HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL REVISION CASE No.2024 of 2016

ORDER :

The A1 and A2 of C.C.No.1145 of 2015 on the file of the II Additional Junior Civil Judge-cum-XIX Metropolitan Magistrate, Cyberabad, Kukatpally at Miyapur, outcome of a private complaint filed before the learned Magistrate by the de facto complainant that was referred to police for investigation under Section 156(3) Cr.P.C. in registering crime No.182 of 2015 on 15.05.2015 by Chandanagar Police Station for the offence punishable under Sections 406 and 420 I.P.C. from the investigation police filed final report in the form of charge sheet that was taken cognizance for the offences supra against the accused persons by the learned Magistrate on 03.10.2015 by ordering summons for appearance of accused by 29.10.2015. It is after appearance of accused and from the case copies supplied, the accused filed application under Section 239 Cr.P.C. to discharge them saying the accusation in the cognizance order of the Magistrate from the material of prosecution is baseless and there are no grounds to frame charge.

2. The learned counsel for the revision petitioner reiterated the same before the lower Court in the discharge application and the lower Court however held that as per the settled law, admissibility and proof of documentary evidence collected by

investigating agency will be decided during trial and not in the course of framing charge but for from the prosecution material to consider prima facie accusation against the accused to sustain or not and Court has no duty in framing charges to whether as if the said material as evidence for appreciation but for to consider on face value of the material. The documents want to rely are the order of assessment assessed by the Income Tax Authority and declaration of assets. Now to consider existence of prima facie material or not when material placed by prosecution right from the registration of the crime on complaint and the statements of witnesses summed up in the charge sheet with material disclosing prima facie case that is suffice and there is nothing to show the accusation groundless much less to say no material to frame charge even on meticulous going through the record in dismissing the said application. Same is now impugned.

3. A perusal of the private complaint in registration of the crime from the same referred to police for investigation shows that the complainant is a proprietor of two firms i.e., Aditya Foods and Archana Enterprises in dealing with retailing and distribution business of bakery products in and around Hyderabad. A2 by name Aditya Bajaj, in the year, 2010 approached the complainant and introduced that they are manufacturers of non-dairy products such as Tropolite Cream, Ecotrop, Cooklite, Chocowip and A2 also introduced A1 by name PuneethDavar saying as M.D. of the said company and they

induced the complainant to take the distribution of said products and believing them, he agreed to distribute their products through his two business entities supra and did business for sometime. The further averments particularly from paras 3 and 4 of the complaint are that, A1 and A2 hatched a plan to extract huge amounts through complainant and on 11.07.2011, with a dishonest intention of them to cheat the complainant sent e-mail by falsely promising, if complainant distribute the said products they pay commission on the business of their products. Wherein the said e-mail, A1 and A2 falsely assured to give commission for selling of the product of Tropolite cream at Rs.5/- per kg. and for selling the products of Ecotrop at Rs.2/- per Kg. and believing their false assurances through the said e-mail, complainant started selling and distributing said products to his customers from July, 2011 to December, 2014 by taking the material on large scale (on credit basis) and complainant used to pay the amounts to A1 and A2 on receipt of stocks but surprisingly A1 and A2 never paid the commission amount to the complainant, which was offered on said products and whenever the complainant asked to pay the commission, A1 and A2 were postponing saying one or other reasons. The commission according to him due from them is Rs.15,61,125/- as per the monthly statements enclosed with the complaint. It is further averred in the complaint that, A1 and A2 induced complainant to market their sample products to customers to promote the business with a promise to reimburse for the same and having falsely promised to pay the amounts for the damaged material received by the complainant since it is on credit basis believing their assurances he has given samples to customers to promote the products without agreement or undertaking. However, during course of business they used to send damaged material to A1 and A2 and they became due Rs.1,08,833/- for the sample damaged material claim to refund and A1 and A2 used to contact complainant's customers named by him by disclosing original price of products and by violating promises and commitments with the complainant, due to which the customers having been duped to avoid payment to the complainant to a tune of Rs.1,25,084/- and A1 and A2 also offered schemes, on believing them, the complainant launched the said schemes to his customers and sustained loss there from of Rs.2,31,989/- and complainant in turn went into loss due to attitude of A1 and A2 to a tune of Rs.20,27,031/- thereby claimed as they cheated intentionally by playing deception and also committed breach of trust.

4. It is the said complaint from reference, the police registered the crime and investigated. During the course of investigation mainly as per the charge sheet three witnesses examined including the complainant, who reiterated his version. The other two witnesses whose statements if at all relevant as per the charge sheet, examined as LWs.2 and 3 by name Naveen

Jain and Aijaz Ahmed, are that they came to know the complainant is a proprietary concern of the two firms and the accused approached and promised and complainant was cheated. In their statements, they did not say specifically of anything happened in their presence or they are witnesses to any such transactions, much less any false assurances by accused to give any weight to their versions. The agreements no doubt in writing entered by the complainant with the entity and not individually with A1 and A2. Even in the distribution agreements there is nothing to show any of the accused were signatories. Even the e-mail sent is on behalf of entity and not individually by A1 and A2 and they are not even persons sent the mail to some other person on behalf of the entity. The person, who is responsible for day to day affairs of the entity besides the entity having mind and soul of that person, for the individual acts can be made liable. It is also the settled law that even entity is not arrayed as one of the accused, the individual liability for the acts of the individuals concerned though can be made personally liable. Thereby it cannot be said that without impleading the entity, A1 and A2 cannot be accusationed. However, the only thing to consider whether there is any material against them. Once the e-mail is the basis for the enhanced commission and the non-payment and the same not shown sent by the accused and there is no reference of accused but for by the company and company is not accused, they cannot be personally liable. The other thing to be considered is otherwise there is any material to sustain the accusation for the offence under Sections 406 and 420 I.PC.

5. So far as Section 406 IPC defined in Section 405 I.P.C. concerned, there is no any entrustment by the complainant to the accused and any breach of trust there from. Thus, Section 406 IPC has no application, leave about if at all to apply is Section 409 IPC for an agent for the breach of trust. The other thing is the commission if at all with a promise to pay, non-payment with an intention so doing is criminal misappropriation. The e-mail when not sent by accused, any commission pursuant to the e-mail message for which accused cannot be made liable even for any criminal misappropriation.

6. So far as the offence of cheating under Section 420 I.P.C. is concerned, it must be shown from the inception as per Section 415 I.P.C., dishonest intention and deception to have wrongful gain and to cause of wrongful loss. There is nothing to show through e-mail, accused committed any offence of cheating but for if at all the entity and the person, who sent the mail on behalf of the entity that was not party to the accusation.

7. Coming to the other requirement from the FIR and charge sheet, it is not only from e-mail but also from other statements, the accused individually approached with false promises and cheated by non-payment of the commission from the beginning and also by non-return of the damaged goods for the assurances

given to replace and also for value of samples given and same is according to him reflected in the accounts. E-mail is not the sole basis. No doubt for the entering into the contracts between complainant and A1 and A2 as per the complainant, thereby, it is only an offence of cheating at best that makes out and not criminal breach of trust.

8. Accordingly and in the result, the petition is allowed in part by holding that no offence under Section 406 I.P.C. prima facie made out but for if at all to frame charge under Section 420 IPC against the accused.

9. Miscellaneous petitions, pending if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:14-02-2017

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