IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

C.R.R. 2518 of 2011

Md. Mohsin @ Meghu Bhai & Ors.

-vs.-

The State of West Bengal & Anr.

For the Petitioners	:	Ms. Rituparna De Ghosh Ms. Siddhartha Paul
For the Opposite Party	:	Mr. Sabyasachi Banerjee Mr. Pawan Kr. Gupta
Heard on	:	27.07.2021, 28.07.2021, 17.08.2021, 23.08.2021, 31.08.2021, 06.09.2021, 09.09.2021, 17.09.2021 & 24.09.2021
Judgment on	:	**07.10.2021**

Tirthankar Ghosh, J:-

The present revisional application has been preferred against the judgment and order dated 17th March, 2011 passed by the learned Additional Sessions Judge, Fast Track, 9th Court, Bichar Bhavan, Kolkata in Criminal Appeal No. 120 of 2010, wherein the learned Appellate Court was pleased to affirm the order of conviction and sentence dated 25th August, 2010 passed by the learned Metropolitan Magistrate, 8th Court, at Calcutta in complaint case no. C/17283 of 2007.

The learned Magistrate was pleased to convict the present petitioners under Section 420/34 of the Indian Penal Code and sentenced each of them to suffer simple imprisonment for 2 years and to pay a fine of Rs.5000/- id., to suffer further simple imprisonment of 3 months for the offences punishable under Section 420/34 of the Indian Penal Code.

The genesis of the case relate to a complaint being filed by the authorized representative of one Arun Kumar Jhajharia, proprietor of M/s Rashi Enterprise situated at 61, Muktaram Babu Street, Kolkata-700007, against the petitioners being Md. Mohsin alias Meghu Bhai, Md. Jane Alam alias Md. Jainuddin and Md. Manauar having their place of business at 167, Lenin Sarani, Chandney Market, 5th Gate, Kolkata-700072.

The relevant paragraphs of the complaint are set out as follows:

3. *"That the accused no. 1 is the proprietor of M/s Chandney Foam House, a proprietory concern having its office and/or place of business at the above mentioned addresses. Accused nos. 2 and 3 are the sons of accused no. 1 who are in charge of and/or responsible for the conduct of the business of the said proprietory concern and they although transacted with the petitioner's concern during all the material times.*

4. *That the accused persons visited the petitioner's office and/or place of business and represented themselves as lucrative buyers of foam products and prompt Whole-seller and Retailer of quality foam materials and also expressed their interest to purchase foam* *materials of diverse qualities and quantities from the petitioner's concern. The petitioner's master being impressed by such glossy and sparkling representation of the accused persons, took the accused persons to be prospective buyer of their foam products and agreed to enter into business transaction with them.*

5. *That the petitioner's master expressly and most unequivocally mentioned the strict condition in dealing with the accused persons that the price in respect of the sold materials would have to be paid forthwith the purchase. The accused persons most unhesitatingly accepted and agreed to such condition and very candidly undertook to pay the price of sold goods immediately after delivery. The petitioner states that they had no reason to disbelieve such candid representation of the accused persons and so believed such undertaking of the accused to be true and honest.*

6. *That thereafter the accused persons placed orders for sale and supply of some foam materials like 'sheets of flexible polyurethane foam' to the petitioner's concern and the petitioner's master accepted the said orders and accordingly sold and supplied such materials from time to time through respective invoices and in this way a total amount of Rs. 55,536/- became due and payable by the accused persons to the petitioner's concern.*

7. *The petitioner states that, but at the time of taking delivery of the sold materials accused persons very unexpectedly and quite suddenly represented to the petitioner's concern that due to sudden unforeseen financial crunch they were not in a position to forthwith pay the price and deeply persuaded the petitioner's master to allow them to take the delivery of the said goods with an undertaking to pay the entire price thereof within a day or two.*

8. *The petitioner's master, a honest and law-abiding citizen still could not recall the confidence reposed on the accused persons and had no reason to disbelieve their such smart categorical representations and undertaking and waited till 11.09.2007 believing patience to be a virtue.*

9. *That after a repeated references and reminders and deputations by the petitioner and other staffs of the petitioner's concern including Shri Shakil, Om Prakash and Kamalesh Sharma, inter alia, on 12.09.7002, 13.09.2007, 15.09.2007 and finally on 18.09.2007 and after their continuous follow-up, the accused persons flatly denied the entire transaction and refused to make any payment towards such liability to the petitioner's concern and threatened the petitioner, other staffs as well as their master with dire consequences if they would make any further demand of the said dues from them.*

10. *The petitioner states that since then all the accused persons have vanished into the blue and are utterly beyond the reach and contact of the petitioner's concern.*

11. *The petitioner respectfully states that the above facts utterly belie the aforesaid assurances and representations advanced by the accused persons and grossly manifest the dishonest design of the accused persons. Had the petitioner's master any such remotest scent of such evil and dishonest intention of the accused persons to cheat him, he would not have entered into any business transaction with the accused persons and part with and/or deliver them any such material.*

12. *The petitioner states that, if further reveals the very fact that the accused persons in pursuance to a dishonest intention and mens rea, had entered into a deep-rooted criminal conspiracy nurtured since the very inception to induce the petitioner's master by such misrepresentations and fake assurances to part with and delivery to the accused persons the sold materials and to criminally cheat the same and cause wrongful gain of themselves and wrongful loss to the petitioner's concern and in practicing that as an overt act of such conspiracy by such fake and false representations induced the petitioner's master to part with the said materials valued at Rs. 55,536/- and cheated the petitioner's concern of the same.*

13. *The petitioner also states that the accused persons after cheating the petitioner's concern to the tune of Rs. 55,536/- did not bother even to*

> *manhandle the staffs and/or office-bearers of the concern and also threatened the petitioner with dire consequences both physical and material and as such all the accused persons are vulnerable prosecution under Section 506 of the Indian Penal Code."*

Records reflect that the complainant in order to prove its case relied upon the oral evidence of the complainant himself and number of documents. The documents which were relied upon are (i) Ext.1, the petition of complaint; (ii) Ext.2, the letter of authority issued by proprietor to the person who represented M/s Rashi Enterprise; (iii) Ext.3, another letter of authority which was issued to the complainant who substituted the original complainant; (iv) Ext.4 & Ext. 5, are tax invoices; (v) Ext.6 & Ext. 7 are Seller Copy.

Records do not reflect that after examination under Section 313 of the Code of Criminal Procedure the defence examined any witness in support of its case. As such in this case the evidence of PW1 and the documents relied upon by PW1 is only relevant for consideration to come to a finding whether the order of conviction and sentence so passed by the learned Magistrate and affirmed by the learned Sessions Court by exercising its appellate jurisdiction is correct. On perusal of the orders passed by both the learned Trial Court and the learned Appellate Court I find that both the Courts relied upon precedents and did not assess whether the precedents were applicable to the facts of the case. I do not find any issue being dealt with by both the Courts below regarding the contentions in the complaint in paragraph 6 where it has been stated by the complainant that *"…the accused persons placed orders for sale and supply of some foam materials* *like 'sheets of flexible polyurethane foam' to the petitioner's concern and the petitioner's master accepted the said orders and accordingly sold and supplied such materials from time to time through respective invoices..."*

In a criminal case when the charges under Section 420 of the Indian Penal Code are considered by a Court of law it was duty of the Court of law also to check as to how many transactions took place between the parties or whether this was a sole transaction. Further it was incumbent upon the learned trial Court to find out whether the complainant has deviated from the original case or the charge which was framed. In the evidence of PW1 Suman Roy, it has been categorically stated that "*There is no signature of the accused persons in Ext.4. There is no signature of the accused persons in Ext.5*". As such there was no reason for coming to a finding on the basis of oral evidence in respect of the proprietorship firm of which it has been categorically stated that Md. Mohsin alias Meghu Bhai is the proprietor; his sons automatically would not be accused. A case under Section 420 of the Indian Penal Code is based on documents and unnecessary petitioner no.2 and petitioner no.3 had been dragged in this case and have been asked to face the ordeal of trial. The two tax invoices relied upon has reference to two challan dated 02.12.2005 and 29.12.2005 in respect of amount Rs. 43,056/- and Rs. 12,480/-.

I do not find that the learned Magistrate while arriving at its finding of conviction took into account the cumulative effect of the oral evidence and the documents which have been admitted in evidence in support of the case and sentenced the accused/present petitioners. The judgment of the

Appellate Court dated 17.03.2011 raises a doubt as to whether the Lower Court Records or the evidences at all were perused, in fact, in a warrant procedure case learned Appellate Court recorded that the accused persons were examined under Section 251 of the Code of Criminal Procedure. None of the Court below took into account whether an offence under Section 420 of the Indian Penal Code has been made out or not. The two issues which are glaring on the face of the records but were not addressed by both the Courts are as follows:

(i) Whether in a case of continuous commercial transaction the provisions of Section 420 of the Indian Penal Code is attracted?

(ii) Whether mere non-payment would attract the provision of Section 420 of the Indian Penal Code?

In Hridaya *Ranjan Prasad Verma –Vs.- State of Bihar*, (2000) 4 SCC 168 the Hon'ble Supreme Court was pleased to observe :

> ***"14.*** *On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the*

inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

15. *In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.*"

In the case of Indian Oil Corpn –Vs.- NEPC India Ltd. & Ors., (2006) 6 SCC 736 the Hon'ble Supreme Court was pleased to observe, as follows :

"13. *While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not* *adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable breakdown of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged. In G. Sagar Suri v. State of U.P. [(2000) 2 SCC 636 : 2000 SCC (Cri) 513] this Court observed: (SCC p. 643, para 8)*

> *"It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."*"

In the case of Vir Prakash Sharma –Vs.- Anil Kumar Agarwal & Anr., (2007) 7 SCC 373 the Hon'ble Supreme Court was pleased to observe, as follows :

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

Further in the case of Anil Mahajan –Vs.- Bhor Industries Ltd. & Anr., (2005) 10 SCC 228 the Hon'ble Supreme Court was pleased to observe, as follows :

> ***"9.*** *In Alpic Finance Ltd. v. P. Sadasivan [(2001) 3 SCC 513 : 2001 SCC (Cri) 565] this Court was considering a case where the complainant had alleged that the accused was not regular in making payment and committed default in payment of instalments and the bank had dishonoured certain cheques issued by him. Further allegation of the complainant was that on physical verification certain chairs were found missing from the premises of the accused and thus it was alleged that the accused committed cheating and caused misappropriation of the property belonging to the complainant. Noticing the decision in the case of Nagawwa v. VeerannaShivalingappaKonjalgi [(1976) 3 SCC 736 : 1976 SCC (Cri) 507] wherein it was held that the Magistrate while issuing process should satisfy himself as to whether the allegations*

in the complaint, if proved, would ultimately end in the conviction of the accused, and the circumstances under which the process issued by the Magistrate could be quashed, the contours of the powers of the High Court under Section 482 CrPC were laid down and it was held: (SCC p. 520, paras 10-11)

> *"10. The facts in the present case have to be appreciated in the light of the various decisions of this Court. When somebody suffers injury to his person, property or reputation, he may have remedies both under civil and criminal law. The injury alleged may form the basis of civil claim and may also constitute the ingredients of some crime punishable under criminal law. When there is dispute between the parties arising out of a transaction involving passing of valuable properties between them, the aggrieved person may have a right to sue for damages or compensation and at the same time, law permits the victim to proceed against the wrongdoer for having committed an offence of criminal breach of trust or cheating. Here the main offence alleged by the appellant is that the respondents committed the offence under Section 420 IPC and the case of the appellant is that the respondents have cheated him and thereby dishonestly induced him to deliver property. To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence. There is no*

allegation that the respondents made any wilful misrepresentation. Even according to the appellant, the parties entered into a valid lease agreement and the grievance of the appellant is that the respondents failed to discharge their contractual obligations. In the complaint, there is no allegation that there was fraud or dishonest inducement on the part of the respondents and thereby the respondents parted with the property. It is trite law and common sense that an honest man entering into a contract is deemed to represent that he has the present intention of carrying it out but if, having accepted the pecuniary advantage involved in the transaction, he fails to pay his debt, he does not necessarily evade the debt by deception.

11. Moreover, the appellant has no case that the respondents obtained the article by any fraudulent inducement or by wilful misrepresentation. We are told that the respondents, though committed default in paying some instalments, have paid substantial amount towards the consideration.””

Having regard to the principles settled by the Hon'ble Supreme Court in cases of cheating under section 420 of the Indian Penal Code, the following facts emerge at the end of the trial of the instant case:

i. An assessment of Ext.4, Ext.5, Ext.6 and Ext.7 reflect that the first delivery was on or about 2.12.2005 and the second delivery was on or about 29.12.2005.

ii. Going by the nature of allegations made in the petition of complaint (relevant paragraphs referred to above) and the narrations made there in, if there was a failure of payment in the first week of December, 2005 without receiving payment there should not be any delivery in the last week of December, 2005.

iii. The same Magistrate was dealing with the instant case (C/17283/2007) and also the other case C-8817/2008. Thus on the face of it this is a case of supply of materials and non-payment of the same.

iv. The issue of continuous business transactions as such cannot be ruled out in the instant case, as also the factum of isolated choosing some of the non-payments.

v. There were other witnesses who were named in the complaint, but subsequently not relied upon at the time of evidence, thus the initial representation as narrated in the petition of complaint regarding the expressions for inducement being not corroborated by the sole witness fails to make out any case of cheating – as there is absence of inducement, deception and willful misrepresentation and only a case of subsequent failure to pay in respect of some of the goods received has been made out.

Accordingly, the judgment and order so passed by the learned Additional Sessions Judge, Fast Track, 9th Court, Bichar Bhavan, Kolkata in

Criminal Appeal No. 120 of 2010 affirming the order of conviction and sentence so passed by the Learned Metropolitan Magistrate , 8th court , Calcutta in complaint case no. C/17283 of 2007 is hereby set aside.

Consequently, the petitioners are acquitted from all the charges. If they are on bail they are to be discharged from their bail bonds.

Therefore, CRR 2518 of 2011 is allowed.

Pending application, if any, is consequently disposed of.

Department is directed to communicate this order to the Ld. Trial Court and send the LCR forthwith to the Court below.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Tirthankar Ghosh, J.)