IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.50149 of 2013

Arising Out of COMPLAINT CASE NO. -1005 Year- 2012 Thana -PATNA District- PATNA

==

1. Vibgyor Texotech Ltd. through its Proprietor Unnikrishnan Nambiar @ U. K. Nambiar, having its Office At 308, Navyung Industrial Estate, 167 T. J. Road, P.S- Sewree, Mumbai.
2. Unnikrishnan Nambiar @ U. K. Nambiar S/O Sri Cherad Govindan Nair resident of 308, Navyung Industrial Estate, 167 T. J. Road, P.S- Sewree, District- Mumbai.

.... Petitioners

Versus

1. The State of Bihar
2. Dharmdeo Singh, proprietor of M/S Prashant Packing Industries, through Manoj Kumar Sharma S/O Sri Kameshwar Singh, resident of Ghagha Ghat Lane (Near Malaria Office), P.S- Sultanganj, District- Patna

.... Opposite Parties.

==

Appearance :

For the Petitioners	:	Mr. Manish Kumar No. 13, Advocate
		Mr. Rohit Kumar, Advocate
For the State	:	Mr. Jharkhandi Upadhyay, APP
For Opposite Party No. 2	:	Mr. Pushkar Narayan Shahi, Sr. Advocate
		Mr. Aporv Harsh, Advocate

==

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 26-07-2017

Heard Mr. Manish Kumar, learned Advocate for the petitioners, Mr. Jharkhandi Upadhyay, learned Additional Public Prosecutor for the State and Mr. Pushkar Narayan Shahi, learned Senior Advocate for complainant/opposite party no. 2.

2. The petitioners have invoked the inherent power of this Court under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') for quashing of the order dated

10.05.2013 passed in Complaint Case No. 1005 of 2012 by the learned Judicial Magistrate, Patna City, Patna whereby finding a *prima facie* case to be made out under Sections 406 and 420 of the Indian Penal Code (for short 'IPC') against the petitioners, they have been summoned to face trial.

3. The complainant (opposite party no. 2) filed Complaint Case No. 1005 of 2012 in the court of Additional Chief Judicial Magistrate, Patna City alleging *inter alia* that he is the proprietor of M/S Prashant Packaging Industries, which has its head office at Patna. The petitioner no. 2 being familiar from before approached him at his Head Office and after full satisfaction, he had agreed to purchase the packaging materials from him. He requested the complainant to supply goods on credit and assured him that he will make payment of the goods supplied to him within the financial year. The complainant, thereafter, supplied the goods to the petitioner no. 1 on credit under different vouchers. Later on, the petitioner no. 2 started irregular payment of the outstanding dues. It is further alleged that in the financial year 2009-10, a total sum of Rs.11,89,127.33/- was due against the petitioner no. 2 for which the complainant requested him to make payment several times and when he did not make payment, the complaint sent various legal notices to him. It is alleged that the petitioner no. 2

paid only Rs.3,93,023.00/- in the financial year 2010-11 and an amount of Rs.7,96,104.00/- is still lying due with the petitioners.

4. On the basis of the aforesaid complaint petition filed by the complainant, the aforesaid complaint case was registered in the court of learned Additional Chief Judicial Magistrate, Patna City, Patna, who in exercise of power conferred under Section 192 of the Cr.P.C. made over the case to the learned Judicial Magistrate, Patna City for inquiry and disposal.

5. After institution of the complaint, the complainant was examined on solemn affirmation and in course of enquiry conducted under Section 202 of the Cr.P.C., three witnesses were examined in support of the complaint.

6. After conducting inquiry, the learned Judicial Magistrate, vide impugned order dated 10.05.2013, summoned the petitioners in exercise of powers conferred under Section 204 of the Cr.P.C to face trial for the offences punishable under Sections 406 and 420 of the IPC.

7. Mr. Manish Kumar, learned Advocate for the petitioners has submitted that the petitioners had never entered into any business dealing with any Bihar based firm having its office at Patna. He has submitted that a party doing business under the name and style of Prashant Packaging having its office at Mumbai was

doing packaging work for the present petitioners. The said company had its address at Mumbai and not at Patna. He has further submitted that the petitioners have paid the entire dues of the said Prashant Packaging and not a single paisa is due and payable to the said Mumbai based Prashant Packaging. As far as the payment to Patna based firm is concerned, it is stated that when there is no dealing with Patna based firm, there is no question of making any payment to them. He has contended that the entire dispute with respect to settlement of accounts arising during transaction of business with Prashant Packaging is purely a dispute of civil nature. In the entire complaint, there is nothing to suggest that the complainant has been induced or dishonestly deceived by the petitioners.

8. In the counter-affidavit filed on behalf of the complainant in the present case, it is stated that the petitioners had every knowledge that the Head Office of the complainant firm is in Patna and that the complainant had been filing his Income Tax returns since long in Patna circle. It is further stated that the petitioners had approached his Patna office and an oral agreement was made between the petitioner and the complainant with a condition that just after receiving the goods, the petitioners shall make payment. The petitioner and the complainant live in different

floors in the same apartment at Goregaon (East), Mumbai and they were good friends before entering into the agreement. It is also stated that after filing of the complaint petition, the petitioners had made payment of a total sum of Rs.5,00,000/- on different dates. The detail of the payment is given in the counter-affidavit, which is as under :-

> *" On 15.09.2014 Rs.1,00,000/- through Cheque No. 000241*
> *On 05.11.2014 Rs.1,00,000/- through Cheque No. 000275*
> *On 26.12.2014 Rs.1,00,000/- through Cheque No. 000224*
> *On 10.02.2015 Rs.1,00,000/- through Cheque No. 000301*
> *On 31.03.2015 Rs.1,00,000/- through Cheque No.000316"*

9. Mr. Pushkar Narayan Shahi, learned Senior Advocate appearing for the complainant has submitted that after the aforesaid payments made by the petitioners, an amount of Rs.2,96,104.33/- is still outstanding in the name of the petitioners. He has contended that it is true that the complainant has his Branch office at Mumbai and certain payments were made by the petitioners to the Branch office at Mumbai, but it is not true that the complainant has no base at Patna. He has contended that the manner in which the payments

were made would clearly indicate that the petitioners had an intention to cheat right from the beginning and, hence, the offences punishable under Sections 406 and 420 of the IPC are clearly attracted in the present case.

10. While adopting the submissions made by the learned Senior Advocate appearing on behalf of the complainant, Mr. Jharkhandi Upadhyay, learned Additional Public Prosecutor for the State has submitted that the allegations made in the complaint do attract the ingredients of the offence alleged. He has submitted that the complainant has supported the allegations made in the complaint and apart from the complainant, three other witnesses have also supported the allegations made in the complaint and in that view of the matter, no illegality can be found with the impugned order passed by the learned Magistrate.

11. I have heard learned counsel for the parties and perused the record.

12. As noted above, the offences alleged to have been committed in the present case are of 'cheating' punishable under Section 420 of the IPC and of 'criminal breach of trust' punishable under Section 406 of the IPC.

13. In so far as, the offence punishable under Section 420 of the IPC is concerned, it reads as under :-

> ***"420. Cheating and dishonestly inducing delivery of property.-***
> *Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

14. From a reading of Section 420 of the IPC, it would be evident that it requires not only 'cheating' but also dishonest inducement to delivery of property.

15. The offence of cheating has been defined under Section 415 of the IPC, which is reproduced as under :

> ***"415. Cheating —***
> *Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived 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, is said to "**cheat**"."*

16. It is now a well established principle of law that every breach of contract or civil dispute under a contract or an agreement does not amount to the offence of 'cheating'. A breach of contract would amount to 'cheating' only in those cases where there was any deception played at the very inception. The subsequent events in this regard are not imparted.

17. In ***G. V. Rao vs. L. H. V. Prasad & Ors. [(2000) 3 SCC 693]***, the Supreme Court held : *"This part speaks of intentional deception which must be intended not only to induce the person deceived to do or omit to do something but also to cause damage or harm to that person in body, mind, reputation or property. The intentional deception presupposes the existence of a dominant motive of the person making the inducement. Such inducement should have led the person deceived or induced to do or omit to do anything which he would not have done or omitted to do if he were not deceived. The further requirement is that such act or omission should have caused damage or harm to body, mind, reputation or property"*.

18. In ***Hridaya Ranjan Pd. Verma & Ors. vs. State Of Bihar & Anr. [(2000) 4 SCC 168]***, the Supreme Court held : *"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 to 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".

19. In ***Uma Shankar Gopalika vs. State of Bihar & Anr. [(2005) 10 SCC 336]***, the Supreme Court held : "… *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 has developed later on, the same cannot amount to cheating. In the present case it has nowhere been stated that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for*

an offence under Section 420 IPC".

20. In ***V. Y. Jose & Anr. vs. State Of Gujarat & Anr. [(2009) 3 SCC 78]*** held as under :-

> *"**14**. 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; or to consent that any person shall retain any property and finally 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 Indian Penal Code can be said to have been made out."*

21. In the said case, the Supreme Court further held as

under :

> ***"21.*** *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 in the way of initiation of a criminal proceeding, there cannot be any doubt whatsoever that in absence of the averments made in the complaint petition wherefrom the ingredients of an offence can be found out, the court should not hesitate to exercise its jurisdiction under Section 482 of the Code of Criminal Procedure.*
>
> ***22.*** *We may reiterate that one of the ingredients of cheating as defined in Section 415 of the Penal Code is existence of an (sic fraudulent or dishonest) intention of making initial promise or existence thereof from the very beginning of formation of contract."*

22. Recently, in ***Vesa Holdings Private Ltd. & Anr. vs. State of Kerala & Ors. [(2015) 8 SCC 293]***, the Supreme Court has held : *"...the settled proposition of law is 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 has developed 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. 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, 1860 can be said to have been made out".

23. In view of the legal position enunciated in the above judgments of the Supreme Court, it is obvious that merely because the agreed amount was not paid by the petitioners to the complainant, the ingredients of 'cheating' punishable under Section 420 of the IPC would not be attracted. What was required to attract the offence of 'cheating' was existence of dishonest intention right from the beginning and intentional inducement at the very inception. Obviously, such ingredients are missing from the complaint.

24. As far as Section 406 IPC is concerned, it prescribes punishment for 'criminal breach of trust'. Section 405 IPC defines the offence of 'criminal breach of trust', which reads as under :

> ***"405. Criminal breach of trust —*** *Whoever, being in any manner entrusted with*

*property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "**criminal breach of trust**"."*

25. A careful reading of Section 405 IPC shows that a criminal breach of trust involves the following ingredients:-

(a) a person should have been entrusted with property, or entrusted with dominion over property;
(b) that person dishonestly misappropriated or converted to his own use that property, or dishonestly used or disposed of that property or willfully suffered any other person to do so;
(c) that such misappropriation, conversion, use or disposal was in violation of any direction of law prescribing the mode in which such trust was discharged.

26. It would, thus, appear that for the offences punishable under section 406 IPC, the prosecution must prove :-

(*i) that the accused was entrusted with property or* *with dominion over it; and*

(ii) that he (a) dishonestly misappropriated it, or (b) dishonestly converted it to his own use, or (c) used it, or (d) disposed of it in violation of any direction of law prescribing the mode in which such trust was discharged.

27. It is well settled in law that in proceedings initiated on criminal complaint exercise of inherent powers to quash the proceedings is called for in a case where the complaint does not disclose any offence or is frivolous. It is equally well settled that power under Section 482 of the Cr.P.C. should be sparingly invoked with circumspection. It should be exercised to see that the process of law is not misused or abused.

28. In ***Smt. Nagawwa vs. Veeranna Shivallngappa Konjalgi & Ors. [(1976) 3 SCC 736]***, the Supreme Court enumerated the cases where an order of Magistrate issuing process against the accused can be quashed or set aside as under :-

"(1) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) Where the allegations made in the

complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) Where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like."

29. While enumerating the cases, the Supreme Court pointed out that the cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings.

30. In ***Indian Oil Corporation vs. NEPC India Ltd. & Ors [(2006) 6 SCC 736],*** the Supreme Court has summarized the principles relating to exercise of jurisdiction under Section 482 of the Cr.P.C. to quash complaint and criminal proceedings as under :-

"(i) A complaint can be quashed where the allegations made in 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 the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal

offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not."

31. Highlighting the growing tendency in business circle to convert purely civil dispute into criminal cases, the Supreme Court in ***Indian Oil Corporation vs. NEPC India Ltd.*** (Supra) in paragraphs 13 and 14 held as under :-

*"**13.** While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression*

that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged. In G. Sagar Suri vs. State of UP [2000 (2) SCC 636], this Court observed :

> *"It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."*

14. *While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made*

> *accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under section 250 Cr.P.C. more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may."*

32. Thus, it would be evident that a given set of facts may make out purely a civil wrong or purely a criminal offence or a civil wrong as also a criminal offence. However, a commercial transaction or a contractual dispute apart from furnishing a cause of action for seeking remedy in civil law may also involve a criminal offence. However, simply because civil law remedies are time consuming, a matter which is essentially of civil nature cannot be allowed to be converted into a criminal offence, as criminal proceedings are not short cut of other remedies available in law. The Supreme Court has cast a duty upon the courts to deprecate and discourage any effort to settle civil disputes and claims which do not involve any criminal offence by applying pressure through criminal prosecution.

33. In the present case, looking at the allegations made in the complaint on the face of it, I find that no case is made out

attracting the ingredients of Section 406 and 420 of the IPC. Excepting the bald allegation that the petitioners did not make full payment to the complainant in time, there is no iota of allegation as to the dishonest intention misappropriating the property. To make out a criminal case, it is not sufficient to show that the money has not been returned by the accused persons. It must also be shown that the accused persons dishonestly disposed of the same in some way or dishonestly retained the same. The mere fact that the petitioners did not pay the money to the complainant does not amount to 'criminal breach of trust'. Further, it is not a case of dishonest inducement to delivery of property. It has no where been stated that at very inception, there was intention on behalf of the petitioners of 'cheating' which is a condition precedent for the offence of 'cheating'. Since no case of criminal breach of trust or dishonest intention of inducement is made out and the essential ingredients of the offence of 'cheating' and 'criminal breach of trust' are missing, the prosecution of the petitioners under Sections 406 and 420 of the IPC is liable to be quashed.

34. Accordingly, the impugned order dated 10.05.2013 passed by the learned Judicial Magistrate, Patna City, Patna in Complaint Case No. 1005 of 2012 and the entire criminal proceedings, arising out of the aforesaid complaint, are hereby

quashed.

35. The application stands allowed.

(Ashwani Kumar Singh, J.)

Kanchan/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	01.08.2017
Transmission Date	01.08.2017