

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION No. 137 of 2015

Art Commercial Advertising (P) Ltd ..Applicant.
(Orig. Complainant)

(1) Mr Sunil Khanwilkar. ..Respondents.
(2) The State of Maharashtra.

Mr J.A. Udaipuri a/with Sagar Kotak i/by Mr Sudeep
Dasgupta and M/s Bhasin & Co. for the Applicant.
Mr Pankaj Vijayan i/by M/s Intra Legal for the
Respondent No.1.
Mrs G.P. Mulekar for the Respondent No.2.

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CORAM : A. R. JOSHI, J.
DATE : 10th APRIL, 2015

P.C.

1) Heard rival submissions at length on this criminal revision application preferred by the original complainant. What is challenged in the present matter is the order passed by the Additional Sessions Judge, Greater Mumbai, dated 30th January, 2015. By the said impugned order, Criminal Revision Application No. 406 of 2012, preferred by the present respondent No.1/original accused, was allowed.

2) Initially, a complaint was lodged by the present applicant against the present respondent No.1, then accused, for taking action against him under Section 420 of the IPC. According to the complainant, an Advertising Agent, he was approached by the present respondent No.1 accused, with a request for telecasting his film by name "FILMI SAFAR". The said film "FILMI SAFAR" was being marketed by the respondent No.1 accused. A sort of contract was entered into between the complainant and the accused and in pursuance of the same, some cheques were given to the complainant. Those cheques were subsequently dishonoured when presented for encashment by the complainant to his bankers. On said dishonour, correspondence was made with the respondent No.1 accused for getting the said money under the cheques but in vain. It is apparent that a notice was sent to the respondent No.1 by RPAD dated 11th February, 2002 mentioning details regarding cheques which were dishonoured totally amounting to Rs.2,88,000/-. In response to the said notice, there was a reply dated 28th February, 2002 which acknowledge the receipt of the demand notice dated 11th February, 2002. The contents of the said reply are very specific and they are reproduced hereunder:-

"We are in receipt of the above notice Mr

Khanwalkar is away till 5th March and hence will be able to attend it only after he gets back. We request you to bear with us till then.”

3) Apart from this reply, there is no plea raised by the respondent-accused on the demand of Rs.2,88,000/- towards dishonour of the cheques. Consequently, a criminal complaint was lodged for taking action against the respondent No.1 for the offence punishable under Section 420 of IPC. On the said complaint, the evidence of the complainant was recorded. In the said evidence, Mrs Sunanda Oberoi, Managing Director of the complainant gave all the details regarding transaction between the parties and specifically it was mentioned that two cheques were encashed but remaining seven cheques were dishonoured and they were amounting to Rs.2,88,000/-. Said cheques were produced before the Court at the stage of pre-charge. They were marked Exhibits 6 to 12 presumably on the factual position that the signatures below the cheques were not disputed by the accused. This is specifically mentioned by the concerned Metropolitan Court No.62, Dadar Mumbai, while recording the evidence of said CW No.1 Smt. Sunanda Oberoi. There is evidence of said witness that the said cheques have been filled in the handwriting of the accused. She also

produced the return cheque memo and also further deposed as to making communication with the accused demanding the amount and also gave evidence as to reply given by the accused admitting his liability. It is also mentioned in the said statement before the Court to the following effect:

“Accused was having intention, right from the beginning, to cheat me, as he had given false promises to me in writing and orally”.

At the end of her such evidence before the Court, she had again reiterated this fact to the following effect :-

“Accused had given false promises saying that his daughter is marriageable and she was getting married and he was but to receive payment from the adversaries and work on the trust of his statement when I had found that the promises given by the accused were false, I have filed the present complaint.”

4) The crucial factual position appears when the accused was asked to cross-examine. However, the cross-examination was reserved and it is so specifically mentioned by

the concerned Metropolitan Magistrate while recording this evidence which is recorded on 21st September, 2012.

5) In furtherance of the above, the Magistrate passed the order below Exhibit-1 in the said complaint, CC No. 96 of 2007 and specifically dealt with the contents of the complaint, the evidence produced by the witness and the arguments advanced on behalf of the rival parties. The Magistrate had also discussed the defence of the accused as that of giving of the cheques as security and respondent No.1 had no intention to cheat the complainant at the inception of the transaction. Various documents produced before the Magistrate were also discussed. In paragraph 9 of the said order dated 6th November, 2012 passed by the concerned Magistrate the specific evidence of CW No.1 is reproduced specifically mentioning that she has categorically deposed that the accused was having intention to cheat her since inception of the transaction. The learned Magistrate has further observed that this version if remains unrebutted certainly would warrant conviction. As such the Magistrate came to the conclusion that the said allegations remained unrebutted mainly for the reason that the cross-examination of CW 1 was reserved. Consequently, the Magistrate held that it was the case for issuance of process under Section 420 of IPC and as such passed the order. Said order was further challenged before the

Sessions Court at Mumbai and the revision was allowed and that order of the Revisional Court is under challenge before this Court.

6) The factual position as to reserving the cross-examination of CW No.1 at the stage of pre-charge is of much significance and this aspect has been emphasized by the learned Counsel for the present applicant and it is submitted that in fact the accused had subjected himself to the further process by not cross-examining CW No.1 at that stage and reserving his right. According to the learned Advocate for the applicant, and rightly so in the considered view of this Court, no cross-examination of CW No.1 at the stage of pre-charge must be taken that the accused had subjected himself to the further process of the Court and he can exercise right of cross-examination when the matter shall be finally taken up for adjudication for the charge under section 420 of IPC. At this juncture, it must be mentioned that this crucial aspect has been completely lost sight of by the Sessions Court, Mumbai and the Sessions Court came to the conclusion as to the failure of the complainant to establish her case even for framing of the charge. In fact, this is vital aspect as to not cross-examining CW 1 at the time of pre-charge stage was of vital importance and should have been properly considered by the Revisional Court, but which had failed and as such leaving the scope for

interference in the impugned judgment and order.

7) During the arguments, the learned Counsel for the respondent-accused submitted that there is nothing in the complaint or even in the evidence of CW 1 that the loss was caused to the complainant, which is an essential ingredient for establishing the offence under section 420 of IPC. It is further argued that there was nothing in the complaint or in the evidence of CW No.1 that there was any inducement caused by the respondent-accused and thirdly it is argued that there was no consideration for these cheques. However, while arguing these points, apparently, the learned Counsel for the respondent-accused had lost sight of the fact that regarding the presumption envisaged by Negotiable Instruments Act so far as cheques are concerned, more so, in the present case, when the signatures on the said cheques had been accepted by the accused as specifically mentioned in the evidence of CW No.1. Lastly, it is argued that there was nothing in the complaint or in the evidence of CW No.1 that the complainant parted money with Bhopal Doordarshan and as such there is nothing to establish that any loss is caused to the complainant. In the considered view of this Court, all these aspects can be validly dealt with by the Trial Court after framing of the charge and when the respondent-accused will call for cross-examination of the complainant. Whether or not the complainant would be

in a position to establish the charge under Section 420 of IPC is not a question, but whether prima facie on the material available before the Magistrate a charge could be framed is the real question and which was rightly so decided and held by the learned Magistrate but has been lost sight of by the Sessions Court, Mumbai.

8) During the arguments on these aspects as to what is the quantum of the material required for framing of a charge, the following authority is cited on behalf of the complainant.

Rajesh Bajaj Vs. State of NCT of Delhi and Ors (reported in (1999) 3 SCC 259). The following observations in the said authority can be taken shelter of :-

“It is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent. Splitting up of the definition into different components of the offence to make a meticulous scrutiny, whether all

the ingredients have been precisely spelled out in the complaint, is not the need at this stage. If factual foundation for the offence has been laid in the complaint the court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence. [In State of Haryana vs. Bhajan Lal](#) (supra) this Court laid down the premise on which the FIR can be quashed in rare cases. The following observations made in the aforesaid decisions are a sound reminder:

"We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection

and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

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 illustrations set out under Section 415 of the Indian Penal Code (illustrations f) is worthy of notice now:

"The crux of the postulate is the intention

of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or not. The complainant has stated in the body of the complaint that he was induced to believe that respondent would honour payment on receipt of invoices, and that the complainant realized later that the intentions of the respondent were not clear. He also mentioned that respondent after receiving the goods have sold them to others and still he did not pay the money. Such averments would prima facie make out a case for investigation by the authorities.”

9) The ratio propounded by the above authority is to be viewed in juxtaposition of the facts in the present case at hand and specifically in view of the evidence of CW No.1 recorded by the Magistrate and reserving the right of cross-examination of said CW No.1 by the accused. On this aspect of reserving the right of cross-examination, the learned Counsel tried to argue

that reserving the cross-examination does not mean that the cross-examination is declined. In one way, the learned Counsel might be right in his argument as he can exercise his right of cross-examination when the charge is framed and he will have opportunity to cross examine the witness. But definitely this factual position as to reserving the right of cross-examination at the pre-trial stage of the evidence is required to be construed as to not objecting for the contents of the evidence given by CW No.1 at the pre charge stage and as such this has been rightly held by the Magistrate for giving the order for framing of the charge under section 420 of the IPC.

10) Counter to the arguments on behalf of the complainant, the learned Counsel for the accused placed reliance on the following authority:-

(1) 2005 Bombay Criminal Cases 465
(Shri Srinivasa Cut Pieces Shop and
Mr Bommanna Krishnamurthy Rao Vs.
The State of Maharashtra & Harish Gehani.

11) Shelter of the observations mentioned in paragraph 15 of the said authority are taken on behalf of the accused. However, in the considered opinion of this Court, the observations of this Court in that matter were on fact situation of that case and as such they cannot have any binding effect.

12) Again, shelter was taken of the following authority :

VY.Jose and Anr Vs. State of Gujarat and Anr
reported in **MANU/SC/8460/2008**

“12. 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 absence of a culpable intention at the time of making initial promise being absent, no offence under section 420 of the Indian Penal Code can be said to have been made out.”

Again considering the specific facts of this case as detailed earlier the ratio of the above authority cannot be taken in favour of the respondent No.1.

13) Considering the rival arguments and on going through the reasoning given by the Sessions Court, Mumbai in the opinion of this Court, the Sessions Court had lost sight of the fact that as to effect of no cross-examination of CW No.1 at the pre-charge stage, though it is mentioned that cross-examination is reserved. As such the present revision

application is required to be allowed and same is allowed with the following order:-

ORDER.

1) The impugned order dated 30th January, 2015 passed by the Additional Sessions Judge, Greater Mumbai, is hereby quashed and set aside.

2) The order of the learned Magistrate is hereby confirmed and the learned Magistrate is directed to proceed further with the matter to frame the charge as per his order and then to deal with the matter, in accordance with law.

3) At this stage, prayer is made on behalf of the respondent No.1 for stay of this order for a period of three months. The prayer is strongly objected by the learned Counsel for the applicant-complainant. The prayer for stay is rejected. Considering the fact that the prayer for stay is rejected, the Trial Court to deal with the matter in accordance with law as per the earlier directions.

(A. R. JOSHI, J.)