

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.6500 OF 2015

ORDER:

This criminal petition is filed by the petitioner/accused under Section 482 of Criminal Procedure Code (for short "Cr.P.C.") to quash the proceedings in C.C.No.345 of 2015 on the file of the I Additional Chief Metropolitan Magistrate at Visakhapatnam, registered for the offence punishable under Sections 406 and 420 of Indian Penal Code (for short "I.P.C.").

The respondent No.2 is the complainant, who lodged a written report with the police and the same is extracted hereunder:

"Sir

In the year 2012, I returned from USA to India and decided to settle down in Visakhapatnam. I came across Mr.GVRM, who collected Rs.30 lakhs from me promising to construct a flat in a multi storied apartment complex in Narasimha Nagar. The apartment/flat was due in May 2013.

Mr.Gatty VRM has neither handed over the flat nor returned the money.

I have been cheated and put to harm. I am a retired person and all the money I advanced was from my provident fund savings and I have no where to go.

Kindly help me.

Sd/-....."

Based on the said written report lodged with the police, a case in Crime No.602 of 2014 was registered for the offence punishable under Sections 406 and 420 of I.P.C. in IV Town Police Station, Visakhapatnam City and F.I.R. was issued. Inspector of Police took up investigation, examined three witnesses, recorded their statements under Section 161 (3) of Cr.P.C. Based on the evidence collected during investigation, police filed charge sheet

before the I Additional Chief Metropolitan Magistrate, Visakhapatnam having concluded that there is prima facie material to proceed against the petitioner for the offence punishable under Sections 406 and 420 of I.P.C.

Even in the charge sheet, it is alleged that based on the statements of L.Ws.1 to 3 recorded under Section 161 (3) of Cr.P.C., investigating officer seized copies of 43 documents and the said documents disclosed that there was correspondence evidencing negotiations between the petitioner and respondent No.2 regarding purchase of flat, payment of money and demand for return of money already paid etc.

The Court below took cognizance of offence punishable under Section 406 and 420 of I.P.C. against the petitioner and ordered summons to the petitioner/accused.

On receipt of summons, the present petition is filed on the ground that the respondent No.2 entered into an agreement with the petitioner for purchase of Flat No.C-1, II Floor, in an extent of 1275 square feet for Rs.30,00,000/- and paid advance on 21.06.2012, but due to unavoidable circumstances i.e. the site pertaining to construction of the said apartment was in legal dispute, the construction could not be completed.

It is further urged that the respondent No.2 wanted to cancel the agreement and demanded to return Rs.30,00,000/- with 18% interest from the petitioner and the petitioner agreed for the same, but he could not refund the same on time, therefore, the respondent No.2 filed the complaint. The allegations made in the F.I.R. and Charge sheet do not constitute any offence punishable

under Section 406 and 420 of I.P.C. and the dispute is purely civil in nature. When the civil dispute is given cloak of criminal offence, the Court can exercise power under Section 482 of Cr.P.C. and quash the proceedings. Absolutely, there is no material to show that the petitioner cheated the respondent No.2 to part with money or property and he has dishonest intention at the very inception of the transaction. In the absence of intentional deception on the part of the accused at the beginning of negotiations, the police cannot proceed to investigate into the offence punishable under Section 420 of I.P.C. Finally, it is contended that filing of civil suit and criminal complaint simultaneously would amount to abuse of process of Court and requested to quash the proceedings in C.C.No.345 of 2015 on the file of the I Additional Chief Metropolitan Magistrate at Visakhapatnam.

This Court initially passed an order on 27.11.2015, but the matter was carried in appeal to Supreme Court in SLP (Criminal) No.11051/2017 and the respondent No.2 appeared as party-in-person before this Court and the Apex Court. The said SLP (Criminal) No.11051/2017 was disposed and the Apex Court requested this Court to dispose of the present petition expeditiously and preferably within a period of three (3) months from the date of order.

During hearing, Sri N.Subba Rao appearing on behalf of Smt.M.S.V.S.Sudha Rani, learned counsel for the petitioner contended that when a civil suit is pending for recovery of amount paid as advance under agreement of sale, filing of criminal complaint is abuse of process of Court. The reason for failure of the petitioner to perform his part of contract is pendency of civil suit

before the Civil Court between the original owner and the developer, the petitioner herein. Consequently, failure on the part of the petitioner does not constitute any offence punishable under Section 420 of I.P.C. Finally, it is contended that entrustment of amount by the respondent No.2 was only for the purpose of purchase of property, hence the same does not constitute any offence punishable under Section 406 of I.P.C. i.e. punishment for criminal breach of trust. In the absence of intentional deception on the part of the accused at the beginning of negotiations, the proceedings are liable to be quashed as the existence of dishonest intention at the inception is *sine qua non* to constitute offence punishable under Section 420 of I.P.C. Learned counsel for the petitioner placed reliance on the judgments of Apex Court rendered in “**Chandran Ratnaswami v. K.C.Palanisamy**”¹ “**Paramjeet Batra v. State of Uttarakhand**”²

The respondent No.2 filed counter denying material allegations and contended that the petitioner/accused cheated the respondent No.2 and the chronological acts, which constitute the offence of cheating are narrated in paragraph No.5 (a) to (f), they are as follows:

“a. On 21-6-2012 petitioner/accused did not have the ownership of the plot in his name on which he promised to construct flat for me Lakshmi Villa C1, 2nd floor. Thus the promise has been made knowing fully well he has no legal authority to construct the flat on someone else's land.

b. The petitioner/accused entered into an agreement for purchase of the same plot, on which the petitioner proposed to construct the flat, from true owner Mr. C. V. K. Raju only on 09.07.2012. However even this purchase did not materialize because the petitioner / accused cheated even the owner of the

¹ (2013) 6 SCC 740

² (2013) 11 SCC 673

plot Mr. C. V. K. Raju by issuing a personal cheque 276551 dated 10-7-2012 drawn on State Bank of Hyderabad, Saligramapuram Vizag, Narasimhanagar, Visakhapatnam 530024 for Rs.75,00,000/- which bounced back on 04.10.2012 thus paying only Rs.38,00,000/- paid towards total cost of the plot of Rs. 1,45,00,000/-. The owner Mr. C. V. K. Raju filed a court case for the bounced check. Details can be found in Case Nos. at Visakhapatnam Courts, details of Cases etc. to be furnished at a later date on demand. As the matter stands, the plot on which the petitioner/accused promised to build me a flat has been all this time since 21.06.2012 or before and after and even on 18.12.2015, office of M/s Andhra Phosphates Limited is situated managed by one Mr. N. L. N. Raju. The petitioner / accused never had a clear title of the plot at any time till date.

c. I submit that in agreement dated 21.06.2012 the petitioner/accused falsified the facts and recited that I purchased an undivided share of 50 Sq. Yds from the Owner Mr. C. V. K. Raju and showed me as the Owner. I hereby once again solemnly reaffirm to state under oath that I never even heard the name of Mr. C. V. K. Raju on or before 21.06.2012. On these stipulations in the agreement dated 21.06.2012 the petitioner / accused assured me that it was the practice in Visakhapatnam and that it was notional and that I need not worry about it. I trusted the petitioner / accused and his words based on my experience of 2 decades of stay in America where nobody can afford to lie and cheat in the manner the petitioner / accused did with me.

d. I submit that the act of cheating and telling lies by petitioner / accused are further established by the fact that in construction agreement dated 21.06.2012 the petitioner/ accused recited that I purchased 50 Square Yards of undivided share from the 500 Square Yards plot from Mr. C. V. K. Raju (which of course is untrue) but at the same time in his plot purchase agreement Document No. 3476 dated 09.07.2012 titled "Agreement to Sell with Irrevocable Power of Attorney" with the same Owner Mr.C.V.K. Raju on second page the petitioner/accused showed the plot size as 500 Square Yards but should have mentioned it as the balance 450 Square Yards if the earlier recital in agreement dated 21.06.2012 were to be believed. It is clear that the petitioner/ accused lied and cheated and committed breach of trust as explained.

e. The petitioner/accused repeatedly failed to honor his promises to return my money but to my utter surprise he offered me to purchase his property worth Rs. 2.1 crores by paying the cost difference over the money due which I could not afford to.

I rejected this proposal several times earlier which he finally admitted in his letter dated 20.07.2014 but unfortunately he raised it again even after this date once on 05.10.2014 in a meeting held between ACP Mr. D. Mahesh, the petitioner/accused, and I vide Document # 41 in CC 345/2015. The petitioner/ accused raised this issue once again on 18.10.2012 vide Document # 43 of CC 345/2015. All this would show that the petitioner/ accused was all along trying to make up and cook up some story in defense although he had malice and intention to cheat and lie all along.

f. On 30-11-2014 at the police station at the time the FIR was registered the petitioner/accused promised to immediately remit available amount directly into my bank account to establish his bonafides and balance money in 3 installments. However, the petitioner/accused once again broke the promise of depositing available money by direct deposit into my bank account and I concluded that his promise of paying the entire money in 3 installments on 30.11.2014 was yet another empty promise to cheat me once again. It is further established by the facts that he never paid single paise till date. His prime intention was to prolong and frustrate my efforts and cheat me by paying through personal checks with a history of check bounce cases as he did with the plot owner.”

It is further contended in the counter that failure on the part of the petitioner to perform his part of obligation though the matter is of civil in nature, when the petitioner appropriated the amount paid as advance, the same amounts to criminal breach of trust as defined under Section 405 of I.P.C. punishable under Section 406 of I.P.C., but the petitioner even today did not complete the construction and delivered the vacant possession of property, apart from that the respondent No.2 is unconcerned with the difficulty being experienced by the petitioner and the civil suit pending before the Civil Court is between the developer and original owner. Though the dispute is of civil in nature initially, subsequent conduct of the petitioner constitutes offence punishable under Section 420 of I.P.C. The respondent No.2 placed reliance on “**Arun**

***Bhandari v. State of U.P.*³ “*Narinder Singh v. State of Punjab*⁴ “*Arun Shankar Shukla v. State of Uttar Pradesh*⁵ “*Hridaya Ranjan Pd. Verma v. State of Bihar*⁶ “*S.W.Palanitkar v. State of Bihar*⁷”**

It is also further contended that the respondent No.2 paid Rs.30,00,000/- from 14.06.2012 to 23.06.2012 through bank transactions and the money straight away credited to the personal account of the petitioner in State Bank of Hyderabad, Saligramapuram Vizag, Narasimhanagar, Visakhapatnam. Respondent No.2 paid the 1st installment of Rs. 50,000/- on 15.06.2012 through account transfer from his bank account in SBI, RBI Layout Branch, and 2nd installment of Rs.50,000/- on the very same day 15.06.2012 from his account in State Bank of Mysore, Visakhapatnam Branch and 3rd installment of Rs.5,00,000, on 22.06.2012 from his account in State Bank of Mysore, Visakhapatnam and 4th installment of Rs.1,50,000/- on 23.06.2012 from State Bank of Mysore, the 5th installment of Rs. 1,00,000/- on 23-6-2012 from his account in State Bank of India, RBI Layout Branch, Bangalore, and the final installments of Rs.21,50,000,00/-on 23.06.2012 directly transferred to above account of the accused through RTGS bearing reference bearing # CHQ Transfer-RTGS SBINH12175311777 G. V. RAMANA MURTHY -99776 from SBI NRI Branch in Visakhapatnam. Thus, in total the respondent No.2 paid an amount of Rs.30,00,000/- within the

³ (2013) 2 SCC 801

⁴ (2014) 6 SCC 466

⁵ AIR 1999 SC 2554

⁶ AIR 2000 SC 2341

⁷ (2002) 1 SCC 241

span of 10 days and all the amounts credited to the personal account of the petitioner at Saligramapura, Visakhapatnam.

It is further contended that despite payment of amount, the petitioner neither fulfilled his promise nor returned the amount paid by the respondent No.2 as advance. It is also contended that he filed a suit for recovery of Rs.51,03,800/- with accrued interest on 10.06.2015 and the same was registered as O.S.No.396 of 2015 on the file of I Additional District Judge, Visakhapatnam. Therefore, the civil proceedings are on different footing and the said civil proceedings do not come in the way of criminal liability of the petitioner. Therefore, there are no ground to quash the proceedings at this stage and prayed to dismiss the petition.

Considering rival contentions and perusing the material on record, the points that arise for consideration are:

- (1) ***Whether entering into agreement to sell the plot bearing No.Lakshmi Villa C1, 2nd floor, by the petitioner and payment of Rs.30,00,000/- as advance by the respondent No.2; failure to complete the construction by the petitioner (accused) within the stipulated time constitutes offence punishable under Section 406 and 420 of I.P.C., if not, whether the proceedings against the petitioner in C.C.No.345 of 2015 on the file of the I Additional Chief Metropolitan Magistrate at Visakhapatnam, are liable to be quashed?***

P O I N T:

The petitioner is a builder and the respondent No.2 entered into agreement to purchase Flat C1, 2nd floor, and paid an amount of Rs.30,00,000/- as advance as narrated in the counter filed by the respondent No.2. Therefore, it is an undisputed fact and the respondent No.2 entered into agreement to purchase the flat and the petitioner received Rs.30,00,000/- as advance towards part of value of the flat proposed to be constructed. The petitioner is only a developer, whereas the property belongs to its owner, who filed a suit O.S.No.536 of 2014 for various reliefs including cancellation of G.P.A. executed in favour of the petitioner and the same is pending before the Civil Court.

The explanation given by the petitioner for failure to fulfill his obligation is that a civil suit is pending between him and the original owner. If really, the petitioner failed to fulfill his obligation under agreement of sale, it amounts to breach of contract, but not an offence punishable under Sections 406 and 420 of I.P.C.

Section 406 of I.P.C. deals with the punishment for criminal breach of trust. "Criminal breach of trust" is defined under Section 405 of I.P.C., which is as follows:

"405. Criminal breach of trust:- Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express, or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust."

To constitute the offence punishable under Section 406 of I.P.C., the prosecution has to prove that there must be

entrustment of property or with any dominion over property, dishonestly misappropriates or converts to his own use that property. But here in this case, an amount of Rs.30,00,000/- allegedly paid to the petitioner as advance of sale consideration for purchase of flat C-1, 2nd floor, Lakshmi villa. Therefore, the amount paid by the respondent No.2 represents part of sale consideration. When the amount was paid towards part of sale consideration, it can be appropriated towards sale consideration payable by the respondent No.2 for purchase of property. The relationship between the petitioner and the respondent No.2 is purchaser of flat and developer, but not trustee and beneficiary. The offence allegedly committed by the petitioner is punishable under Section 406 of I.P.C. and in the absence of any entrustment of property or money with a specific direction to appropriate the same for specific purpose, it is difficult to conclude that the petitioner misappropriated the amount paid, if any, in contravention of direction for appropriation as per law or as agreed by the parties.

In “**Murari Lal Gupta v. Gopi Singh**”⁸ the Apex Court while dealing with the similar case for the offence punishable under Section 406 and 420 of I.P.C. held as follows:

“The complaint does not make any averment so as to infer any fraudulent or dishonest inducement having been made by the Petitioner pursuant to which the Respondent parted with the money. It is not the case of the Respondent that the Petitioner does not have the property or that the Petitioner was not competent to enter into an agreement to sell or could not have transferred title in the property to the Respondent. Merely because an agreement to sell was entered into which agreement the Petitioner failed to honour, it cannot be said that the

⁸ (2006) 2 SCC (Cri) 430

Petitioner has cheated the Respondent. No case for prosecution Under Section 420 or Section 406 Indian Penal Code is made out even prima facie. The complaint filed by the Respondent and that too at Madhepura against the Petitioner, who is a resident of Delhi, seems to be an attempt to pressurize the Petitioner for coming to terms with the Respondent.”

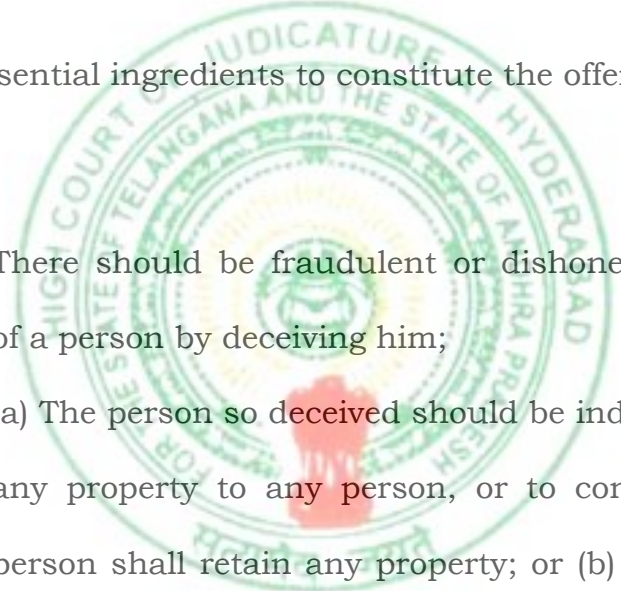
Thus, to constitute offence punishable under Section 406 of I.P.C., there must be entrustment of property for specific purpose and appropriation of the same for any other purpose or converts to his own use amounts to criminal breach of trust. Here, the respondent paid advance sale consideration to the petitioner and the purpose of payment is to appropriate the same towards part of sale consideration. Accordingly, the petitioner appropriated, such appropriation does not constitute an offence defined under Section 405 of I.P.C. punishable under Section 406 of I.P.C. though entrustment of amount is accepted by the petitioner, it is appropriated as directed by the respondent No.2. As such, the allegations made in the complaint i.e. entrustment of Rs.30,00,000/- towards sale consideration to the petitioner and appropriation does not constitute an offence punishable under Section 406 of I.P.C. even if the allegations made in the complaint are accepted on its face value. Therefore, the proceedings against the petitioner in C.C.No.345 of 2015 on the file of the I Additional Chief Metropolitan Magistrate at Visakhapatnam for the offences punishable under Sections 406 and 420 of I.P.C. are liable to be quashed.

Section 420 of I.P.C. deals with punishment for the offence of ‘cheating’ and inducing a person with dishonest intention to part with any property.

Cheating is defined under Section 415 of I.P.C and it is as follows:

“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".

The essential ingredients to constitute the 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 or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property.

In **V.Y.Jose v. State of Gujarat**⁹ the Apex Court laid down following ingredients to constitute cheating.

“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.

An offence of cheating may consist of two classes of cases:

(1) where the complainant has been induced fraudulently or dishonestly. Such is not the case here;

(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.”

⁹ (2009) 3 SCC 78

The Apex Court in “**S.W.Palanitkar v. State of Bihar**” (referred supra) held that 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.

An identical question came up before the Apex Court in “**Anil Mahajan v. Bhor Industries**¹⁰”, 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 19.08.2000 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 therein for the offences punishable under

¹⁰ 2005 (10) SCC 228

Sections 415, 418 & 420 I.P.C and the Court took cognizance of it and the same is challenged before the Court.

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.

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.

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.

In “**G.V. Rao v. L.H.V. Prasad and Others.**”¹¹, the Apex Court has held thus:

“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

¹¹ (2000) 3 SCC 693

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 *Jaswantrao Manilal Akhaney 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."

In "***Hridya Rajan Pd. Verma and Ors. v. State of Bihar and another***" (referred supra) the Apex Court discussed about the offence of 'cheating'. In the facts of the above judgment, a complaint was filed that the accused persons therein had deliberately and intentionally diverted and induced the respondent society and the complainant by suppressing certain facts and giving false and concocted information and assurances to the complainant so as to make him believe that the deal was a fair one and free from troubles. The further allegation was that the accused person did so with the intention to acquire wrongful gain for themselves and to cause wrongful loss to the Society and the complainant and they had induced the complainant to enter into negotiation and get advance consideration money to them. The two-Judge Bench referred to the judgment in "***State of Haryana v. Bhajan Lal***"¹² wherein the Apex Court has enumerated certain categories of cases by way of illustration wherein the extraordinary power under Article 226 or the inherent powers Under Section 482 of the Code of Criminal Procedure could be exercised either to prevent abuse of the process of the court or otherwise to secure the ends of justice.

¹² 1992 Supp (1) SCC 335

The Bench also referred to the decisions in “**Rupen Deol Bajaj (Mrs.) v. Kanwar Pal Singh Gill**”¹³, “**Rajesh Bajaj v. State NCT of Delhi**”¹⁴ and “**State of Kerala v. O.C. Kuttan**”¹⁵ wherein the principle laid down in “**State of Haryana v. Bhajan Lal**” (referred supra) was reiterated. The Court posed the question whether the case of the appellants therein came under any of the categories enumerated in “**State of Haryana v. Bhajan Lal**” (referred supra) and whether the allegations made in the FIR or the complaint if accepted in entirety did make out a case against the accused-Appellants therein. For the aforesaid purpose advertence was made to offences alleged against the appellants, the ingredients of the offences and the averments made in the complaint. The Court took the view that main offence alleged to have been committed by the appellants is cheating punishable Under Section 420 of the Indian Penal Code. Scanning the definition of 'cheating' the Court opined that there are two separate classes of acts which the persons 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. Thereafter, the Bench proceeded to state as follows:

¹³ AIR 1996 SC 309

¹⁴ (1999) 3 SCC 259

¹⁵ AIR 1999 SC 1044

“16. 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.”

After laying down the principle the Bench referred to the complaint and opined that reading the averments in the complaint in entirety and accepting the allegations to be true, the ingredients of intentional deception on the part of the accused right at the beginning of the negotiations for the transaction had neither been expressly stated nor indirectly suggested in the complaint. All that the respondent No.2 therein had alleged against the appellants therein was that they did not disclose to him that one of their brothers had filed a partition suit which was pending. The requirement that the information was not disclosed by the appellants therein intentionally in order to make the respondent No.2 to part with property was not alleged expressly or even impliedly in the complaint. Therefore, the core postulate of dishonest intention in order to deceive the complainant-respondent No. 2 was not made out even accepting all the averments in the complaint on their face value and, accordingly, ruled that in such a situation continuing the

criminal proceeding against the accused would be an abuse of process of the Court.

In the absence of intentional deception on the part of the accused at the beginning of negotiations, the proceedings against the petitioner are liable to be quashed.

Learned counsel for the petitioner contended that when a civil suit is pending for adjudication, the petitioner returned part of the amount due towards advance sale consideration in the civil Court, the petitioner cannot be prosecuted for the offence punishable under sections 406 and 420 of I.P.C. more particularly when the suit is pending.

It is also contended by the learned counsel for the petitioner that the respondent No.2 cannot prosecute both civil and criminal cases against the petitioner and such prosecution of both civil and criminal cases against the petitioner is nothing but abuse of process of Court to wreck vengeance against the petitioner and to bring him to his terms, in such case, the Court can exercise power under Section 482 of Cr.P.C. To substantiate his contentions, he placed reliance on the judgment of Apex Court rendered in "**Paramjeet Batra v. State of Uttarakhand**" (referred supra). In the facts of the above judgment, the complainant filed earlier complaint, which ended in acquittal and later filed another complaint for the same offences along with other offences. But the Apex Court quashed the proceedings and held that "while exercising its jurisdiction under Section 482 of the Code the High Court has to be cautious. This power is to be used sparingly and only for the

purpose of preventing abuse of the process of any court or otherwise to secure ends of justice. Whether a complaint discloses a criminal offence or not depends upon the nature of facts alleged therein. Whether essential ingredients of criminal offence are present or not has to be judged by the High Court. A complaint disclosing civil transactions may also have a criminal texture. But the High Court must see whether a dispute which is essentially of a civil nature is given a cloak of criminal offence. In such a situation, if a civil remedy is available and is, in fact, adopted as has happened in this case, the High Court should not hesitate to quash criminal proceedings to prevent abuse of process of court.”

In the said judgment, the Apex Court further held as follows:

“As we have already noted, here the dispute is essentially about the profit of the hotel business and its ownership. The pending civil suit will take care of all those issues. The allegation that forged and fabricated documents are used by the Appellant can also be dealt with in the said suit. Respondent 2's attempt to file similar complaint against the Appellant having failed, he has filed the present complaint. The Appellant has been acquitted in another case filed by Respondent 2 against him alleging offence under Section 406 of the Indian Penal Code. Possession of the shop in question has also been handed over by the Appellant to Respondent 2. In such a situation, in our opinion, continuation of the pending criminal proceedings would be abuse of the process of law.”

In “**Chandran Ratnaswami v. K.C.Palanisamy**” (referred supra), the Apex Court had an occasion to deal with doctrine of abuse of process of Court and held that “the doctrine of abuse of process of court and the remedy of refusal to allow the trial to

proceed is well-established and recognized doctrine both by the English courts and courts in India. There are some established principles of law which bar the trial when there appears to be abuse of process of court.” Lord Morris in the case of “**Connelly v. Director of Public Prosecutions**¹⁶” observed:

"There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. A court must enjoy such powers in order to enforce its rule of practice and to suppress any abuse of its process and to defeat any attempted thwarting of its process"

"The power (which is inherent in a court's jurisdiction) to prevent abuse of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice."

In his separate pronouncement, Lord Delvin in the same case observed that where particular criminal proceedings constitute an abuse of process, the court is empowered to refuse to allow the indictment to proceed to trial.

In “**Hui Chi-Ming v. The Queen**¹⁷”, the Privy Council defined the word "abuse of process" as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case.

The Apex Court in “**State of Karnataka v. L. Muniswamy**¹⁸” observed that the wholesome power under Section 482 Code of Criminal Procedure entitles the High Court to quash a proceeding when it comes to the conclusion that allowing the proceeding to continue would be an abuse of the

¹⁶ (1964) 2 All ER 401 (HL)

¹⁷ (1992) 1 AC 34 (PC)

¹⁸ (1977) 2 SCC 699

process of the Court or that the ends of justice require that the proceeding ought to be quashed. The High Courts have been invested with inherent powers, both in civil and criminal matters, to achieve a salutary public purpose. A court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. The Court observed in this case that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the legislature. It was held in this case (at p.703 of SCC):

“7..... In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction.”

Even in “**Gian Singh V. State of Punjab**¹⁹”, a three-Judge Bench of the Apex Court held that “in the very nature of its constitution, it is the judicial obligation of the High Court to undo a wrong in course of administration of justice or to prevent

¹⁹ (2012) 10 SCC 303

continuation of unnecessary judicial process. This is founded on the legal maxim quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest. The full import of which is whenever anything is authorized, and especially if, as a matter of duty, required to be done by law, it is found impossible to do that thing unless something else not authorized in express terms be also done, may also be done, then that something else will be supplied by necessary intendment. Ex debito justitiae is inbuilt in such exercise; the whole idea is to do real, complete and substantial justice for which it exists. The power possessed by the High Court Under Section 482 of the Code is of wide amplitude but requires exercise with great caution and circumspection.”

If this principle is applied to the facts of the present case, it is clear that certainly civil litigation is given cloak of criminal offence and such practice cannot be encouraged by the Court.

In “***State of Haryana v. Bhajan Lal***” (referred supra) the Apex Court considered in detail the powers of High Court under Section 482 and the power of the High Court to quash criminal proceedings or FIR. The Apex Court summarized the legal position by laying down the following guidelines to be followed by High Courts in exercise of their inherent powers to quash a criminal complaint:

- (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non- cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

In view of the law declared by the Apex Court in the above judgments, when a civil suit is pending and the allegations made in the complaint are purely civil in nature i.e. breach of contract

and when the respondent No.2 is availing remedy in civil Court by filing suit and recovered part of amount, the petitioner cannot be prosecuted for the offences punishable under Sections 406 and 420 of I.P.C. based on the same cause of action and giving a colour of criminal offence to the civil wrong i.e. breach of contract, is nothing but abuse of process of Court and the Court can exercise power under Section 482 of Cr.P.C. since it amounts to abuse of process of Court as per guideline No.7 of guidelines formulated by the Apex Court in “**State of Haryana v. Bhajan Lal**” (referred supra).

Respondent No.2 appeared as party-in-person through referred to judgments of Apex Court in the written arguments, he did not produce copies of citations. In “**Arun Bhandari v. State of U.P.**” (referred supra) the Apex Court held that sometimes a case may apparently look to be of civil nature or may involve a commercial transaction but such civil disputes or commercial disputes in certain circumstances may also contain ingredients of criminal offences and such disputes have to be entertained notwithstanding they are also civil disputes. Therefore, order of taking cognizance by lower Court against the accused shall not be quashed by High Court if *prima facie* case is made out against the accused. Even if, this principle is applied to the present facts of the case, this Court cannot quash the proceedings when the allegations in the complaint disclosed commission of criminal offences though civil suit is pending. In the present facts of the case, as discussed in the earlier paragraphs, the allegations made in the complaint if accepted on its face value do not constitute offence punishable under

Sections 406 and 420 of I.P.C., thereby the Court can exercise power under Section 482 of Cr.P.C. since it is abuse of process of Court. Therefore, the principle laid down in the above judgment has no direct application to the present facts of the case.

The respondent No.2/party-in-person also drawn the attention of this Court to the judgment of the Apex Court rendered in “**Hridya Rajan Pd. Verma and Ors. v. State of Bihar and another**” (referred supra), which I discussed in the earlier paragraphs. This judgment is of no assistance to the respondent No.2/party-in-person to substantiate his contentions; on the contrary it would assist the petitioner.

The respondent No.2/party-in-person to substantiate his contentions relied on the judgment of Apex Court rendered in “**S.W.Palanitkar v. State of Bihar**” (referred supra). In the facts of the said judgment, the agreement is in relation to commercial transaction containing arbitration clause and the prosecution was launched for criminal breach of such contract. The Apex Court held that merely because there is an arbitration clause in the agreement, that cannot prevent criminal prosecution against the accused if an act constituting a criminal offence is made out even *prima facie*. This judgment is of no help to the respondent No.2, on the other hand it supports the case of the petitioner as the allegations made in the complaint do not constitute offence punishable under Sections 406 and 420 of I.P.C.

Respondent No.2 also relied on the judgment of the Apex Court rendered in “**Arun Shankar Shukla v. State of Uttar Pradesh**” (referred supra), but the said judgment is not applicable to the present facts of the case. The question involved in the above case is quashment of proceedings in calendar case pending before the Magistrate and the Court issued N.B.W. against the petitioner therein for his absence. The Court concluded that the quashment of proceedings on that ground is unjustified and unsustainable. Hence, the judgment is not at all applicable to the present facts of the case on hand.

The respondent No.2 also drawn the attention of this Court to the judgment of Apex Court in “**Narinder Singh v. State of Punjab**” (referred supra). The said case is relating to quashment of proceedings on the basis of settlement. The offence allegedly committed by the accused therein is punishable under Section 307 of I.P.C., but the Court laid down certain guidelines for quashment of proceedings in view of the settlement though the offences are non-compoundable. The said judgment of the Apex Court is of no assistance to the respondent No.2.

Though, the respondent No.2 placed reliance on various judgments, some of them could be traced out by the Court and some of them are not tallying with citation since the respondent No.2 did not furnish the copies of those judgments. Therefore, this Court is disabled from discussing the principles laid down in some of the judgments referred in the written arguments and counter also.

As discussed above, the allegations made in the complaint even if accepted on its face value do not constitute offence punishable under Sections 406 and 420 of I.P.C. and the respondent No.2 filed civil suit O.S.No.396 of 2015 on the file of I Additional District Judge, Visakhapatnam for recovery of amount and part of amount covered by civil suit is also paid by the petitioner, the respondent No.2 having accepted part of the amount resorted to criminal litigation giving flavour of criminal offence to the civil litigation by abusing process of Court somehow to bring the petitioner to his terms to recover the amount with interest at the rate of 18% p.a. In such case, the Court is bound to exercise its jurisdiction as held by the Apex Court in “**Gian Singh V. State of Punjab**” (referred supra).

By applying the principles laid down in the above judgments, I find that it is a fit case to quash the proceedings against the petitioner. The point is answered accordingly.

In the result, the criminal petition is allowed. The proceedings in C.C.No.345 of 2015 on the file of the I Additional Chief Metropolitan Magistrate at Visakhapatnam, are hereby quashed against the petitioner herein. No costs.

The miscellaneous petitions pending, if any, shall also stand closed.

JUSTICE M. SATYANARAYANA MURTHY

20.08.2018
Ksp