

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on : September 12, 2011

+ **CRIMINAL M.C. No.379/2009**

G.K. SAWHNEY

....PETITIONER

Through: Mr. Jayant K. Sud, Advocate with
Mr. Harish Sharma, Advocate

Versus

STATE & ANR

.....RESPONDENTS

Through: Ms. Fizani Husain, APP for respondent
No.1.
Mr. Vishwa Bhushan Arya, Advocate for
respondent No.2.

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.(ORAL)

1. G.K. Sawhney, the petitioner herein, vide this petition under Section 482 Cr.P.C. seeks quashing of criminal complaint No.385/2001 titled "*Jai Prasad Jain Vs. Rajasthan Ball Bearing Ltd. & Ors.*" pending in the court of ACMM, Patiala House, New Delhi qua him.

2. Briefly put, facts relevant for the disposal of this petition are that on 4.4.1998, respondent No.2 filed a complaint under Section 138 of the Negotiable Instruments Act (N.I.Act) against M/s Rajasthan Ball Bearing Ltd. and others, including the petitioner. It was alleged in the complaint

that pursuant to an advertisement issued by M/s Rajasthan Ball Bearing Ltd. seeking fixed deposit, respondent complainant opened three fixed deposit accounts which were due to mature with 15% interest on 30th October, 1997, 25th January, 1998 and 25th January, 1998 respectively. On maturity of those fixed deposit receipts, aforesaid company issued 11 cheques in favour of the respondent/complainant to meet the liability of the principal deposit and interest. Those cheques, on presentation, were dishonoured with the remarks "funds insufficient". This led to issue of demand notice under Section 138 N.I. Act to the company as well as its Director Sandeep Sawhney and the petitioner. They, however, failed to make payment of the amount of cheques within the requisite period of 15 days from the date of receipt of demand notice. This led to filing of complaint under Section 138 N.I. Act against the company as well as two others, including the petitioner.

3. While aforesaid complaint under Section 138 N.I. Act was pending, respondent filed the subject complaint under Section 190/403/420 IPC against the aforesaid company and two others, including the petitioner on the same set of facts. Learned M.M. conducted preliminary enquiry and on consideration of the second complaint and preliminary evidence led in support of the complaint, found that a *prima facie* case of commission of offences under Section 420/406/409/34 IPC was disclosed. He, accordingly, summoned the accused persons named in the complaint, including the petitioner.

4. Mr.Jayant K.Sud, Advocate appearing for the petitioner has submitted that the impugned summoning order dated 26.2.2001 is bad in law for the reason that the allegations in the complaint as also the preliminary evidence adduced in support of the complaint does not disclose commission of the offence under Section 420/406/409 IPC by the petitioner. It is further contended that the complaint filed by respondent No.2 is an abuse of process of law and it has been filed with mala fide intention to harass the petitioner. Expanding on the argument, learned counsel for the petitioner submits that admittedly a complaint under Section 138 N.I. Act was filed against the petitioner by respondent No.2 in the year 1998. On the same set of facts, two years later, the petitioner had filed the instant complaint without giving any explanation as to what prevented complainant respondent No.2 from including the offence under Section 420/406/409 IPC. In support of this contention, learned counsel for the petitioner has relied upon the judgment of Supreme Court in the matter of ***G.Sagar Suri and Another Vs. State of U.P. and Others (2000) 2 SCC 636.***

5. Learned counsel for the respondent No.2, on the contrary, has argued in support of the impugned order. It is contended that learned Metropolitan Magistrate has rightly appreciated the allegations in the complaint and the preliminary evidence and arrived at a conclusion that a prima facie offence under Section 420/406/409/34 IPC is disclosed against the petitioners. It is further contended that cause of action for filing of a complaint under Section 138 N.I. Act is distinct from the cause of action in filing the complaint under Section 420/406/409/34 IPC. Therefore, there

is no bar under law to file two different complaints for distinct offences on the same set of facts. Thus, it is urged that the petition be dismissed.

6. I have considered the rival contentions and perused the record. The petitioner, vide impugned summoning order has been called upon by the Magistrate to undergo trial for the offences punishable under Section 420/406/409 IPC. In order to constitute the offence under Section 420 IPC, following ingredients are required to be satisfied:-

- (1) Deception of any person;
- (2) Fraudulently or dishonestly inducing that person;
 - (i) To deliver any property to any person or
 - (ii) to consent that any person shall retain any property or intentional inducing that person 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.

7. From the reading of above, it is apparent that dishonest intention is an essential ingredient to constitute an offence of cheating. In the instant case, though it is alleged that the respondent deposited certain amounts with the accused company, yet there is no specific allegation that the aforesaid company or any of the other accused made any fraudulent or dishonest statement so as to induce the respondent to deposit his money with the company. Thus, essential ingredient of cheating i.e. dishonest intention is lacking in this case. As such, learned M.M. was wrong in

summoning the petitioner for the offence punishable under Section 420 IPC.

8. The other offences for which the petitioner has been summoned are offences under Sections 406 IPC and 409 IPC.

9. Section 406 IPC provides punishment for the offence of criminal breach of trust and Section 409 IPC is aggravated form of the offence of criminal breach of trust and it comes into play when the offence is committed by a banker, merchant, factor, broker, attorney or an agent. In order to constitute the offence either under Section 406 IPC or Section 409 IPC, it is essential that the act so committed by the accused must fall within the parameters of the definition of the offence of criminal breach of trust. In order to constitute the offence of criminal breach of trust, following ingredients must exist:-

1. There should be an entrustment by one person to another of the property or of any dominion over property;
2. Such entrustment must be in trust;
3. There must have been misappropriation or conversion to his own use by the person who receives the property in trust;
4. Such conversion or retention of property must be against or in violation of any direction of law prescribing the mode in which such a trust is to be discharged or any other local contract made touching the discharge of such trust.

10. The subject complaint has been filed on the allegations that respondent complainant, pursuant to the invitation of M/s Rajasthan Ball bearing Ltd. had deposited ₹8 lacs with the company for fixed term at 15% interest and after maturity, the cheques given for payment of the fixed deposit amount and interest were dishonoured. In my opinion, on the basis of these allegations, the offence of criminal breach of trust is not made out. The deposits made by the respondent with the company were in the nature of a civil contract and those cannot be termed as entrustment of property to the company because the said amount was deposited with the company on an understanding that the company would utilize the money for its own purpose. Therefore, the basic ingredient of misappropriation of the property is lacking in this case. Thus, in my view, no case under Section 406/409 IPC is disclosed and the learned M.M. has committed an error in summoning the accused for the said offences.

11. Otherwise also, admittedly, prior to the filing of the complaint under Section 190/403/420 IPC against M/s Rajasthan Ball Bearing Ltd. and Others, including the petitioner, the respondent complainant had already instituted a complaint under Section 138 N.I. Act on the same set of allegations. Respondent complainant has failed to give any explanation either in his complaint under Section 190/403/420 IPC or in his preliminary evidence as to why he did not include offence u/s 190/403/420 IPC which are subject-matter of second complaint in his earlier complaint under Section 138 N.I. Act. This circumstance leads to an inescapable conclusion that the second complaint has been filed with mala fide intention to harass the petitioner by filing multiple criminal proceedings

against him on the basis of cause of action arising from same set of facts. This conduct on the part of the respondent certainly is an abuse of process of law justifying the interference u/s 482 Cr.P.C. to quash the proceedings of the second complaint. In my aforesaid view, I am supported by the judgment of Supreme Court in the matter of **G.Sagar Suri and Another Vs. State of U.P. and Others**, (2000) 2 SCC 636.

12. In view of the above, I find it difficult to sustain the impugned summoning order qua the petitioner. Summoning order dated 26.02.2001 is, therefore, set aside and the complaint case No.385/2001 titled "Jai Prasad Jain Vs. Rajasthan Ball Bearing Ltd. & Ors." qua the petitioner is quashed.

13. Petition is disposed of.

(AJIT BHARIHOKE)
JUDGE

SEPTEMBER 12, 2011

ks