IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.02.2020

Pronounced on: 13.05.2020

Coram:

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

CRL.O.P.No.10699 of 2017

S.Hemamalini ... Petitioner

Vs.

K. Shanmugam ... Respondent

PRAYER: Criminal Original Petition filed under Section 482 of the Criminal Procedure Code to set aside the order passed by the V Additional District Judge, Coimbatore in CRP.No.65 of 2015 dated 18.10.2016 confirming the order passed by the Judicial Magistrate No.II Coimbatore in Criminal Miscellaneous Petition No.291/2015 dated 04.08.2015 and to take the complaint on file and direct the trial court to issue process to the first respondent and to deal with the first respondent in accordance with law.

For Petitioner : Mr.V.S.Jagadeesan

For Respondent : Mr.P.M.Duraisamy

O R D E R

This petition has been filed by the complainant under Section 482 of Cr.P.C., to set aside the order passed by the V Additional District and Sessions Judge, Coimbatore in CRP.No.65 of 2015 dated 18.10.2016 confirming the order passed by the Judicial Magistrate No.II, Coimbatore in Crl.MP.No.291 of of 2015 dated 04.08.2015 and to direct the Judicial Magistrate No.II, Coimbatore to take the complaint on file and issue process to the respondent/accused and dispose of the case in accordance with the law.

2. The petitioner herein has filed a private complaint stating that she is dealing/trading in high quality cotton cloths under the name and style of 'Mrrine Overseas' . She has taken the property of the respondent/accused on lease for godown purpose on a monthly rent of Rs.3200/- and she paid Rs.25,000/- as advance. The accused being the owner of the tenanted premises, the husband of the complainant and the accused became acquainted. The accused is carrying on business

in Textiles under the name and style of 'Sri Chitra Tex'. Based on the acquaintance, the accused approached the complainant and requested to supply grey clothes (goods) on credit basis. He promised and assured to pay the value of the goods supplied to him promptly. Believing the representation and promise made by the accused, the complainant has supplied goods under nine invoices from 28.11.2006 to 16.12.2006 to the value of Rs.25,30,786/- But, the accused has been postponing the payment under one pretext or the other. Subsequently, all of a sudden without any intimation, the accused has sold the tenanted premises to third parties and forcibly evicted the complainant. The complainant has lodged a complaint with the Karumathampatti police on 03.04.2008. At the intervention of the well wishers of both the parties, the accused promised to settle the entire invoice amount and also refund the rent advance. But, the accused did not make any payment and hence the complainant has issued a lawyer's notice to the accused on 27.04.2009 calling upon him to pay the aforesaid amount. After receipt of the notice, the accused approached the complainant and requested time for settling the amount. But he did not come forward to settle the amount and hence the complainant has lodged a complaint on 16.05.2012 with District Crime Branch. But no action has been taken on the said complaint. Hence, the complainant has filed Crl.OP.No.16105 of 2014 before this court. This court has disposed of the said petition on 26.06.2014 with a liberty to the petitioner to pursue her remedy in court of law. Since the accused has made false representations and forced the complainant to supply the goods under credit basis, he has committed the offence punishable under Section 420 of IPC. Hence, the petitioner has filed a private complaint before the Judicial Magistrate No.II, Coimbatore with a request to take the case on file and issue summons to the accused and punish him in accordance with law.

3. The learned Judicial Magistrate, No.II, Coimbatore after recording sworn statement of the petitioner/complainant, has taken the case on file in Crl.MP.No.291 of 2015 and conducted enquiry under Section 202 of Cr.P.C., During enquiry under Section 202 of Cr.P.C., the complainant has examined two witnesses as P.Ws1 and 2.

4. The learned Judicial Magistrate after considering the complaint, statement of the complainant and deposition of P.Ws.1 and 2 and the materials produced before him, has dismissed the said complaint by the order dated 04.08.2015, under Section 203 of Cr.P.C., as the transaction is purely civil in nature. Aggrieved by the same, the petitioner/complainant has filed a criminal Revision in CRP.No.65 of 2015 on the file of the V Additional District and Sessions Judge, Coimbatore. The learned V Additional District and Sessions Judge, Coimbatore by the order dated 18.10.2016, has dismissed the said CRP and thereby confirmed the order passed by the learned Judicial Magistrate, No.II, Coimbatore.

Feeling further aggrieved, the complainant has filed the present Criminal Original Petition under Section 482 of Cr.P.C.,

5. Heard Mr.V.S.Jagadeesan, the learned counsel for the petitioner/complainant and Mr.P.M.Duraisamy, the learned counsel for the respondent/accused.

6.The learned counsel for the petitioner/complainant has submitted that the learned Judicial Magistrate has erred in holding that the transaction is purely civil in nature and the same has been mechanically confirmed by the learned Sessions Judge. He further submitted that it is not necessary that a complainant should verbatim reproduce in the body of the complaint all the ingredients of the offence he is alleging. He further submitted that at the stage of issuing process, the Magistrate cannot make a meticulous scrutiny. If factual foundation for the offence has been laid in the complaint, the Magistrate ought to have issued process to the accused. He further submitted that the complainant has clearly stated in her complaint that she was induced to believe that the accused would pay the amount for the goods supplied to him. He further submitted that many a cheatings were committed in the course of commercial and also money transactions. He further submitted that criminal prosecution cannot be thwarted merely because civil proceedings are also maintainable. He further submitted that for determining the question whether any process is to be issued or what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction and therefore he prayed to allow this petition and set aside the orders passed by the courts below and direct the trial court to take the complaint on file and issue summons to the accused and proceed further in accordance with law.

7. The learned counsel for the petitioner, in support of his contentions relied upon the following decisions:-

1) Rajesh Bajaj Vs. State NCT of Delhi and others (1999) 3 SCC 259;

2)Trisuns Chemical Industry Vs. Rajesh Agarwal and Others (1999) 8 SCC 686;

3) M/s.Indian Oil Corporation Vs. M/s.NEPC India Ltd., and others (2006) 6 SCC 736;

4) ICICI Bank Ltd Vs. Maikaal Fibres Limited and Ors, 2004 SCC online Cal 650: (2006) 3 CHN 365;

5) Prashant Jhunjhunwala Vs. Union Territory of Daman & Diu & Others CDJ 2009 BHC 841.

8. Per contra, the learned counsel for the

respondent/accused has submitted that a sum of Rs.3.54 Crore is due to the respondent from his customers and hence, he lodged a complaint to the District Crime Branch, Coimbatore and based on the same an FIR in Crime No.14 of 2007 has been registered. He further submitted that in the meanwhile in order to settle the creditors, a mediation was held with the help of respectful persons and it was decided that the properties of the respondent have to be sold and the sale proceeds be divided proportionately among his creditors. Accordingly, the respondent's properties were sold and a sum of Rs.7,30,000/- was paid to the petitioner towards full and final settlement and the said amount has been received by the petitioner's husband and as such nothing is due to the petitioner. He further submitted that in order to constitute an offence of cheating, the intention to deceive should be in existence at the time of alleged inducement. He further submitted that in this case, the very fact that the respondent has taken efforts to settle all his creditors by selling his properties itself shows that he has no intention to deceive any one. He further submitted that taking into consideration of the aforesaid facts, the learned Judicial Magistrate has rightly dismissed the complaint and the same has been confirmed by the learned Additional Sessions Judge and therefore he prayed to dismiss this petition.

9. The learned counsel for the respondent/accused in support of his contentions, relied upon the decision in International Advance Research Centre for Powder Metallurgy and New Materials (ARCI) and others Vs. Nimra Cerglass Technics Private Limited and another (2016) 1 SCC 348.

10. According to the petitioner/complainant, she has supplied the goods to the respondent/accused to the tune of Rs.25,30,786/- under various invoices on different dates and also paid a sum of Rs.25,000/- as advance to the respondent for taking his godown for lease, but subsequently he failed to pay the aforesaid amount and hence he has committed the offence punishable under Section 420 IPC.

11.The respondent/accused has not denied the aforesaid transactions. But his case is that since his customers failed to pay the amounts due to him, a mediation was held and in the said mediation, it was decided that he should sell his properties and settle the amounts to his creditors proportionately and accordingly he sold his properties and paid a sum of Rs.7,30,000/- to the petitioner towards full and final settlement and the said amount has been received by the petitioner's husband on behalf of the petitioner.

12. The petitioner/complainant, in her complaint has not denied the fact that her husband has received Rs.7,30,000/- from the respondent/accused. On the contrary, what she has stated in her complaint is that her husband is in no way connected with the transaction which took place between

herself and the respondent /accused. Her further contention is that she has not authorised her husband to settle the matter. Her further case is that the alleged transaction if any, which took place between her husband and the accused will not bind upon her. She further stated that the alleged settlement agreement between her husband and the respondent/accused might be a fabrication and also out of threat and coercion to wriggle out of his liability. But she has not stated that she is not having any cordial relationship with her husband. She not even examined her husband as witness during enquiry under Section 202 of Cr.P.C., to show that the said settlement agreement was obtained by threat and coercion. Further, her husband has not lodged any complaint before the police. So, it has to be presumed that on behalf of the petitioner, her husband participated in the mediation and agreed to receive Rs.7,30,000/- in full and final settlement and accordingly, he received the said amount on behalf of the petitioner.

13. In Rajesh Bajaj Vs. State NCT of Delhi and others (cited supra), the Hon'ble Supreme Court has held that it is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Further it has held that it is not necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent. Further, in paragraph Nos.10 and 11, it has held as follows:

> "10. It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions. One of the illustrations set out under Section 415 of the Indian Penal Code (illustrations f) is worthy of notice now: "(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats."
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> 11. The crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or not. The complainant has stated in the body of the complaint that he was induced to believe that respondent would honour payment on receipt of invoices, and that the complainant realised later that the intentions of the respondent were not clear. He also mentioned that respondent after receiving the goods have sold them to others and

still he did not pay the money. Such averments would prima facie make out a case for investigation by the authorities. "

14. In Trisuns Chemical Industry Vs. Rajesh Agarwal and Others (cited supra), in paragraph No.9 the Hon'ble Supreme Court has observed as follows:

"9. We are unable to appreciate the reasoning that the provision incorporated in the agreement for referring the disputes to arbitration is an effective substitute for a criminal prosecution when the disputed act is an offence. Arbitration is a remedy for affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the agreement. Hence, those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases as indicated in State of Haryana vs. Bhajaj Lal (Supra). "

15. In Indian Oil Corporation Vs. NEPC India Ltd and others (cited supra), the Hon'ble Supreme Court in paragraph Nos.32 and 33 has held as follows:

"Section 415

32.The essential ingredients of the offence of 'cheating' are : (i) deception of a person either by making a false or misleading representation or by other action or omission (ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person 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.

33. The High Court has held that mere breach of a contractual terms would not amount to cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction and in the absence of an allegation that the accused had a fraudulent or dishonest intention while making a promise, there is no 'cheating'. The High Court has relied on several decisions of this Court wherein this Court has held that dishonest intent at the time of making the

promise/inducement is necessary, in addition to the subsequent failure to fulfil the promise. Illustrations (f) and (g) to section 415 makes this position clear :

> "(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats."
>
> "(g). A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contact and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract."

16. In ICICI Bank Ltd., Vs Maikaal Fibres Limited & Ors (cited Supra), the Calcutta High Court in paragraph No.68 has observed as follows:

> "68. For determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. As stated in Sub-section (1) of Section 202 itself, the object of the enquiry is to ascertain the truth or falsehood of the complaint, but the Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements made before him at the enquiry which would naturally mean the complaint itself, the statement on oath made by the complainant and the statements made before him by persons examined at the instance of the complainant."

17. In Prashant Jhunjhunwala Vs. Union Territory of Daman & Diu & Others (cited supra), the Bombay High Court in para-21 has held as follows:

> "21. In our opinion the above judgments make it clear that whether a complaint discloses a criminal offence or it involves only a civil dispute depends on facts and circumstances of each case. A complaint may have civil profile but it

may also have overwhelming criminal overtones. In such case, a criminal court cannot shut its doors to it. Because a complaint involves a commercial transaction, it cannot be inferred that it contains a civil dispute if ingredients of a criminal offence are present. It is trite that in several commercial transactions, criminal offences are committed.....”

18. In International Advance Research Centre for Powder Metallurgy and New Materials (ARCI) and others Vs. Nimra Cerglass Technics Private Limited and another (cited supra), the Hon'ble Supreme Court after referring to Rajesh Bajaj Vs. State (NCT of Delhi) (cited supra), Trisuns Chemical Industry Vs. Rajesh Agarwal (cited supra) and Indian Oil Corporation Vs. NEPC India Ltd (cited supra) has held in paras-15 and 16 follows:

> “15. The essential ingredients to attract Section 420 IPC 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 IPC. 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.
>
> 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. 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. In S.W. Palanitkar &

Ors. vs. State of Bihar & Anr. (2002) 1 SCC 241, this Court held as under: 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. The above view in Palanitkars case was referred to and followed in Rashmi Jain vs. State of Uttar Pradesh."

19. From the aforesaid decisions, it is clear that whether a complaint discloses a criminal offence or it involves only a civil dispute depends on facts and circumstances of each case. A complaint may have civil profile but it may also have overwhelming criminal overtones. It is trite that in several commercial transactions, criminal offences are committed. It is also clear that 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 is 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. 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.

20. In the present case, as already stated, that the averments made in the complaint would show that there was a mediation between the accused and his creditors in which on behalf of the petitioner, her husband has participated and he agreed to receive Rs.7,30,000/- in full and final settlement of the amounts due to the petitioner and accordingly he has received a sum of Rs.7,30,000/- towards full and final settlement and that being so, it cannot be said that the accused has acted with a dishonest intention at the very beginning of the transaction itself. If really the accused got such an intention he would not have come forward to settle the matter. The conduct of the accused shows that despite his sincere efforts, he could not pay all the dues to his creditors. It is a mere breach of contract and hence criminal liability cannot be foisted on the accused. Both the courts below rightly held that the transaction is purely civil in nature. Hence, I do not find any merit in this petition.

21. In the result, this criminal original petition is dismissed.

Sd/-
Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

gv

To

1.The V Additional District Judge,
Coimbatore.

2.The Judicial Magistrate No.II
Coimbatore.

CRL.O.P.No.10699 of 2017

MR(CO)
GN(15/07/2020)