IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M No. 13697 of 2014(O&M)
Date of Decision : 10.02.2015

Mohd.Khaja Moinuddin Hussain and another **.....Petitioners**

Versus

State of Haryana and another **..... Respondents**

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CORAM : HON'BLE MR. JUSTICE AJAY TEWARI

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Present : Mr.Gaurav Mohunta, Advocate with
Mr.Gaurav Gogna, Advocate
for the petitioners.

Mr.Ashish Yadav, Addl.AG, Haryana.

Mr.Mandeep S. Vinaik, Advocate with
Mr.Gurpreet Singh, Advocate
for respondent No.2-complainant.

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i. Whether Reporters of local papers may be allowed to see the judgment?

ii. To be referred to the Reporters or not?

iii. Whether the judgment should be reported in the Digest?

AJAY TEWARI, J. (Oral)

This petition has been filed against the complaint and the summoning order.

As per complaint the petitioners had approached the complainant in April, 2011 to purchase *Basmati* Rice which were duly supplied to the petitioners and on 09.07.2012 an amount of Rs.4,45,47,934/-was due. At that stage the petitioners represented to the complainant that they would make the due payments and some of these promises were allegedly made in writing also. At one stage a letter was also issued acknowledging payment of Rs. 20-25 lacs between 22.05.2012 to

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31.05.2012 and a further amount of Rs. 2 Crores in the month of June, 2012. Thereafter the complaint records that the petitioners, after receiving the goods, started singing a different tune and started claiming that actually nothing was due from them to the complainant. Some cheques issued by the petitioners were returned with the endorsement 'stop payment'. At that stage the complainant smelled a rat and got the signatures of the petitioners compared on the cheques and it transpired that actually the petitioners had forged their own signatures on the cheques. Consequently it was prayed that the petitioners be summoned under Sections 420, 467, 468, 471, 506 and 120-B IPC.

After the complainant had led preliminary evidence the impugned summoning order was passed in which the petitioners were not found guilty under Sections 467/468/471 IPC but enough material was found against them for the commission of offence under Sections 420/506/120-B IPC and they were summoned.

Learned counsel for the petitioners has argued that prior to the filing of the complaint the complainant had filed a civil suit against the petitioners for the recovery of about Rs. 3.5 crores and in that suit had obtained an order of attachment of property of the petitioners. The petitioners had also filed a suit for recovery of certain amount which they alleged they had overpaid to the complainant and for declaring some cheques issued by them as being non-operative.

Learned counsel for the complainant has argued that the mere fact that a cause of action has both criminal and civil overtones and the mere fact that a party may have initiated civil proceedings to recover the amount would not and cannot preclude a criminal action on the same ground. He has relied upon **Lee Kun Hee, President Samsung Corporation, South**

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Korea and others v. State of Uttar Pradesh and others reported as 2012(3) Supreme Court Cases 132. In that case a person had supplied technical drawings worth about Rs. 9 crores to M/s Samsung, Dubai through an intermediary. There was record of receipt of the material, record of issuance of bill of exchange and also record that Samsung had received the goods and had rather claimed that they had made the payment. However, subsequently it was the case of Samsung that the material had not been received. The Hon'ble Supreme Court held as follows:-

> "73. We have given our thoughtful consideration to the last contention advanced at the hands of the learned counsel for the appellants. We are of the considered view, that in offences of the nature contemplated under the summoning order, there can be civil liability coupled with criminal culpability. What a party has been deprived of by an act of cheating, can be claimed through a civil action. The same deprivation based on denial by way of deception, emerging from an act of cheating, would also attract criminal liability. In the course of criminal prosecution, a complainant cannot seek a reciprocal relief, for the actions of the accused. As in the instant case, the monetary consideration under the bill of exchange dated 1.2.2001, cannot be claimed in the criminal proceedings, for that relief the remedy would be only through a civil suit. It is therefore not possible for us to accept, that since a civil claim has been raised by the complainant-JCE Consultancy, based on the alleged breach of the agreement dated 1.12.2001, it can be prevented from initiating proceedings for penal consequences for the alleged offences committed by the accused under the Indian Penal Code."

Learned counsel has also relied upon **Mahesh Chaudhary v. State of Rajasthan and another** reported as 2009(4) SCC 439 where the Hon'ble Supreme Court has laid down the parameters within which a petition for quashing of a complaint has to be examined and have laid down that neither

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the defence of the accused can be seen and nor is the trial Court required to go deep into the evidence. There can be no quarrel with both these propositions.

However, to my mind, in this case the substratum on which criminal liability was sought to be fastened was not and could not have been the mere fact that the petitioners refused to make payment for what they had received but was the allegation that they had presented cheques on which the signatures were forged. Once the trial Court found that the charges under Sections 467/468/471 IPC were not maintainable, the only allegation which remained was that despite having promised to pay and having issued written acknowledgements thereof the petitioners did not make the payments. Learned counsel for the respondent has accepted that the petitioners have not been summoned under Sections 467/468/471 IPC and that order has become final. He has argued that prior to enactment of Section 138 of the Negotiable Instruments Act if cheques were dishonoured on the ground of there not being adequate funds it was well known that parties could invoke both civil proceedings for recovery as well as Section 420 IPC and in this case also the complainant should be allowed to prove his contention that all the undertakings were given with a fraudulent intention. I am afraid that would be taking it too far. In **Arun Bhandari v. State of Uttar Pradesh and others** reported as 2013(2) Supreme Court Cases 801 the Hon'ble Supreme Court held as follows:-

> "15 Scanning the definition of 'cheating' the Court opined that there are two separate classes of acts which the persons deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set-forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be

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fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest. Thereafter, the Bench proceeded to state as follows: -

> "15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution 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. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

In my opinion this judgment would be more applicable to the facts of the present case. Had the complainant been able to satisfy the Court that the petitioners had given forged cheques, of course, the chain would have been complete but in the absence thereof it would not be possible for this Court to hold in the facts and circumstances of the present case that offence under Sections 420/506 IPC has been made out. The petition is allowed. The complaint and the summoning order are quashed.

It goes without saying that no observation made in this order would have any bearing on the merits of the civil proceedings between the parties.

(AJAY TEWARI)
JUDGE

February 10 , 2015
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