

THE HON'BLE SRI JUSTICE GUDI SEVA SHYAM PRASAD

CRIMINAL PETITION No. 1306 of 2011

ORDER:

This criminal petition is filed under Section 482 Cr.P.C., by the petitioner-accused seeking to quash the proceedings in C.c.No.85 of 2010 on the file of Judicial Magistrate of First Class, at Dhone, Kurnool District.

2. Brief facts of the case are that the 2<sup>nd</sup> respondent has filed a private complaint before the Judicial Magistrate of First Class, at Dhone, Kurnool District, under Section 200 Cr.P.C., against the petitioner alleging that on 07.05.2008, the petitioner borrowed an amount of Rs.20,00,000/- and on 18.09.2008, the petitioner borrowed Rs.20,00,000/- to meet his business needs, and executed two separate promissory notes, in the presence of witnesses Chandrasekhar Goud @ Babu Goud and Katika Mahesh Rao of Dhone, agreeing to repay the amounts with interest. On 18.03.2009, the petitioner again borrowed Rs.5,00,000/- and on 24.03.2009, he borrowed Rs.10,00,000/- in the presence of the aforestated witnesses, and executed separate promissory notes agreeing to repay the same with interest. In total, the petitioner had borrowed a total of Rs.55,00,000/- from the 2<sup>nd</sup> respondent, and issued four cheques in favour of the 2<sup>nd</sup> respondent in discharge of the legally enforceable debt for the aforestated amounts i.e., Cheque bearing No.915192 dated 18.03.2009 for Rs.5,00,000/-; Cheque bearing No.915177 dated 24.03.2009 for Rs.10,00,000/-; Cheque bearing No.915176 dated 29.06.2009 for Rs.20,00,000/- and Cheque bearing No.915191 dated 29.06.2009 for Rs.20,00,000/-.

The 2<sup>nd</sup> respondent presented the cheques in State Bank of India, Dhone, for encashment and all the four cheques were returned with an endorsement "Insufficient Funds". The 2<sup>nd</sup> respondent got issued a legal notice to the petitioner on 30.07.2009 by registered post calling upon him to repay the amount due under the dishonoured cheques. The legal notice was returned as "not claimed" on 07.08.2009. The petitioner failed to repay the amounts to the 2<sup>nd</sup> respondent inspite of knowledge that the cheques issued by him to the 2<sup>nd</sup> respondent were returned dishonoured due to insufficiency of funds in his account.

Alleging that the petitioner has issued the cheques with a dishonest intention to cheat him and therefore the petitioner has committed offences punishable under Section 420 IPC and Sections 138 and 142 of Negotiable Instruments Act, 1881 (for short, NI Act), the 2<sup>nd</sup> respondent filed a private complaint before the Judicial Magistrate of First Class, at Dhone.

The learned Magistrate referred the private complaint to the Station House Officer, Dhone, under Section 156(3) of Cr.P.C. Based on the complaint, the SHO, Dhone has registered a case in FIR No.257 of 2009 against the petitioner for the offences punishable under Sections 420 IPC and Sections 138, 141 and 142 of the NI Act.

During pendency of investigation in the FIR No.257 of 2009, the petitioner approached this Court by filing Criminal Petition No.7931 of 2009 seeking to quash the proceedings in the FIR. This Court disposed of the said criminal petition with a direction to continue the investigation and take consequential steps in the case, and stayed the arrest of the petitioner till filing of charge sheet. On completion of investigation, the police filed charge sheet. The learned Magistrate has taken the case on file as C.C.No.85 of 2010, taking cognizance of the offences punishable under Section 420 IPC and Sections 138, 141 and 142 of the NI Act.

3. Heard the arguments of Sri Vinesh Raj, learned counsel for the petitioner; and Sri K. Sudhakar, learned counsel for the 2<sup>nd</sup> respondent; and the learned Public Prosecution.

4. Learned counsel for the petitioner submitted that a Criminal Court cannot refer the complaint to the SHO for investigation of an offence punishable under Section 138 of the NI Act, as police have no power to investigate an offence under Section 138 of the NI Act. It is further submitted that the charge sheet does not disclose offences punishable under Sections 138, 141 and 142 of the NI Act, against the accused. It is further argued that the 2<sup>nd</sup> respondent has not issued statutory notice to the petitioner as required under Section 138 of the NI Act, as such no case is made out for initiating criminal proceedings against the petitioner. It is argued that there are no ingredients of Section 420 IPC. It is further argued that the statutory requirement of Section 138 of NI Act is not complied and the ingredients of Section 420 IPC are not present in the

case. As the police have no power to investigate an offence punishable under Section 138 of NI Act, the charge sheet filed by the police stating that the accused has committed offences punishable under Section 420 IPC and Sections 138, 141 and 142 of the NI Act, cannot sustain and therefore the proceedings in the C.C.No.85 of 2010 on the file of Judicial Magistrate of First Class, at Dhone, are liable to be quashed.

In this connection, the learned counsel for the petitioner placed reliance on the decision of this Court in the case of J. Vidya Sagar, S/o L.J. Rajam v. State of Andhra Pradesh<sup>1</sup>, and submitted that the facts of the present case are similar to the facts in Vidya Sagar (1 supra). It is further submitted that this Court in Vidya Sagar has referred to the decisions rendered in H. Mohan & Anr. V. State of Karnataka<sup>2</sup>; Jagarlamudi Surya Prasad and Others v. State of Andhra Pradesh<sup>3</sup>; Y. Venkateswara Rao v. Mahee Handlooms (P) Ltd.<sup>4</sup>; Central Bank of India and another v. M/s Saxons Farms and Others<sup>5</sup>; Nemichand Swaroopchand Shaha v. M/s T.H. Raibhagi Firm<sup>6</sup>; S. Jayaswami and another v. State of Orissa and another<sup>7</sup>; Veer Prakash Sharma v. Anil Kumar Agarwal<sup>8</sup>; and Hridaya Rajan Prasad Verma and others v. State of Bihar and another<sup>9</sup>, and came to the conclusion that when there is no allegation with regard to fraudulent intention on the date of issuing cheque and closing the account, the ingredients of Section 420 IPC does not attract in the present case.

Learned counsel for the petitioner has also placed reliance on Binod Kumar v. State of Bihar<sup>10</sup>. Paragraphs 17, 18 and 19 of the said judgment are extracted below:

**17. Section 420 IPC deals with cheating. Essential ingredients of Section 420 IPC are:- (i) cheating; (ii) dishonest inducement to deliver property or to make, alter or destroy any valuable security or anything which is**

---

<sup>1</sup> 2010 (2) ALD (CrI) 86 (AP)

<sup>2</sup> 1991 (2) Crimes 93

<sup>3</sup> 1992 (0) CRLJ 597

<sup>4</sup> 1992 (3) ALT 73

<sup>5</sup> 1999 (0) CRLJ 4571

<sup>6</sup> 2002 (1) CLJ 417

<sup>7</sup> 2005 (0) CRLJ 2896

<sup>8</sup> 2007 (9) SCALE 502

<sup>9</sup> 2000 (4) SCC 168

<sup>10</sup> (2014) 10 SCC 663

sealed or signed or is capable of being converted into a valuable security, and (iii) mens rea of the accused at the time of making the inducement.

18. In the present case, looking at the allegations in the complaint on the face of it, we find no allegations are made attracting the ingredients of Section 405 IPC. Likewise, there are no allegations as to cheating or the dishonest intention of the appellants in retaining the money in order to have wrongful gain to themselves or causing wrongful loss to the complainant. Excepting the bald allegations that the appellants did not make payment to the second respondent and that the appellants utilized the amounts either by themselves or for some other work, there is no iota of allegation as to the dishonest intention in misappropriating the property. To make out a case of criminal breach of trust, it is not sufficient to show that money has been retained by the appellants. It must also be shown that the appellants dishonestly disposed of the same in some way or dishonestly retained the same. The mere fact that the appellants did not pay the money to the complainant does not amount to criminal breach of trust.

19. Even if all the allegations in the complaint taken at the face value are true, in our view, the basic essential ingredients of dishonest misappropriation and cheating are missing. Criminal proceedings are not a short cut for other remedies. Since no case of criminal breach of trust or dishonest intention of inducement is made out and the essential ingredients of Sections 405/420 IPC are missing, the prosecution of the appellants under Sections 406/120B IPC, is liable to be quashed.

Learned counsel for the petitioner further submitted that when the dishonest intention and inducement is not made out, the essential ingredients of Section 420 IPC are not present in the case and, therefore, the offence under Section 420 IPC is liable to be quashed.

5. Learned counsel for the 2<sup>nd</sup> respondent-complainant submitted that though the ingredients of Section 420 IPC are not present in this case, the accused is liable for prosecution for the offences punishable under Sections 138, 141 and 142 of the NI Act.

6. Learned Public Prosecutor also canvassed the same point that the ingredients of Section 420 IPC are not present in this case.

7. At the outset, it is obvious that the 2<sup>nd</sup> respondent has filed a private complaint under Section 200 Cr.P.C., before the Judicial Magistrate



of First Class, at Dhone, alleging offences punishable under Section 420 IPC and Sections 138, 141 and 142 of NI Act, against the petitioner. The learned Magistrate has made an endorsement on the complaint referring the matter to the S.H.O., Dhone, under Section 156(3) Cr.P.C., for investigation and report. In the meanwhile, the petitioner has approached this Court by filing CrI.P.No.7931 of 2009, and this Court disposed of the criminal petition with a direction to continue investigation but staying arrest till filing of charge sheet. Thereafter, the police filed charge sheet against the petitioner for the offences punishable under Section 420 IPC and Sections 138, 141 and 142 of NI Act, it was taken on file by the Judicial Magistrate of First Class, at Dhone, as C.C.No.85 of 2010. Seeking to quash the proceedings of the C.C.No.85 of 2010, the present criminal petition is filed.

8. On consideration of the material on record, it is obvious that the complainant has to establish the ingredients of offence punishable under Section 420 IPC against the petitioner. The private complaint filed before the learned Magistrate is placed before this Court. It does not disclose any ingredients to attract offence punishable under Section 420 IPC.

9. Learned counsel for the 2<sup>nd</sup> respondent had fairly conceded that ingredients of Section 420 IPC are not present in this case.

10. On considering the submissions of both sides and in the light of the material available, there are no ingredients attract the offence punishable under Section 420 IPC against the petitioner and, therefore, the proceedings in C.C.No.85 of 2010, insofar as the offence punishable under Section 420 IPC, is liable to be quashed.

11. Therefore, the only point that is to be considered is whether the ingredients of Section 138, 141 and 142 of the NI Act, are present and whether the police can investigate an offence punishable under NI Act.

12. As far as the allegations under Sections 138, 141 and 142 of the NI Act are concerned, the police do not have any role in investigating the offence under NI Act, except in respect of offence under Section 420 IPC. It is pertinent to note that when the police cannot investigate an offence punishable under Sections 138, 141 and 142 of the NI Act, the

chargesheet filed by the police, insofar as those offences under the NI Act, are also liable to be quashed.

13. In the result, the criminal petition is allowed, quashing the proceedings in C.C.No.85 of 2010 on the file of Judicial Magistrate of First Class, at Dhone, Kurnool. The respondent is at liberty to proceed against the petitioner for the offences punishable under Section 138, 141 and 142 of the NI Act, as per the established procedure under the NI Act. Miscellaneous petitions, if any pending, shall stand closed.

\_\_\_\_\_  
GUDI SEVA SHYAM PRASAD, J

03<sup>rd</sup> October, 2017

KSM



THE HON'BLE SRI JUSTICE GUDI SEVA SHYAM PRASAD



CRIMINAL PETITION No. 1306 of 2011

03<sup>rd</sup> October, 2017

KSM