

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of order : January 4, 2008

CRL.M.C. 2049/2004

DAVENDER KUMAR

..... Petitioner

Through Mr. J.M. Kalia, Advocate

versus

ANIL KUMAR & ANR.

..... Respondents

Through Mr. Gagan Gupta, Advocate for R-1.

CORAM:

HON'BLE DR. JUSTICE S. MURALIDHAR

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| 1. | Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in Digest? | Yes |

ORDER

Dr. S. Muralidhar, J (open court)

1. This petition under section 482 of the Code of Criminal Procedure, 1973 (CrPC) is directed against an order dated 19th May, 2004 passed by the learned Additional Sessions Judge (ASJ), New Delhi dismissing the Criminal Revision No. 2/2004 filed by the petitioner herein. By the impugned order the learned ASJ declined to interfere with the summoning order dated 24.4.1998 passed by

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the learned Metropolitan Magistrate (MM) on a complaint filed by the Respondent No.1 herein against the petitioner under Sections 406/420/506 read with Section 34 IPC.

2. The learned ASJ declined to interfere with the summoning order of the MM not on merits but on the ground that it was an interim order and not a judgment. The learned ASJ relied relying on the judgment of Supreme Court in ***K.M. Mathew v. State of Kerala 1992 SC 2206*** in which it was held that the appropriate remedy for a person aggrieved by a summoning order would be to approach the Magistrate for its recall. Learned Counsel for the petitioner in the first instance submits that the said decision in ***K.M. Mathew*** has been overruled by a later decision of the Supreme Court in ***Adalat Prasad v. Rooplal Jindal AIR 2004 SC 4674*** in which it has been held that the only remedy available to a person aggrieved by a summoning order is to file a petition under Section 482 CrPC. He accordingly submits that since learned ASJ has not dealt with the merits of the petition the matter should be remanded to learned ASJ for a fresh decision on merits.

3. At this stage learned Counsel for the respondent submits that even if the summoning order were not an interim order, it would be open to the petitioner

to challenge it in a petition under Section 482 CrPC and therefore the respondent will have no objection to this Court examining the merits of the summoning order in these proceedings. In view of this submission, there is no need for this Court to remand the matter to the learned ASJ. Learned counsel for the petitioner has been heard on the merits of the summoning order dated 24th April 1998 passed by the learned MM.

4. Learned counsel for the petitioner referred to several paragraphs of the complaint dated 11th October, 1995 and submitted that the only allegation made therein is about the dishonor of the cheque dated 23rd December 1993 issued by the petitioner here for a sum of Rs.3,00,228 which was dishonoured by the bank with the remarks “insufficient funds.” Learned Counsel submits that this court at the highest could constitute the cause of action for a civil liability and the ingredients of the offences under Sections 420 and 506 are not made out. Reliance is placed on the decision of Supreme Court in ***G. Sagar Suri v. State of U.P. 2000(1) RCR (Criminal) 707*** to contend that the matter which is essentially of a civil nature ought not to be entertained in the criminal jurisdiction as that would constitute as an abuse of the process of law. Reliance is also placed on judgment of the Supreme Court in ***Hari Prasad Chamaria v.***

Bishun Kumar Surekha AIR 1974 SC 301. Learned Counsel submits that there was no inducement by the petitioner to make the respondent part with property. At the time of the supply of goods to the petitioner there was no manifest intention of the petitioner not to make payment. Learned Counsel then referred to the judgment of the Calcutta High Court in ***M. S. Natarajan v. Ramasis Shaw 1995 CrLJ 11*** and of the Andhra Pradesh High Court in ***Kalyani Modern Rice Mill v. State 1994 CrLJ 1123*** to contend that the supply of goods in the instant case commenced in July 1993 and concluded on 5th December 1993. The cheque in question was issued only thereafter on 23rd December 1993. Since the issuance of the cheque was not simultaneous with the supply of goods but subsequent thereto, the essential ingredient of Section 420 IPC was absent.

5. Learned counsel for the respondent, on the other hand, referred to several paragraphs of the complaint which aver that an assurance was held out to the respondent complainant by the petitioner that payment would be made for the supply of goods and that this assurance was held out not only prior to but during the period of the supply of goods as well. A specific averment has been made that a cheque was issued with the full knowledge that the petitioner did not have sufficient funds in his account and that cheque was issued with the malafide

intention of cheating the complainant. Learned counsel referred to the judgment in *Nagpur Steel and Alloys Pvt. Ltd. v. P. Radhakrishna* 1997 SCC (Cr) 1073 to contend that at the summoning stage the MM was only to ascertain if there was sufficient material brought on record for issue of summons. The truth or otherwise of the allegations in the complaint could be decided only at the completion of trial.

6. A perusal of the complaint filed in the present case shows that there are specific averments in paras 3 and 6 thereof to the effect that an assurance was held out by the petitioner to the complainant that payment would be made for the supply of goods. It is stated that on the basis of this assurance the supply was made. The sequence of events indicates that the cheque dated 23rd December 1993 was issued by the petitioner soon upon the completion of the supply of the last consignment of goods. Then there are specific averments made in paras 18 and 25 of the complaint imputing knowledge to the complainant that he did not have sufficient funds in the account at the time when he issued the cheque. Further, in his statement recorded on oath Shri Anil Kumar, Court Witness No. 1, says:

“I am sure the respondent has a malafide intention to cheat me at the time of issuing of cheque as he had

knowledge that there was n o sufficient fund in his account to honour the cheque moreover he misappropriated with my goods supplied to him as he had knowledge and intention for non-payment on behalf of him.”

7. Examined as a whole it cannot be said that the complainant does not even prima facie disclose the commission of the offences under Sections 420 and 506 IPC. This Court finds no error having been committed by the learned MM in passing the impugned summoning order on the basis of the above materials and that too only against the petitioner here. No ground has been made out by the petitioner to persuade this Court to interfere with the summoning order dated 24th April 1998 passed by learned MM.

8. This petition is dismissed. The interim order stands vacated.

S. MURALIDHAR, J.

January 04, 2007

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