

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

Writ Petition No. 3047 / 2021

Amazon India
Through its India Head,
Mr. Amit Agrawal,
Having office at 8th Floor,
Bridge Gate Way 26/1,
Bridge Ward Trade Center,
Dr. Rajkumar Road,
Bangalore – 560055.

.. Petitioner

Versus

1. State of Maharashtra,
Through Ulhasnagar Police Station,
District Thane.

2. Amritpal Singh Khalsa,
Age : years, Occupation : Advocate,
R/o: 201-2, Pleasure Park,
Opposite Pinto Park, O.T. Section,
Ulhasnagar – 421003.

.. Respondents

Senior Counsel Mr. Shirish Gupte a/w Advocate Sanjeev Sawant,
Sanjeev Kadam, Onkar Gujar, Shailendra Gangakhedkar, Garima Joshi,
Murli Kale i/by GNP Legal, Advocate for Petitioner.

Mr. Amritpal Singh Khalsa – Respondent No.2 in person.

Smt. Sharmila Kaushik, APP for State.

CORAM : SANDEEP K. SHINDE J.
RESERVED ON : 08th SEPTEMBER, 2021.
PRONOUNCED ON : 28th OCTOBER, 2021.

JUDGMENT :-

1. Rule.
2. Rule made returnable forthwith. Heard. finally with the consent of the parties.
3. This Petition under Article 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C. for short), seeks to quash the private complaint instituted by the Respondent No.2 in the Court of Judicial Magistrate, First Class, Ulhasnagar, Thane as well as order dated 16th August, 2021 issuing process against the Petitioner for the offence punishable under Section 420 read with 34 of the Indian Penal Code, 1860.
4. Facts giving rise to the present petition are that Amazon Seller Services Pvt. Ltd. is a Company registered under the Companies Act,

1956. Petitioner operates as an e-commerce Marketplace, which follows a marketplace based model of e-commerce within the meaning of Clause (iv) of Press Note 2 issued by the Government of India, Ministry of Commerce and Industry. It is e-commerce entity, provides information technology platform on a digital and electronic network to act as a facilitator between buyer and seller. Thus, Petitioner does not follow inventory based model of e-commerce, where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly. Petitioner claims, it is an intermediary between buyer and seller within the meaning of Section 2(w) of the Information Technology Act, 2000 and does not control the transaction between the two parties. It only acts as a neutral platform to allow sellers to interact with the buyers/customers, without exercising ownership over any goods or indulging in the manufacture or dealing of any goods. The Petitioner claims, it only receives and stores the information on behalf of the seller/ buyer and acts a facilitator/ intermediary. Petitioner's case is that RBI had issued a circular bearing No. RBI/2009-10/231 dated 24th November, 2009 under which directions were issued for opening and operation of accounts and settlement of payments for electronic

payment transactions involving intermediaries and the same applies to the Petitioner. Therefore, it is claimed that pursuant to RBI's circular, the e-payments made online are never credited to the account of Petitioner and all proceeds go into a nodal account maintained as per circular of RBI, which cannot be operated directly by the Petitioner.

5. Complainant's case : It is Complainant's case that while browsing website of the Petitioner, he came across with a product named as "WD-Elements 2TB Portable External Hard Drive (Black)". The said product was priced at Rs.3,999/-. Complainant ordered the said product by making payment of the amount through UPI (Unified Payment Evershine Marketing, Jamnagar Highway, Gujarat) to Petitioner on their UPI ID, which infact was sold by M/s KNP-MPL (Seller of product and Accused No.2). The said product was dispatched through third party courier company Fedex on the address provided by the Complainant. According to the Complainant, he ordered the product on 6th December, 2019. It was dispatched on 7th December, 2019 through FedEx Courier from Ahmedabad and was supposed to be delivered on 14th December, 2019, but having not

been delivered, Complainant contacted customer care service of the Petitioner. Complainant's case is that the customer care executive promised him that his complaint regarding non delivery of goods would be looked into. However, goods were never delivered to him, nor his grievance was looked into by the Petitioner as assured on 16th December, 2019. Complainant thus, alleged that there was no intention on the part of the Petitioner to deliver the goods or to pay back the money. He therefore, alleged that despite making numerous request and repeated contact to verify the status of the product, there was no response from the Petitioner. Complainant further alleged that although there being a guarantee in the form of protection to the product purchased through Amazon.in., whereby Amazon assures indemnity that, they will make the loss good, he neither received refund nor the goods were delivered to him, even after passage of 47 days. Complainant would therefore allege that Petitioners have conspired with the Accused No.2, to dupe the Complainant by accepting orders on behalf of the Accused No.2 in trust, but by not making delivery of the goods an offence of cheating has been committed by the Petitioner and Accused No.2 (seller).

6. Complainant thus, lodged the complaint against the Petitioner and Accused No.2 with Central Police Station, Ulhasnagar on 20th January, 2020. Since there was no action on the request of initiating prosecution against the Petitioner, Complainant sought directions under Section 156(3) of Cr.P.C. On 22nd March, 2021, learned JMFC directed the Respondent No.1-State to investigate into the allegations and submit report in terms of Section 202 of Cr.P.C. within three months from the date of order. In furtherance to this order, Respondent No.1 – State recorded statement of Complainant and Accused No.2 and issued notice to the Petitioners to make themselves available for the inquiry. Report was submitted on 18th June, 2021, wherein it was alleged that in spite of service of notices, Accused / Petitioners did not turn and participate in the inquiry and chose to remain absent.

7. The learned JMFC after receipt of the report from the police passed an order on 16th August, 2021, thereby issuing process against the Petitioners under Section 420 read with 34 of the Indian Penal Code, 1860 (IPC for short). Being aggrieved and dissatisfied by the impugned order, Petitioners have filed this petition under Article 227

of the Constitution of India read with 482 of Cr.P.C.

8. Before advertng to the grounds urged in the petition and the arguments advanced by Mr. Gupte, learned Counsel for the Petitioner, it may be stated that pending regular criminal case, Complainant has also approached Consumer Forum by filing consumer complaint, alleging deficiency in service against the Petitioners as well as the courier service on the alleged cause of action. I have perused the complaint. It revolves around deficiency of service under Consumer Protection Act, wherein Complainant has prayed for refund of the product amount with interest and also prayed for compensation to the tune of Rs. 3,00,000/- (Rupees Three Lacs) towards mental agony and harassment and cost of Rs.1,75,000/- (Rupees One Lac Seventy Five Thousand).

9. Mr. Gupte, learned Counsel for the Petitioners would submit that in the entire complaint, the element of, 'cheating', as is sought to be attributed to the Petitioners, is wholly absent. It is argued that the dispute is purely commercial in nature and at the most, could be defined as consumer dispute or deficiency in service. It is submitted that the narrations in the complaint do not suggest element of

dishonest intention or fraudulent act on the part of the Petitioners. Neither the facts even remotely suggest that there was an intention since beginning to deceive or cheat the Complainant to make payment against the product and not deliver and/or even not to return purchased price, paid by the Complainant. Mr. Gupte, learned Senior Counsel, submitted that the learned Magistrate could not have acquired jurisdiction to issue directions under Section 156(3) or 200 of Cr.P.C. in absence of compliance under Section 154(3) of Cr.P.C. Mr. Gupte has taken me through the police report, which according to him, is not an investigation contemplated under Section 202 inasmuch as the report contained the statement of Complainant. Mr. Gupte therefore, submitted the Police report does not reveal investigation being carried out in respect of matter in question. Mr. Gupte submitted that the trial Court has failed to examine the complaint, which does not attribute any role to Mr. Amit Agrawal in commission of a crime in question. It is therefore, argued that in absence of prima-facie allegations against the officer of the Petitioner, the learned JMFC ought not to have issued process in absence of any direct and specific role attributed against him in the complaint and or surfaced during the course of inquiry/ investigation undertaken

by police.

10. Mr. Gupte, vehemently submitted that the learned Court has failed in appreciating that there are no allegations against Mr. Amit Agrawal as to how Mr. Agrawal has controlled over the dispatch and delivery of product in question. It is therefore argued that the learned JMFC has committed an error in issuing a process without there being evidence on record to show active participation or involvement of Mr. Amit Agrawal in relation to sell, dispatch and delivery of product in question and therefore, the complaint against Mr. Amit Agrawal was unsustainable. Mr. Gupte has taken me through the complaint filed under the Consumer Court to contend that the goods attempted to be delivered to the Complainant, were returned back to Original – Accused No.2 (seller) from Pune to Ahmedabad and therefore it is not a case that the goods were never intended to be delivered with intention to deceive or cheat the Complainant. It is therefore, argued that the complaint against Mr. Agrawal and the impugned order ‘issuing process’ against the Petitioner, has been passed without examining the complaint from the close quarters and without application of the mind to the facts of the

case. Mr. Gupte in support of his contention would largely rely on the judgments in the case of **Pepsi Foods Ltd. Vs. Special Judicial Magistrate**, (1998) 5 SCC 749; **GHCL Employees Stock Option Trust Vs. India Infoline Limited**, (2013) 4 SCC 505 and **Sunil Bharti Mittal Vs. Central Bureau of Investigation**, (2015) 4 SCC 609, to contend that in the order issuing summons, the learned Magistrate has to record his satisfaction about a prima-facie case against the Accused, who are Managing Director, the Company Secretary and the Directors of the Company and the role played by them in their respective capacities which is *sine qua non* for initiating criminal proceedings against them. In **Pepsi Foods Ltd.** (supra), the Hon'ble Apex Court has held that Summoning of an accused in a criminal case is a serious matter and criminal law cannot be set into motion as a matter of course. Thus, held that the order of Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto.

11. Mr. Gupte would also contend that the learned Judicial Magistrate has failed in appreciating that the Petitioner is neither the seller, nor the supplier of the product in question, but is an

intermediary as defined under Section 2(1)(w) of the Information Technology Act and therefore the transaction in question is not between the Complainant and the Petitioner. It is argued that the Petitioner was no way related in the process of delivery of product in question. Mr. Gupte contended that the learned Magistrate has failed in appreciating that the product in question, was in fact dispatched through an independent service provider, but due to some technical flaw or defect, it could not be delivered and therefore the allegations do not constitute an offence under Section 415 of the IPC. On these grounds, Mr. Gupte seeks to quash the complaint and the impugned order dated 16th August, 2021 passed in C.C. No. 193/2020.

12. Mr. Amritpal Singh Khalsa – Respondent No.2 in person, vehemently opposed the petition and would contend that the order issuing summons to the Petitioner was well within the jurisdiction of the Court. Since it is not a case of exercise of excessive jurisdiction but found on complaint and inquiry report, interference in supervisory jurisdiction is not called for. Mr. Amritpal has filed an affidavit-in-reply and would submit that he ordered the product through Petitioners' website and made payment of Rs. 3999/- to Petitioners'

UPI and discharged the invoice value. It is contended that though he requested the Petitioner to resolve the non-delivery of product, his repeated calls fell on deaf ears of customer executive of the Petitioner. It is contended that although product placed on Petitioners' website, was covered under A to Z guarantee clause. The Petitioner neither delivered the product, nor refunded the amount paid by him. Complainant therefore, contended that the Petitioner by accepting the entire consideration upfront and non-delivery of product and non-refund of the amount despite being covered under A to Z guarantee clause amounts to cheating. It is argued that although the Petitioner had received a notice to attend the inquiry, he did not appear before the Investigating Officer. According to the Complainant, allegations do disclose dishonest intention of the Petitioner in as much as Complainant was induced to buy the product for a consideration and after receiving the consideration, neither product was delivered, nor money was refunded, in spite of the guarantee and therefore a case has been made out against the Petitioner for cheating under Section 415 of IPC.

13. The Complainant in support of his contention has relied on the judgment of the Hon'ble Apex Court in the case of **Assistant**

Commissioner of State Tax and Others Vs. M/s Commercial Steel Limited; Civil Appeal No.5121/2021 and the judgment of the Hon'ble Delhi High Court in the case of **Christian Louboutin Sas Vs. Nakul Bajaj & Ors.** (2018) SCC OnLine Del 12215.

14. I have carefully considered the submission of learned Counsel for the Petitioner and Mr. Amritpal Khalsa and also perused the complaint and the reply filed by the Complainant. Admittedly, herein the transaction is not between two natural persons. Petitioner operates e-commerce entity to provide information on digital network and acts as a facilitator between buyer and seller. Petitioner does not own the product and sell the goods to the customer directly. Since Petitioner is not following inventory based model, it has no control over the transaction between two parties i.e. buyer and seller. Petitioner simply, receives and stores the information on behalf of the seller and buyer and acts as a facilitator. In the order issuing process, the learned Magistrate has clearly understood that it was not conventional transaction and human contact is minimal. In spite of clear understanding, the learned Magistrate prima-facie held, that "it could be gathered from over all circumstances, that Petitioner never

intended to complete the transaction, but since initial stage, intention was to deceive the Complainant from the facts of the case.” It is not in dispute that Petitioner being facilitator, had no control over the delivery of the product and further herein, the product in question was dispatched through independent service provider, but due to technical defect, it could not be delivered. The allegations in the complaint have not disclosed role of Petitioner – Mr. Amit Agrawal in commission of crime in question and this fact has been admitted by the learned Magistrate in the impugned order by observing that, “the human contact is nowhere and is minimal to the extent of customer care or grievance Redressal.” (emphasis supplied)

. As such the Petitioner is neither owner, nor seller, nor supplier of product in question, but he facilitated the Complainant to purchase this product by following a marketplace based model of e-commerce. Admittedly, Petitioner does not follow inventory based model of e-commerce. The Petitioner simply provides a neutral platform which allows sellers to interact with the buyers.

15. In consideration of these admitted facts, the allegations do not constitute an offence of cheating, nor the allegations disclosed the

fraudulent intention of the Petitioner, when Complainant placed an order of the product in question. The Petitioner being a mere facilitator, Complainants' allegations that he was induced to buy a product with intention to cheat him, is wholly absent. There is no material on record to even suggest that the Petitioner had a direct involvement and inducing the Complainant to place an order with intention, not to deliver it, even after receiving the consideration for the same. Thus, neither the complaint, nor inquiry report submitted by the Investigating Officer constitute the offence of cheating against the Petitioner.

16. As to constitute offence under Section 420 of IPC, it must be shown that Complainant parted with his property, acting on a representation, which was false to the knowledge of the accused; AND the persons so deceived should be induced to deliver any property to any person or the person so deceived should be intentionally induced to do anything which he would not do if he was not so do AND the act done pursuant to inducement should be one are caused or likely to cause damage or harm to the person induced in body, mind, reputation or property.

. In the case in hand, the allegations do not imply or suggest that any point of time, the Petitioner induced the Complainant to part with property (consideration for a product) with a dishonest intention, not to deliver the same. On the contrary, facts of the case show that the Complainant volunteered to purchase the product through the e-commerce market platform of the Petitioner from the seller. Thus, the ingredients to constitute offence of the cheating are wholly absent. The learned Magistrate failed in appreciating the facts of the case and thereby committed an error in concluding that prima-facie case of cheating has been made out.

17. For the reasons stated, Petition is allowed. As a result, Complaint No. 193/2020, pending before the learned Judicial Magistrate, First Class, Ulhasnagar and order dated 16th August, 2021 passed therein, qua Petitioner, is quashed. Rule is made absolute in the aforesaid terms.

(SANDEEP K. SHINDE J.)

Najeeb..

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Digitally signed
by MOHAMMAD
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