed that there may not

be any doubt that only because civil law can be taken recourse to would not necessarily mean criminal proceeding should be barred.

9. In V.Y. Josh and Anr. Vs. State of Gujrat and Anr.(supra) , the Apex Court observed that there exists a distinction between pure contractual dispute of a civil nature and an offence of cheating. Although, breach of contract per se would not come on the way of initiation of criminal proceeding, there cannot be any doubt that in absence of averment made in the complaint, wherefrom the ingredients of offence can be found out, the court should not hesitate to exercise the jurisdiction u/s 482 CrPC.

10. In Devendra Vs. State of U.P.(supra), the Apex Court held that a distinction must be made between civil wrong and criminal wrong. When dispute between the parties constitute only a civil wrong and not criminal wrong, the court would not permit a person to be harassed, although, no case for taking cognizance has been made out.

11. Thus on the basis of averment and allegations made, the FIR or the complaint can be broadly divided into two categories. The first category consists of the FIR or complaint, which contains direct allegations of criminal acts constituting offence without involvement of any civil transaction associated with the ingredients of offence. The second category consists of the complaint or the FIR, containing the averment and allegations, which ex-facie discloses a civil dispute like breach of contract and alike, and at the same time it may also contains the ingredients of criminal offence. Needless to say that the same set of facts may constitute both civil wrong as well as criminal wrong and both civil remedy and criminal remedy may be available simultaneously. In the second category of complaint, which basically discloses civil dispute, the court is required to see whether the allegation made in the complaint, though, ex-facie discloses civil dispute also contains the ingredients of criminal offence. If the ingredients of criminal offence are available in the complaint, which, though, prima facie appears to be a dispute of civil nature, the complaint cannot be quashed only because civil remedy is available.

12. The test to be applied for quashing of a criminal proceeding at the threshold, having been found well settled as indicated hereinbefore. Let us now examine the complaint of the present case, in the touchstone of the settled principle.

13. The gravamen of the allegations made in the complaint is that the husband of the accused/petitioner No. 1, Shymal Baruah (since deceased), who was a builder by profession had cordial relationship with the respondent/complainant. Lt. Shymal Baruah offered to sell two flats, viz., Flat No. 2B and Flat No. 3A, on the 2nd and 3rd floor of the building called "City Residency" and the respondent/complainant initially entered into a verbal agreement with Shymal Baruah to purchase the two flats. Despite insistence of the respondent/complainant, Lt. Shymal Baruah delayed the process of written agreement on various pretext and upon pressure of the complainant, Shymal Baruah ultimately produced a written agreement on 07-06-2014 for sale of only one flat (Flat -2B) out of two flats proposed to be sold and the complainant paid almost 70% of the price for both the flats to Shymal Baruah. It was also alleged in the complaint, that despite receiving the 70% of the sale price of the two flats, Shymal Baruah was neither interested to complete the construction of the flat nor took necessary sale permission etc for transferring the flats in favour of the complainant. Having realized the bad intention of Shymal Baruah and associates, the complainant sent a legal notice on 21-09-2016 to the accused No. 3, Amit Kumar Ray, who was accountant of Shymal Baruah, requesting to honour the terms and conditions of the agreement and to provide the copy of the agreement of both the flats. Shymal Baruah died sometime in the year 2017 leaving behind his wife Urmila Baruah (petitioner No. 1) as his sole legal heir, who took control over the building along with two flats proposed to be sold to the complainant. It was also alleged in the complaint that the petitioner No. 2, Rituraj Hazarika, who is the brother of the petitioner No. 1, Urmila Baruah, started a guest house on the 2nd floor of the building and dilapidated the Flat No. 2 B in the process of his business. It was also stated that notice dated 21-09-2016 was addressed to petitioner No. 3 Amit Kumar Ray, as Shymal Baruah was suffering from illness and was hospitalized and Amit Ray was handling the financial matters of Shymal Baruah as his accountant. It was further alleged in the complaint that though, the complainant intended to occupy the Flat No. 2B, he could not do so, as the kitchen of the said flat was not constructed. The complainant made several verbal requests to Shymal Baruah to build the kitchen, but he failed to construct the kitchen on various excuses. Therefore, the complainant himself spent Rs. 1,94,476/- for construction of the kitchen and the entire cost for construction of the kitchen was borne by the complainant, though, it was the duty of Lt.

Symal Baruah and associates to complete the construction of the building including the kitchen and deliver possession thereof to the complainant. It was further alleged in the complaint that the petitioner No. 2 Rituraj Hazarika converted the Flat No. 2B into two rooms (Room No. 208 and 209), as it was a two bedroom flats with two separate entry doors and thereby changed the nature of the rooms. Further allegation made in the complaint was that the complainant was dishonestly induced to part with huge amount of money by the accused persons by entering into a criminal conspiracy for making unlawful gain.

14. A perusal of the complaint as well as the statement of the complaint recorded u/s 200 CrPC would show, that initially there was oral agreement between the complainant/respondent no.2 and Lt. Shymal Baruah for purchasing two flats in the five storied building to be constructed by Shymal Baruah under the name and style "City Residency" and the complainant paid about 70% of the total sale price of the two flats to said Shymal Baruah, but Shymal Baruah was not interested to construct the house or to make a written agreement. However, upon insistence of the complainant a written agreement was made in the month of June 2014 between the complainant and Shymal Baruah and associates in respect of only one flat. Admittedly despite several request and demand of the complainant, Shymal Baruah during his life time did not complete the construction of the building nor handover the possession of the two flats proposed for sale to the complainant and eventually Shymal Baruah died in the year 2017 leaving behind the petitioner No. 1 as his legal heir in respect of his property, including the building in question. Therefore, admittedly there was no contract between the present petitioners and the complainant nor any money was paid to the present petitioners on the basis of the agreement between the complainant and Shymal Baruah. Evidently as per averment made in the complaint, Shymal Baruah during his live time violated the contract being reluctant to fulfill the promise. Further it was alleged in the complaint that the petitioner No. 1 Rituraj Hazarika made some changes in the Flat No. 2B proposed to be sold to the complainant and he was running a business of the guest house on the third floor and caused damaged to the two flats proposed to be sold to the complainant. If the allegation made in the complainant is taken in its face value, admittedly there was no agreement or contract between the complainant and the petitioners, nor any money was paid to the petitioners by the complainant. Evidently initial agreement of the

complainant was with Shymal Baruah, to whom, the complainant paid the money and during his lifetime Shymal Baruah did not comply with the terms and conditions of the agreement entered into with the complainant and thereby allegedly violated the contract.

15. It is no doubt true, that breach of contract may contain the ingredients of cheating. If from the allegations made in the complainant, it can be discerned that at the time of making promise or entering into agreement, there was dishonest intention on the part of the accused not to honour the contract and with such dishonest intention induced the complainant to deliver the property or money to the accused, such breach of contract may constitute an offence of cheating. Admittedly in the instant case, there was neither any contract between the complainant and the present petitioners nor any money was delivered to them pursuant to any contract between them. Rather the contract was between Late Shymal Baruah and the complainant and money was also paid to Shymal Baruah. Admittedly Shymal Baruah during his lifetime failed to honour the contract inspite of repeated demands of the complainant. Therefore, even if the entire allegation made in the complaint is accepted to be true, there was no question of attributing any fraudulent intention or deception to the present petitioners at the beginning or inducing the complainant by the present petitioners to deliver the property by fraudulent inducement. Therefore, the basic ingredient of the offence u/s 420 IPC is totally absent against the petitioners.

16. Even if it is assumed for the sake of argument that the petitioner No. 1, Urmila Baruah, the wife of Lt. Shymal Baruah, who inherited all the properties of Late Shymal Baruah as his legal heir, may be liable to shoulder the civil liability of her husband, Lt Shymal Baruah in respect of property left by him, but no criminal liability can be saddled even with the petitioner No.1, Urmila Baruah, being the wife of late Shymal Baruah, for the wrong, if committed by her husband. Though allegations were made in the complaint that the petitioner No. 2, Rituraj Hazarika made some changes in the construction of the two Flat No. 2B proposed to be sold to the complainant or he has been running business in the said building, such allegation does not disclose any ingredient of cheating against the petitioner No. 2, Rituraj Hazarika.

17. The Apex Court in V.Y. Josh and Anr. Vs. State of Gujrat and Anr.(supra) held in paragraph 14 of the judgment that an offence of cheating cannot be said to have been made

out unless the following ingredients are satisfied :

- “(i) deception of a person either by making a false or misleading representation or by other action or omission ;
- (ii) fraudulently or dishonestly inducing any person to deliver any property;
- (iii) or to consent that any person shall retain any property and finally and intentionally inducing that person to do or omit to do anything which he would not do or omit.

For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Penal Code can be said to have been made out”.

18. In *Anil Mahajan Vs. Bhor Industries* reported in (2005) 10 SCC 228, the Apex Court observed that from mere failure of a person to keep up promise subsequently, a culpable intention right at the beginning, i.e., when he made the promise cannot be presumed. A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating, unless fraudulent/dishonest intention is shown at the beginning of the prosecution. The substance of the complaint is to be seen. Mere use of the expression “cheating” or “deception” in the complaint is of no consequence.

19. In *Vesa Holdings Pvt. Lts. and Anr. Vs. State of Kerala & Ors.* reported in (2015) 8 SCC 293, the Apex Court held that the settled proposition of law is that every breach of contract would not give rise to an offence of cheating and only those cases breach of contract would amount to cheating, where there was any deception played at the very inception. If the intention to cheat develops later on, the same cannot amount to cheating. In other words, for the purpose of constituting an offence of cheating, the complainant is required to show that

the accused had fraudulent or dishonest intention at the time of making promise or representation.

20. In *Uma Shankar Gopalika Vs. State of Bihar and Anr.* reported in (2005) 10 SCC 336, the Apex Court observed that "it is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases, breach of contract would amount to cheating, where there was any deception played at the very inception. If the intention to cheat develops later on, the same cannot amount to cheating.

21. Though, the learned Magistrate has taken cognizance u/s 120B IPC against the petitioners, I find no allegation in the complaint that the petitioners entered into a conspiracy with Shymal Baruah for making the agreement for sale of the flat or to deceive the complainant, nor there is any averment at all in the complaint to indicate that the petitioners were part or partner of Shymal Baruah and associates as mentioned in the agreement. Cognizance was also taken against the petitioners u/s 506 IPC, which provides punishment for the offence of criminal intimidation defined in Section 503 IPC. The complaint also did not contain any averment to disclose the ingredients of any offence u/s 506 IPC. Therefore, this Court is of the view that the complaint in the instance case does not disclose any criminal offence against the present petitioners.

22. What is therefore, abundantly clear from the averment made in the complaint, as indicated above, is that the complaint did not disclose any offence u/s 420 or 506 IPC or 120-B IPC against the present petitioners, though, the petitioner No. 1, Urmila Baruah may be saddled with civil liability. Therefore, the present complaint appears to be an endeavor on the part of the complainant to exert pressure on the petitioners to resolve the civil dispute or civil claim by giving criminal flavor to an out and out civil dispute so far the present petitioners are concerned.

23. In *Indian Oil Corporation Vs. NEPC India Ltd. and Ors.* reported in (2006) 6 SCC 736, the Apex Court deprecated the growing tendency in the business circles to convert purely a civil dispute into a criminal wrong for exerting pressure to resolve the civil dispute and observed that "any effort to settle civil dispute and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and

discouraged”.

24. In Indra Mohan Singh Goswami Vs. State of Uttaranchal reported in (2007) 12 SCC 1, the Apex Court observed that the court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurize the accused.

25. The oftquoted judgment of the Supreme Court in State of Haryana Vs. Bhajanlal, (1992) 1 Suppl. 1 SCC 335, the Apex Court has laid down the following categories of cases by way of illustration in paragraph 102, where the criminal proceeding can be quashed : -

(i) 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;

(ii) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. 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;

(iii) 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;

(iv) 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;

(v) 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;

(vi) 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;

(vii) 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.”

26. The criminal proceeding in the instant case squarely falls under the clause (i), (iii) and the (vii) set out in paragraph 102 of the judgment in Bhajanlal's case, and therefore, this Court is of the view that this is a fit case, where the complaint and the criminal proceeding in

CR Case No. 145/2018 deserves to be quashed to secure the ends of justice. Accordingly, the complaint and the proceeding in CR Case No. 145/2018 is hereby quashed.

27. The petition is allowed.

28. Send down the LCR.

JUDGE

Comparing Assistant