IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 19.11.2018
CORAM
THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH
Crl.OP No.5427 of 2017
and
Crl.M.P.Nos.4046 & 4047 of 2017

S.Anbazhagan ..Petitioner

..Vs..

1.The Sub Inspector of Police,
(Law and Order)
Othiyan Salai Police Station,
Puducherry.

2.V.Ramani. ..Respondents

PRAYER: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to call for the records relating to the Complaint in C.C.No.9 of 2017, on the file of the learned Chief Judicial Magistrate, Puducherry, and quash the same.

For Petitioner : Mr.A.R.L.Sundaresan, Sr.Counsel
for AL.Ganthimathi

For Respondents: Mr.Bharath Chakravarthi for R1
Public Prosecutor (Puducherry)

Mr.D.Palanivel for R2
Mr.P.Vasanthan

ORDER

This Criminal Original Petition has been filed challenging the proceedings in C.C.No.9 of 2017, pending on the file of the learned Chief Judicial Magistrate, Puducherry.

2.The petitioner is the accused, against whom the first respondent Police have filed a Final Report before the Court below for an alleged offence under Section 420 of IPC.

3.The case of the prosecution, as projected in the Final Report is that during the month of December 2011, the petitioner who was the Managing Director of an Export Company received a sum of Rs.1,50,000/- from the second respondent as an advance to install 1 KWP OOF-GRID Solar Photovoltalic Power Plant, at the house of the de-facto Complainant. In the course of transaction, during September 2013, the petitioner installed 100 WT instead of 1 KWP without DC combiner Box, in the house of the second respondent and the said installation was not in accordance with the general specifications. Therefore, according to the Final Report, the cost of the product that was installed by the petitioner was only Rs.23,500/- and the petitioner caused a wrongful loss of Rs.1,27,000/- to the 2nd respondent. Therefore, a

Final Report was filed by the respondent Police for an offence under Section 420 IPC.

4.The learned Senior counsel appearing on behalf of the counsel for petitioner would submit that even on the entire reading of the Final Report, no offence has been made out under Section 420 of IPC. The learned Senior counsel further submitted that there was no dispute with regard to the fact that the Solar Power Plant was in fact installed at the house of the de-facto Complainant, and according to the de-facto Complainant, the product is only worth Rs.23,500/-. It is the further case of the de-facto Complainant that the petitioner had promised to install the balance 900 WT at a later point of time and the same was not complied with by the petitioner, and therefore, even if the said allegation is taken to be true, no offence under Section 420 IPC has been made out. The learned Senior counsel therefore submitted that this is a case of a defective equipment, that is said to have been installed by the petitioner and it is not worth the amount received by the petitioner and at the best this dispute can only be termed as a defective service, which will at the best attract the provisions of the Consumer Protection Act, or the second respondent must have worked out his remedy only before a

Competent Civil Court, and setting the criminal law in motion is not sustainable.

5.The learned Public Prosecutor (Puducherry) representing the first respondent would submit that the materials available on record would clearly establish that the de-facto Complainant suffered a wrongful loss and there was a wrongful gain for the petitioner, and therefore, there are sufficient grounds to frame a charge under Section 420 of IPC, and in fact the Court below has also framed a charge under Section 420 IPC against the petitioner. Therefore, this Court should not entertain the quash petition at this stage.

6.The learned counsel appearing for the second respondent would submit that the second respondent has been cheated by the petitioner by collecting the entire amount of Rs.1,50,000/- and has been supplied with a Solar Power Equipment with a lower capacity. Therefore, the learned counsel would submit that the second respondent has been put to wrongful loss, and therefore, an offence of cheating under Section 420 has been prima facie made out.

7.This Court has carefully considered the submissions made on either side. The essence of the case of the prosecution is that the petitioner received a sum of Rs.1,50,000/- from the de-facto Complainant in order to install a Solar Power Plant of 1 KWP and ultimately installed a Solar Power Plant with a capacity of 100 WT and in spite of several promises failed to install the balance 900 WT. Therefore, according to the prosecution an offence under Section 420 has been made out.

8.It will be useful to refer to the judgment of the Hon'ble Apex Court in Dalit Kaur and Ors .Vs. Jagnar Singh and Anr. reported in [2017(3) MWN (Cr.) 335 (SC)]. It will be relevant to extract para 9 to 11 of the judgment is hereunder:

> "9.The ingredients of Section 420 of the Indian Penal Code are :
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> "(i) Deception of any persons;
> (ii) Fraudulently or dishonestly inducing any person to deliver any property; or
> (iii) 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."
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> 10. The High Court, therefore, should have posed a question as to whether any act of inducement on the part of the appellant has been raised by the second respondent and whether the appellant had an intention to cheat him from the very inception. If the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the part of the appellants by non-refunding the amount of advance the same would not constitute an offence of cheating. Similar is the legal position in respect of an offence of criminal breach of trust having regard to its definition contained in Section 405 of the Indian Penal Code. {See Ajay Mitra v. State of M.P. [(2003) 3 SCC 11]}.
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> 11.There cannot furthermore be any doubt that the High Court would exercise its inherent jurisdiction only when one or the other propositions of law, as laid down in R. Kalyani v. Janak C. Mehta & Ors. [(2009 (1) SCC 516] is attracted, which are as under:

"(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a First Information Report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.

(2) For the said purpose, the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.

(4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue."

9.It will also be useful to refer to the judgment of the Hon'ble Supreme Court in S.V.L.Murthy .Vs. State Rep. by CBI, Hyderabad reported in [(2009) 6 SCC 77] . The relevant portions of the judgment is extracted hereunder:

40. Section 415 of the Indian Penal Code defines cheating as under :

'Section 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'."

41. 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

(iii) 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 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.

42.We may reiterate that one of the ingredients of cheating as defined in Section 415 of the Indian Penal Code is existence of an intention of making initial promise or existence thereof from the very beginning of formation of contract.

In Hira Lal Hari Lal Bhagwati v. CBI [(2003) 5 SCC 257], this Court held :

"40. It is settled law, by a catena of decisions, that for establishing the 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. From his making failure to keep promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed. It is seen from the records that the exemption certificate contained necessary conditions which were required to be complied with after importation of the machine. Since the GCS could not comply with it, therefore, it rightly paid the necessary duties without taking advantage of the exemption certificate. The conduct of the GCS clearly indicates that there was no fraudulent or dishonest intention of either the GCS or the appellants in their capacities as office-bearers right at the time of making application for exemption."

[See also Indian Oil Corporation v. NEPC India Ltd. & Ors. [(2006) 6 SCC 736]

43.In Vir Prakash Sharma v. Anil Kumar Agarwal [(2007) 7 SCC 373], noticing, inter alia, the aforementioned decisions, this Court held:

"13. The ingredients of Section 420 of the Penal Code are as follows:

(i) Deception of any persons;
(ii) Fraudulently or dishonestly inducing anyperson to deliver any property; or
(iii) 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.

No act of inducement on the part of the appellant has been alleged by the respondent. No allegation has been made that he had an intention to cheat the respondent from the very inception.

14. What has been alleged in the complaint petition as also the statement of the complainant and his witnesses relate to his subsequent conduct. The date when such statements were allegedly made by the appellant had not been disclosed by the witnesses of the complainant. It is really absurd to opine that any such statement would be made by the appellant before all of them at the same time and that too in his own district. They, thus, appear to be wholly unnatural.

15. In law, only because he had issued cheques which were dishonoured, the same by itself would not mean that he had cheated the complainant. Assuming that such a statement had been made, the same, in our opinion, does not exhibit that there had been any intention on the part of the appellant herein to commit an offence under Section 417 of the Penal

Code."

44. The said principle has been reiterated in All Carogo Movers (I) Pvt.

Ltd. v. Dhanesh Badarmal Jain & Anr. [2007 (12) SCALE 391], stating:

" 16... For the said purpose, allegations in the complaint petition must disclose the necessary ingredients therefor. Where a civil suit is pending and the complaint petition has been filed one year after filing of the civil suit, we may for the purpose of finding out as to whether the said allegations are prima facie cannot notice the correspondences exchanged by the parties and other admitted documents. It is one thing to say that the Court at this juncture would not consider the defence of the accused but it is another thing to say that for exercising the inherent jurisdiction of this Court, it is impermissible also to look to the admitted documents. Criminal proceedings should not be encouraged, when it is found to be mala fide or otherwise an abuse of the process of the Court. Superior Courts while exercising this power should also strive to serve the ends of justice."

. 45.In R.Kalyani v. Janak C.Mehta & Ors. [2008 (14) SCALE 85], this Court held:

"29. ... As there had never been any interaction between the appellant and them, the question of any representation which is one of the main ingredients for constituting an offence of cheating, as contained in Section 415 of the Indian Penal Code, did not and could not arise.

30. Similarly, it has not been alleged that they were entrusted with or otherwise had dominion over the property of the appellant or they have committed any criminal breach of trust."

10. It will also be relevant to refer to the judgment of the Honble Apex Court in Samir Sahay .Vs. State of U.P. and Others reported in [2017 (3) MWN (Cr.) 335 (SC)]. The relevant portions of the judgment is extracted hereunder:

16. Before we proceed further to examine the contentions of the learned counsel for the parties, it is necessary to notice the ingredients for establishing a charge under Section 420 IPC. Section 415 IPC defines cheating which is to the following effect:

"Section 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".

17. Section 420 IPC is with regard to the cheating and dishonestly inducing delivery of property which is to the following effect:

"Section 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 fo a term which may extend to seven years, and shall also be liable to fine."

18. According to Section 415 IPC, the inducement must be fraudulent and dishonest which depends upon the intention of the accused at the time of inducement. This Court had occasion to consider Sections 415 and 420 IPC in Hridaya Ranjan Prasad Verma and others vs. State of Bihar and another, 2000 (4) SCC 168. This Court after noticing the provisions of Section 415 and 420 IPC stated following in paragraphs 14 and 15:

"14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person 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 fraudulent or dishonest. In the second class of acts,the inducing must be intentional but not fraudulent or dishonest.

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."

19. Again in Dalip Kaur and others vs. Jagnar Singh and another, 2009 (14) SCC 696, this Court noticed the ingredients of Section 420 IPC. In paragraphs 9 to 11 following was stated:

"9.The ingredients of Section 420 of the Penal Code are:

“(i) Deception of any persons;

(ii) Fraudulently or dishonestly inducing any person to deliver any property; or

(iii) 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.”

10. The High Court, therefore, should have posed a question as to whether any act of inducement on the part of the appellant has been raised by the second respondent and whether the appellant had an intention to cheat him from the very inception. If the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the part of the appellants by non refunding the amount of advance the same would not constitute an offence of cheating.

Similar is the legal position in respect of an offence of criminal breach of trust having regard to its definition contained in Section 405 of the Penal Code. (See Ajay Mitra v. State of M.P.,2003(3)SCC11)

11. There cannot further more be any doubt that the High Court would exercise its inherent jurisdiction only when one or the other propositions of law, as laid down in R Kalyani v..Mehta, 2009 (1) SCC 516 is attracted, which are as under: SCC p. 523, para (15) “(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a first information report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence. (2) For the said purpose the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence. (3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the court shall not go beyond the same and pass an order in favour of the accused to hold absence of any

mens rea or actusreus.

(4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue.””

20. Applying the ratio laid down by this Court as noted above, it is clear that ingredients of Section 420 IPC are not made out in the present case,either from the First Information Report or from any other material. From the First Information Report as extracted above only allegation made against the appellant was that he accompanied his father Major P.C. Sahay (Retd.) when he assured that the money of the applicants will not be lost and it shall be the responsibility of his father(late P.C.Sahay). Following allegations made in the First Information Report need to be specially noticed:

“Along with him his son Samir Sahay Advocate who was already acquainted with the applicant also accompanied his father. Major PC Sahay gave the above said assurance, and the applicant and his wife Smt. Uma Devi deposited Rupees one Lakh with Major P.C.Sahay in this regard and he gave the receipt of the same to the applicant of which the applicant is enclosing the photocopy. Like this Major P.C.Sahay(retired) has got deposited total amount of Rs.86,000 /- from me and my wife(4) But after some days it came to know that the said company has ran away along with the lakhs of rupees of the depositors after closing its office.”

21. In the First Information Report even allegation of making assurance was not made against the appellant but was made against Major P.C.Sahay (Retd.), father of the appellant. There was no allegation that the appellant fraudulently or dishonestly induced the complainant to deposit money. This Court in Arun Bhandari vs. State of Uttar Pradesh and others, 2013 (2) SCC 801, has held that it is necessary to show that a person had fraudulent

or dishonest intention at the time of making the promise. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating. An earlier two - Judge Bench judgment of this Court in State of Keral vs. A. Pareed Pillai, 1972 (3) SCC 661, was quoted with approval in paragraph 21.Paragraphs 21,22,23 and 24 which are relevant are to the following effect:

21.Before we proceed to scan and analyse the material brought on record in the case at hand, it is seemly to refer to certain authorities wherein the ingredients of cheating have been highlighted. In State of Kerala v. A.

Pareed Pillai, a two-Judge Bench ruled that: (SCC p.667,para16) "16.…To hold a person guilty of the offence of cheating, it has to be shown that his intention was dishonest at the time of making the promise [and] such a dishonest intention cannot be inferred from [a] mere fact that he could not subsequently fulfill the promise."

22. In G.V. Rao v. L.H.V. Prasad, 2000 (3) SCC 693, this Cour has held thus:(SCC pp. 696 -97, para 7) "7. As mentioned above, Section 415 has two parts. While in the first part, the person must 'dishonestly' or 'fraudulently' induce the complainant to deliver any property; in the second part, the person should intentionally induce the complainant to do or omit to do a thing. That is to say, in the first part, inducement must be dishonest or fraudulent. In the second part, the inducement should be intentional. As observed by this Court in Jaswantrai Manilal khaney v State of Bombay,AIR 1956 SC 575, a guilty intention is an essential ingredient of the offence of cheating. In order, therefore, to secure conviction of a person for the offence of cheating,'mens rea' on the part of that person,must be established. It was also observed in Mahadeo Prasad v. State of W.B.,AIR 1954 SC 724, that in order to constitute the offence of cheating, the intention to deceive should

be in existence at the time when the inducement was offered."

23. In S.W. Palanitkar v. State of Bihar, 2002 (1) SCC 241, it has been laid down that: (SCC p.250, para 21) "21.…In order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating."

24. In the said case while dealing with the ingredients of criminal breach of trust and cheating, the Bench observed thus: (S.W. Palanitkar case,SCC p.246, paras 9- 10) "9.The ingredients in order to constitute a criminal breach of trust are: (i) entrusting a person with property or with any dominion over property, (ii) that person entrusted (a) dishonestly misappropriating or converting that property to his own use; or (b) dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation (i) of any direction of law prescribing the mode in which such trust is to be discharged,(ii) of any legal contract made,touching the discharge of such trust.

10.The ingredients of an offence of cheating are: (i) there should be fraudulent or dishonest inducement of a person by deceiving him,(ii)(a)the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or (b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and (iii) in cases covered by, (ii)(b) the act of omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property.""

> 22. The Chief Judicial Magistrate while rejecting the application of the appellant for seeking discharge has not even referred to any allegation or evidence on the basis of which it can be said that ingredients of Section 420 IPC were made out in the facts of the present case.
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> 23. We are, thus, of the considered opinion that in the present case ingredients of Section 420 IPC were not made out so as to frame any charge under Section 420 IPC against the appellant.

11.On a reading of the entire material that has been placed on record, it can be seen that the petitioner had quoted the total cost of the equipment as 3,45,000/- and after giving discount, the petitioner has quoted a total sum of Rs.3,10,000/- for installing a 1 KWP Solar Power Plant. The second respondent has paid a sum of Rs.1,00,000/- by cheque and Rs.50,000/- by cash as an advance. The petitioner installed a Solar Power with a capacity of 100 WT and promised the second respondent that he will install the balance 900 WT and thereafter receive the balance amount. The petitioner did not install 900 WT of Solar Power as promised by him. The second respondent attempted to get in touch with the petitioner, but the petitioner never responded.

12.It is to be seen whether the above facts culled out from the Final Report and the statement of witnesses, constitute an offence under Section 420 of IPC. A careful reading of the judgments referred supra, makes it abundantly clear that for establishing the 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. From his making failure to keep up promise subsequently, such a culpable intention right at the beginning, i.e., at the time when the promise was made, cannot be presumed. In this case, the grievance of the second respondent is that even though the petitioner promised to install 900 WT Solar Power subsequently, it was never done by him. Admittedly in this case, the second respondent has not paid the entire amount of Rs.3,10,000/- for the 1 KWP Solar Power Plant and what was paid was only an advance of Rs.1,50,000/- and the petitioner had installed a Solar Power only for 100 WTS. An attempt is also made by the prosecution by getting a statement from one of the witnesses that the Solar Power that was installed does not satisfy the fixed standard.

13.The material that is available on record does not satisfy the ingredients of Section 420 of IPC and at the best it can only said to be a failure to keep up a promise subsequently, by the petitioner. A subsequent conduct can never raise a presumption of the culpable intention right at the beginning. The prosecution has not established that there was fraudulent or dishonest intention at the inception.

14.In view of the above, in the present case, the prosecution has completely failed to establish the offence of cheating against the petitioner, and therefore, the continuation of the proceedings before the Court below will amount to an abuse of process of Court.

15.In the result, the proceedings in C.C.No.9 of 2017, on the file of the learned Judicial Magistrate, Puducherry is hereby quashed. Accordingly, the Criminal Original Petition is allowed. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Deputy Registrar

//True Copy//

Sub Assistant Registrar

KP

To

1.The Chief Judicial Magistrage,
Puducherry.

2.The Sub Inspector of Police,
(Law and Order)
Othiyan Salai Police Station,
Puducherry.

+1cc to Mr.AL.Ganthimathi, Advocate, S.R.No.79026
+1cc to the Public Prosecutor (Puducherry), S.R.No.78881

Crl.OP No.5427 of 2017

rrs 07/12/2018