IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

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Criminal Petition No.5636 of 2011

Between:

M/s.Adorn Jewellers
Rep. by its Managing Partner Vino Patel
and two others.

... Petitioners/Accused 1 to 3

AND

The State of A.P.
Rep. by its Public Prosecutor, High Court,
and another … Respondents

DATE OF JUDGMENT PRONOUNCED: **22.10.2018**

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers may be allowed to see the judgment? Yes / No

2. Whether the copies of judgment may be marked to Law Reporters / Journals? Yes / No

3. Whether His Lordship wish to see the fair copy of the Judgment? Yes / No

U. DURGA PRASAD RAO, J

*** THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**

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and another … Respondents

! Counsel for Petitioners **:** Ms. K.Pallavi

^ Counsel for Respondent No.1 **:** Addl. Public Prosecutor (TS)

^ Counsel for Respondent No.2 **:** None appeared.

< Gist:

> Head Note:

? Cases referred:

1) (2016) 1 SCC 348
2) (2014) 10 SCC 663
3) AIR 1968 SC 700 = MANU/SC/0091/1967

HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

Criminal Petition No.5636 of 2011

ORDER:

The petitioners/A1 to A3 seek to quash the proceedings against them in C.C.No.588 of 2010 on the file of XI Additional Chief Metropolitan Magistrate, Secunderabad.

2) The factual matrix of the case is thus:

a) The 2nd respondent filed a private complaint against the accused with the averments that the complainant is a registered company doing business in selling diamond and jewellery ornaments by purchasing them from different diamond and jewellery merchants as per the orders placed by the various customers. The accused are the manufacturers of diamond and jewellery ornaments and they used to make diamond and jewellery ornaments as per the orders placed by the complainant company. Therefore, the accused approached the complainant with an offer to manufacture and supply the diamond and jewellery ornaments by accepting 50% of the ordered amount and agreeing to collect the remaining balance at the time of delivery of the ornaments. The complainant and accused agreed to continue their business and accordingly developed acquaintance. They continued their business relations for some period. During the course of business on different dates between 03.04.2007 and 13.09.2008 the complainant placed orders for different types of diamond and jewellery ornaments worth Rs.50,27,032/- and paid the amount. The accused neither prepared the ornaments nor delivered them to the complainant. The accused expressed their inability to deliver the ornaments within the prescribed time and they used to postpone the matter from time to time. In the 1st week of September, 2008 the accused have requested the complainant to pay the remaining amount of Rs.2,27,032/- and the complainant paid the said amount through DD No.628385 dated 13.09.2008 drawn on ICICI Bank. Thereafter, the complainant demanded for delivery of the ornaments. On that, the accused abused the complainant in filthy and un-parliamentary language and also warned not to approach for collecting ornaments or for the amount. The accused intentionally and deliberately cheated the complainant with an intention to misappropriate the amounts given to them. Further, the accused threatened the complainant when requested for the ornaments or money.

b) The said complaint was referred to police of Bowenpally PS under Section 156(3) Cr.P.C. and the same was registered as Cr.No.375 of 2008 for the offences under Section 406, 420 and 507 IPC. The police after investigation filed a final report dated 30.07.2009 before the Court submitting that facts of the case revealed both complainant and accused were running business transactions since last some years and in the course of business transaction the complainant issued cheques in favour of accused which were dishonoured and thereby, the accused have filed two criminal case—C.C.Nos.14969 and 14970 of 2008 for the offence under Section 138 r/w 141 and 142 of Negotiable Instruments Act (for short 'NI Act') before the learned Chief Judicial Magistrate Court at

Surat and the same are pending and in those circumstances, the complaint allegations only reveal a civil dispute and accordingly filed final report.

c) Aggrieved, the complainant filed a protest petition before XI Additional Chief Metropolitan Magistrate, Secunderabad. The Court, it appears, after examining LWs.1 to 3 took cognizance of the case for the offence under Sections 420, 406, 507 r/w 34 IPC and ordered summons.

Hence the instant quash petition.

3) Heard arguments of Ms. K.Pallavi, learned counsel for petitioners and learned Additional Public Prosecutor for 1st respondent. Though 2nd respondent appeared through counsel, there is no representation.

4) Severely fulminating the order of the trial Court taking cognizance of the complainant, learned counsel for petitioners Ms. K.Pallavi would argue that the complaint allegations are false to the core in as much as, the petitioners/accused and complainant have been doing business in gold ornaments and jewellery quite for some time and some of the cheques issued by the complainant for the jewellery and gold ornaments supplied by the accused were dishonoured and therefore, the accused filed C.C.Nos.14969 and 14970 of 2008 against the complainant before the Chief Judicial Magistrate, Surat for the offence under Section 138 r/w 141 and 42 of NI Act and those cases are pending and the present complaint is filed by the complainant with all false allegations only to wriggle out of those criminal cases and to bring down them to his

dictates. Learned counsel further argued that even assuming that complaint allegations are true and genuine, still they at best reveal breach of contract for which the remedy lies before the civil court but not criminal court. Learned counsel strenuously argued that mere non-delivery of jewellery and gold ornaments as agreed, after receiving the amount would only amount to breach of contract but by no stretch of imagination the failure on the part of accused can be dubbed as cheating or misappropriation to bring the transaction within the fold of criminal offence. The civil liability cannot be converted into a criminal liability to intimidate the opposite party. In that view, learned counsel argued, continuation of the criminal proceedings would amount to abuse of process of court. To buttress her argument, she placed reliance on the following judgments.

1) ***International Advanced Research Centre for Powder Metallurgy and New Materials (ARCI) and Ors. vs. Nimra Cerglass Technics (P) Ltd. and others***[1]

2) ***Binod Kumar and others vs. State of Bihar and another***[2]

5) Per contra, learned APP would argue that on the promise of delivery of jewellery and gold ornaments the accused have received and deceived the complainant to the tune of Rs.50,27.032/- and therefore, the trial Court rightly took cognizance. He thus prayed to dismiss the petition.

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[1] (2016) 1 SCC 348
[2] (2014) 10 SCC 663

6) The point for determination is:

"Whether there are merits in this Criminal Petition to allow?"

7) **<u>POINT</u>**: I gave my anxious consideration to the facts and material placed before the Court to know whether the transaction between the parties even if assumed to be true would amount to criminal offence. As can be seen from the complaint allegations and the statements of witnesses examined before the trial Court, the complainant and accused were known to each other and they have been in the jewellery and gold ornaments business quite for some time, as the complainant sells jewellery and gold ornaments by purchasing them from the manufacturers. The accused company is the manufacturer of such jewellery and gold ornaments. As per the complaint, in between 03.04.2007 and 13.09.2008 the complainant placed an order for diamond and jewellery ornaments worth Rs.50,27,032/- with accused company and paid total amount through cheques and DDs. In spite of receiving the total amount the accused have failed to comply with the order and did not deliver the jewellery and gold ornaments as per the agreement. As per the statement of LW3, an amount of Rs.50,27,032/- was paid to the accused through cheques and DDs. on different dates for different amounts. The petitioners/accused in para-4 of the quash petition denied the allegation that they received Rs.50 lakhs and odd between 03.04.2007 and 13.09.2008 as false and frivolous story. Their case is that during the course of business transaction, the complainant had issued cheques, out of which some cheques were bounced back and therefore

the accused filed C.C.No.14969 and 14970 of 2009 in the Court of Chief Judicial Magistrate, Surat and the present complaint is only a counter blast.

8) In the light of allegations and counter allegations, it has now to be seen, if the complaint allegations are accepted to be true on their face value, whether they divulge any criminal offence or depict only breach of contract for taking civil action.

9) The offences alleged in this case are under Sections 406, 420 and 507 IPC. The Apex Court in ***International Advanced Research Centre for Powder Metallurgy and New Materials (ARCI)***'s case (*1 supra*) has drawn the distinction between the breach of contract and cheating. It held thus:

> *"**Para-15**: The essential ingredients to attract Section 420 Indian Penal Code are: (i) cheating; (ii) dishonest inducement to deliver property or to make, alter or destroy any valuable security or anything which is 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.* ***The making of a false representation is one of the essential ingredients to constitute the offence of cheating Under Section 420 Indian Penal Code.*** *(Emphasis supplied) In order to bring a case for the offence of cheating, it is not merely sufficient to prove that a false representation had been made, but, it is further necessary to prove that the representation was false to the knowledge of the accused and was made in order to deceive the complainant.*

> ***Para-16*** *The distinction between mere breach of contract and the cheating would depend upon the intention of the accused at the time of alleged inducement. If it is established that the intention of the accused was dishonest at the very time when he made a promise and entered into a transaction with the complainant to part with his property or money, then the liability is criminal and the accused is guilty of the offence of cheating.* ***On the other hand, if all that is established that a representation made by the accused has subsequently not been kept, criminal liability cannot be foisted on the accused and the only right which the complainant acquires is the remedy for breach of contract in a civil court.*** *(Emphasis supplied) Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown at the beginning of the transaction.*

10) When the above principle is applied to the case on hand, admittedly the complainant and the accused are known to each other and doing the business in gold ornaments and jewellery quite for some time. Even assuming that the complainant has paid Rs.50,27,032/- to the accused, which fact is denied, for supplying jewellery and gold ornaments and accused failed to deliver the same, that by itself one cannot draw a conclusion that the accused had dishonest intention at the inception to take away the money and not to supply the ornaments. Even the complaint and statements of witnesses did not specify that the accused made a false representation at the inception to deceive or defraud the complainant. L.Ws.1 and 2 stated that the accused persons refused to supply the gold ornaments and jewellery on the plea that the

gold rate increased and they cannot supply the articles as per the old rate and they were running in loss. From this alleged explanation one cannot readily infer that the accused had deceptive intention to cheat the complainant since inception. Every non-fulfilment of an obligation cannot be readily dubbed as cheating. Therefore, the act of accused, as rightly argued, may at best be treated as breach of contract. Of course, the accused denied receiving of such huge amount, which is a different fact altogether. Therefore, the material on record will not attract the ingredients of Section 420 IPC.

11a) To attract the offence of criminal breach of trust under Section 405 IPC, there must be entrustment of the property or there must be obtainment of any dominion over the property which the accused misappropriated or converted to his own use or dishonestly used or disposed of the property in violation of any direction of law which prescribes the mode in which such a trust is to be discharged or of any legal contract express or implied, which the accused made touching the discharge of such trust. So, the live nerve to attract the offence of criminal breach of trust is entrustment of property to the accused out of trust for utilising the property in a particular manner or to return the same after particular purpose is over. Though the property is entrusted to the accused, the proprietary right over the said property still vests with the person who entrusted. When these ingredients are applied, it can be emphatically said that the transaction of sale will not fulfil the ingredients of criminal breach of trust. In a sale transaction, there is no entrustment of property which the accused has to dispose of as per the terms of any statute or as per the terms of contract when the complainant pays the money for obtaining certain goods or articles and the accused fails to fulfil his obligation by making delivery, the recourse for the complainant is a civil action.

b) My view gets fortified by the decision of Honourable Apex Court reported in ***State of Gujarat vs. Jaswantlal Nathalal***[3] wherein it is held thus:

> *"**Para-8**: xx xx xx The expression 'entrustment' carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. Further the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them.*
> *A mere transaction of sale cannot amount to an entrustment.*
> *It is true that the government had sold the cement in question to BSS solely for the purpose of being used in connection with the construction work referred to earlier. But that circumstance does not make the transaction in question anything other than a sale. After delivery of the cement, the government had neither any right nor dominion over it. If the purchaser or his representative had failed to comply with the requirements of any law relating to cement control, he should have been prosecuted for the same. But we are unable to hold that there was any breach of trust."*

So, even if the complaint allegations are held to be true, the offence under Section 406 IPC will not attract.

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[3] AIR 1968 SC 700 = MANU/SC/0091/1967

12) Then, the offence of criminal intimidation under Section 507 IPC is concerned, LW1 only stated as if the accused abused the complainant in filthy language and refused to send jewellery and diamonds. The abuse without any intimidation to cause injury to the person, reputation or property will not attract the offence of criminal intimidation under Section 507 IPC.

13) So, at the outset, even if the complaint allegations are accepted to be true, they do not attract the offences under Sections 420, 406 and 507 IPC. Therefore, continuation of criminal proceedings against the accused, in my considered view, will amount to abuse of process of court.

14) In the result, this Criminal Petition is allowed and proceedings in C.C.No.588 of 2010 on the file of XI Additional Chief Metropolitan Magistrate, Secunderabad are quashed against the petitioners/A1 to A3.

As a sequel, miscellaneous petitions pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 22.10.2018
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