HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

Crl.P. No.4623 OF 2018

ORDER:

This criminal petition is filed under Section 482 Cr.P.C. to quash the proceedings in C.C.No.801 of 2017, pending on the file of V Additional Judicial Magistrate of First Class, Rajamahendravaram, East Godavari District, registered for the offences punishable under Sections 420, 506 read with 34 IPC.

2. The petitioner is A2, whereas, the 2nd respondent is the *de facto* complainant.

3. The 2nd respondent lodged report with the police alleging that Kamburu Bhanu Chandra – A1 and his mother, petitioner/A2 circulated pamphlets that their company Iyantra has been supplying machineries for manufacturing of CLC/AAC/Flyash bricks/Pre cast/Cat in situ plants and propagated that they will provide good service and they engaged good technicians to give excellent service to the consumers and they will provide project reports, feasibility report, plant designing, project management services, raw material analysis etc. Believing their representations, propagations and advertisements, the *de facto* complainant approached A1 and during his negotiations, A1 informed that he will take care of supplying machinery to the project and erection of the same and that the machinery is going to manufacture 50 cubic meters of brick within 8 to 10 hours. The 2nd respondent informed to A1 that he wanted to invest money by borrowing private loans at huge rate of interest and also the money received by his father towards retirement benefits into project by believing his words that the project is going to be flourishing. Believing the representations made by A1, the 2nd respondent agreed to purchase AAC Blocks machines and other equipments for manufacturing bricks and paid an amount of Rs.97,50,000/-

towards sale consideration for the machine and equipment within the time agreed between them and that A1 failed to deliver the machine within time. A1 received the said amount with a dishonest intention to deceive the 2nd respondent with a fraudulent intention to cheat him. On repeated demands made by the 2nd respondent, A1 supplied inferior quality of machines and when the machine was under process of manufacturing bricks, it is not even manufacturing 30 cubic meters of brick product and not functioning properly. When it was informed to A1, he is not attending to the repairs and not responding properly with an ill intention. The 2nd respondent approached A1 on several occasions and requested to set right the machines, but on lame excuses, he has not moved his little finger to keep his promise and rectify the defect of the machine.

4. On 01.04.2016 at about 11.00 A.M., A1 came to the industry at G.Yerrampalem village, Rajanagaram Mandal to rectify the defects and when the 2nd respondent requested to rectify the defects, A1 replied that he is not a technically qualified engineer and he was not properly trained to attend the repairing work, he wanted his staff to come, attend the repair work and requested time for 15 days to bring the technicians and to rectify the defects. It is also alleged that the machine was purchased in the month of December, 2014 and the machinery was sent to the project in the month of August, 2015, ever since it is not functioning properly and when he questioned A1 for the delay, he abused in filthy language. The 2nd respondent shocked about the abusive language used by A1, Manager of A1 i.e. Kosuri Veera Venkata Satyanarayana, Supervisor – Mekana Kalebu, Machine operator – Y.Prabhu questioned A1 about his highhandedness, then A1 abused them also in filthy language and threatened the 2nd respondent and other persons present there with dire consequences and left the place saying that he will see their end. Thus A1 allegedly deceived the 2nd respondent by making false representations with a dishonest

intention and at the end of the complaint, he also made request to the police to take appropriate action against A1 and his mother A2.

5. On the strength of the complaint, the police registered the case in Crime No. 98 of 2016 of Rajanagaram Police Station, Rajamahendravaram Urban, for the above offences and issued FIR.

6. On the strength of FIR, the Sub-Inspector of Police, Rajanagaram took up investigation and examined LWs1 to 5, recorded their statements under Section 161(3) Cr.P.C. and after collection of evidence, having satisfied that there is *prima facie* material to proceed against the accused, filed charge sheet for the offence punishable under Section 420 IPC against A2 and for the offences punishable under Sections 420 and 506 read with 34 IPC.

7. The present petition is filed by A2 – Kamburu Vijaya Kumari @ Vijaya Lakshmi, mother of A1 on the ground that the supply of machines is purely commercial transaction and if it is not functioning to the expectations of the 2nd respondent or as promised by the petitioner/A1, at best they can claim damages for the defective supply of machinery and that the defective functioning of machinery would not constitute the offence punishable under Section 420 IPC and apart from that none of the allegations made in the complaint against A2 do not constitute any of the offences. Similarly the statements recorded by the police under Section 161(3) Cr.P.C. are not pointing the complicity of the petitioner/A2 for any of the offences and prayed to quash the proceedings.

8. During hearing, learned counsel for the petitioner reiterated the contentions urged in the petition. Whereas, though notice was served on the 2nd respondent, proof of service is filed, none appeared for the 2nd respondent.

9. As seen from the allegations made in the complaint, charge sheet and the other material produced along with the petition, including the statements recorded under Section 161(3) Cr.P.C., the 2nd respondent approached A1 for supply of machines and to rectify the defects and that A1 promised that the machines will produce 50 cubic meters of brick within 8 to 10 hours, but the production is now limited to 30 cubic meters of bricks and A1 did not rectify the defect in the machine and failure to produce 50 cubic meters of bricks as promised by A1, is purely a commercial transaction, as purchase of machine and supply of it and if for any reason, there is any defect in the functioning of machine that would not constitute offence punishable under Section 420 IPC and similar question came up before the Apex Court in ***Anil Mahajan v. Bhor Industries***[1] where the parties entered into Memorandum of Understanding for supply of steel grip tapes stipulating that 50% of the payments against monthly quantity would be given in advance and balance 50% on receipt of the goods in pursuance of the Memorandum of Understanding, the complainant delivered. In the said case, the complainant delivered 56,94,120 reels of steel grip tapes valued at Rs. 3,38,62,860 to the accused during the period 19-8-2000 to 20-11-2000 and out of this amount, the accused made only part payment of Rs. 3,05,39,086 leaving balance amount of Rs. 33,23,774. The accused did not make further payment despite repeated demands and started giving reasons such as cash flow problems, non-receipt of right type of colour assortment and sales tax problems, etc., besides raising disputes in respect of the material purchased six years back being defective. Based on the contents of the Memorandum of Understanding, the company filed a complaint against the petitioner for the offences punishable under Sections 415, 418 & 420 I.P.C and the Court took cognizance of it and the same is challenged before the Court.

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[1] 2005 (10) SCC 228

10. In paragraphs 6,7 & 8 of the said judgment, the Court held as under:

> "6.Reliance has been placed, in that order, on various decisions of this Court holding that from mere failure of a person to keep up promise subsequently, a culpable intention right at the beginning that is, when he made the promises cannot be presumed. A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the transaction.
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> 7. The order of the learned Additional Sessions Judge has been set aside by the High Court by the impugned judgment. The High Court, except noticing that the ratio of the judgment of this Court cannot be applied to all cases in a uniform way, has neither discussed the said judgment nor stated as to how it was wrongly applied by the learned Additional Sessions Judge. There is hardly any discussion in the impugned judgment for reversing a well-considered judgment of the learned Additional Sessions Judge.
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> 8. The substance of the complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence. Except mention of the words "deceive" and "cheat" in the complaint filed before the Magistrate and "cheating" in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MOU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay. According to the complainant, a sum of Rs. 3,05,39,086 out of the total amount of Rs. 3,38,62,860 was paid leaving balance of Rs. 33,23,774. We need not go into the question of the difference of the amounts mentioned in the complaint which is much more than what is mentioned in the notice and also the defense of the accused and the stand taken in reply to notice because the complainant's own case is that over rupees three crores was paid and for balance, the accused was giving reasons as above noticed. The additional reason for not going into these aspects is that a civil suit is pending inter se the parties for the amounts in question.
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> (emphasis supplied)

11. If the above principles are applied to the present facts of the case, the supply of defective machine i.e. not producing 50 cubic meters of bricks within 8 to 10 hours as promised is not a ground to proceed against the petitioner/A2 for the offence punishable under Section 420 IPC.

12. The material does not disclose that the petitioner/A2 made any false promise with a dishonest intention to part with any moveable or immoveable

property by the 2nd respondent. To constitute offence punishable under Section 420 IPC, there must be dishonest intention at the very inception of the transaction. But no such allegation is made against the petitioner/A2 in the entire complaint or the charge sheet or at least in the statements recorded under Section 161 (3) Cr.P.C. by the police.

13. The Apex Court in ***V.Y.Jose v. State of Gujarat*[2]*,*** laid down the following ingredients to constitute the offence punishable under Section 420 IPC"

> "An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied:
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> (i) deception of a person either by making a false or misleading representation or by other action or omission;
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> (ii) fraudulently or dishonestly inducing any person to deliver any property; or
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> (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.
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> An offence of cheating may consist of two classes of cases:
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> (1) where the complainant has been induced fraudulently or dishonestly. Such is not the case here;
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> (2) When by reason of such deception, the complainant has not done or omitted to do anything which he would not do or omit to do if he was not deceived or induced by the accused."

14. In view of the law declared by the Apex Court, in the absence of any allegation that the petitioner/A2 had any intention at the very beginning to cheat the 2nd respondent and dishonestly induced the 2nd respondent, the prosecution against the petitioner/A2 is not maintainable and liable to be

[2] (2009) 3 SCC 78

quashed. Therefore, I find that it is a fit case to quash the proceedings against the petitioner/A2 for the offence punishable under Section 420 IPC.

15. In the result, the criminal petition is allowed.

Pending miscellaneous petitions in the petition, if any, shall stand closed.

M.SATYANARAYANA MURTHY,J

12.09.2018
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