

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ajoy Kumar Mukherjee

C.R.R. 890 of 2019

FITJEE Limited & Ors.

-vs-

Sibadatta Mohanty & Anr.

For the Petitioners : Mr. Shyamal Kumar Pandey
Mr. Somenath Gangopadhyay

Heard on : 29.7.2022

Judgment on : 03.08.2022

Ajoy Kumar Mukherjee, J.

1. Being aggrieved and dissatisfied with the proceeding being CS/96841 of 2018 under Sections 420/34 of the Indian Penal Code pending before the learned Metropolitan Magistrate, 8th Court, Calcutta, the present application under Section 401 read with 482 of the Code of Criminal Procedure has been preferred.

2. The petitioners have contended that the petitioner no.1 is a company incorporated under the Companies Act and the petitioner nos.2, 3, 5 and 7 are the Directors of the petitioner no.1/company. The petitioner No.1/company is running entrance examination coaching centre under the name and style of "FIITJEE" throughout India.

3. The opposite party no.1 who is the father of a student, namely, Shreen Mohanty appeared in the entrance examination held on 04.02.2018 for the

purpose of taking admission in coaching classes for IIT-JEE, scheduled to be held in the year 2020 and after qualifying the entrance examination, the said student filled up the enrollment form issued by the petitioner no.1/company which was also filled up by the opposite party no.1 as father and guardian of the said student.

4. Before taking admission in the coaching classes, the opposite party no.1 was specifically and categorically informed that the money paid on account of course fees is non-refundable and it was well within the knowledge of the opposite party no.1 at the time of filling up the enrollment form.

5. It is also to be mentioned that out of various course models the opposite party no.1 and his daughter expressed willingness to join the “Two Year Classroom Programme for JEE (Advanced) 2020” on the weekend contact classes and accordingly, enrollment form was filled up by the opposite party no.1. Opposite party no.1 and his daughter were informed about each and every aspect of the course module in detail. It is to be mentioned further that opposite party no.1 himself choose one time payment option for the entire two years course after reading the prospectus and enrollment form supplied to him and his daughter and being satisfied with the terms and conditions as laid down by the petitioner no.1/company and knowing fully well that the amount paid is non-refundable in any event which was explained to opposite party no.1 and/his daughter in clear terms, before accepting such payment, concerned declaration was signed by both the opposite party no.1 and his daughter.

Accordingly, at the time of taking admission to the selected course, opposite party no.1 deposited a total sum of Rs.1,82,275/-.

6. After taking admission with the aforesaid weekend contact classes, the daughter/student of opposite party no.1 started to attend such classes from April 2018 and she attended such classes for about six months till September 2018 and thereafter, she suddenly stopped in attending the classes without any intimation. It is also pertinent to mention, neither the student nor her father made any complain regarding quality of teaching or the staff provided thereat during the period the student used to attend the classes. After the student stopped attending classes, the opposite party no.1 started to send several letters and emails claiming refund of a sum of Rs.1,82,275/- alleging that the student is not satisfied with the teaching provided there at. As the petitioner no.1 refused to make any refund in view of the policy of the institute/company as stated above, the opposite party no.1 brought allegation of cheating against the petitioners and suddenly in the month of January 2019, the petitioners served with a notice in connection with the present complaint case being No.CS/96841 of 2018 under Section 420/34 of the Indian Penal Code.

7. In the said complaint, several persons were arrayed as accused out of which Kanti Kumar Goyal, the father of petitioner no.7 herein has expired on 30.11.2018 and accused no.10, Rishi Navani resigned from Board of the petitioner no.1 company since 24.02.2011, that is much prior to initiation of the present proceeding.

8. In spite of service of notice, the opposite party no.1 remained unrepresented.

9. Mr. Shyamal Kumar Pandey, learned counsel appearing on behalf of the petitioners, submits that no ingredient of the offence of cheating under Section

420 of the Indian Penal Code is emanating from the written complaint. The opposite party no.1 had also instituted a case before Consumer Forum claiming refund of the sum paid by him and also for damages by way of compensation and such proceeding being No. CC/324/2018 was dismissed on the ground of default on 17.05.2021.

10. He further submits that the signature of opposite party no.1 and his daughter appearing on the declaration dated 6.3.2018, clearly proves that they were well aware that the fees once paid will not be refunded and as such, no criminal intention to cheat and/or defraud, could be attributed to any of the petitioners. No intention to cheat or dishonest inducement can be inferred from the set of facts pleaded in the petition of complaint and even if the allegations are taken as true then also no offence of cheating of whatsoever is made out therein. Moreover neither any wrongful loss to opposite party no.1 can be attributed nor any wrongful gain can be attributed to the petitioners.

11. Mr. Pandey further submits that the main fulcrum of the entire petition of complaint is assertion of the opposite party no.1 that his daughter was not satisfied with the quality of teaching at the institute of petitioner no.1 and consequently she decided to leave. He further submits that 'satisfaction' is a subjective and perspective term which differs from person to person and for mere lack of satisfaction, the machinery of criminal law cannot be set in motion. Moreover, the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so and thus, an individual who has allegedly perpetrated the commission of an offence on behalf of a company can be made accused along with company only if there is sufficient evidence of his or her active role coupled with criminal intent.

12. Mr. Pandey further submits that though most of the petitioners are not residing within the jurisdiction of the learned Magistrate but in spite of that without following mandatory amended provisions as laid down in Section 202 of the Code of Criminal Procedure, the Magistrate issued the summons and did not feel it necessary that before issuance of summons, necessary inquiry and/or investigation is required to be conducted as most of the accused persons are not residing within his jurisdiction.

13. He further submits that issuance of summons against the accused in a criminal case is a serious matter since criminal law cannot be set in motion as a matter of course and the order must reflect that the concerned Magistrate has applied his mind to the facts of the case and the law applicable thereto beside examining the nature of allegations made in the petition of complaint and oral and documentary evidence, before issuance of summons to the accused persons. Learned Magistrate is not supposed to be a silent spectator at the time of recording of preliminary evidence before passing any order directing issuance of summons against the accused. He should find out truthfulness of the allegations or otherwise and is required to be satisfied that the offence is *prima facie* committed by all or any of the accused before issuance of summons but in the instant case, learned Magistrate has proceeded to pass the impugned order in a mechanical way and as such, if the present proceeding is allowed to be continued that will be purely an abuse of process of the court and as such, the proceeding is required to be quashed.

14. Perused all the annexures, and it appears that declaration/undertaking was signed by the opposite party no.1 as well as the daughter of opposite party no.1 who is the student.

Paragraph 8 and 10 of the said undertaking signed and agreed by both opposite party no.1 and his daughter may be quoted for better understanding of the issue :-

“8.I undertake that if I leave the institute midway before completing the full course for any reason whatsoever, including but not limited to transfer of my Father / Mother / Legal Guardian / ill health of myself or any other member of the family or my admission in any institute / course / engineering college etc., or my studentship is cancelled because of misconduct etc., I or my Father / Mother / Legal Guardian shall not be entitled for refund of fees

10. In addition to the above, I understand without any ambiguity that the fee once paid is not refundable at all, whatever the reasons be, nor is it adjustable towards any other existing courses at FITJEE or any yet to be launched nor towards the fee of any other existing or prospective student.”

15. In view of aforesaid clear undertaking given by the opposite party no.1 and that the student have voluntarily left the course for whatever reason, it is quite clear that the content of the complaint does not disclose any offence at all far from offence under Section 420 of the Indian Penal Code.

16. It further appears that even though most of the accused persons/petitioners residing outside the jurisdiction of the Magistrate, he did not make any attempt to make inquiry or direct to investigate under Section 202 of the Code of Criminal Procedure before issuance of the summons against the accused persons.

17. Having considered the arguments advanced on behalf of the petitioners and also considering the documents filed as annexure including the undertaking, it appears that existence of dishonest or fraudulent intention has not be made out against the petitioners. Even if there is any dispute that involves determination of issue which are of civil nature and for which the opposite party no.1 has already knocked at the door of Consumer Forum where also he chooses not to proceed. The opposite party no.1 by no stretch of imagination can impart such dispute in a criminal colour.

18. The Hon'ble Apex Court in the case of **Hridaya Ranjan Prasad Verma and others Vs. State of Bihar and another** reported in **(2000) 4 SCC 168** was pleased to observe in Paragraph 15.

“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.”

19. Applying the dictum to the instant factual matrix, it appears that the ingredients of having and dishonest fraudulent intention under Section 420 is not made out in the case in hand.

20. In **Indian Oil Corporation Vs. NEPC India Limited and others** reported in **(2006) 6 SCC 736** it was observed by the Apex Court in paragraph 13.

“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.”

21. The Apex Court on various instances expressed its disapproval for imparting criminal colour to a civil dispute, made merely to take advantage of a relatively quick relief granted in a criminal case in contrast to a civil dispute. Such an exercise is nothing but an abuse of the process of law which must be discouraged in its entirety and as such, the impugned proceeding being CS/96841 of 2018 under Sections 420/34 of the Indian Penal Code pending before the learned Metropolitan Magistrate, 8th Court, Calcutta stands quashed.

22. CRR 890 of 2019 is accordingly allowed.

However, there will be no order as to costs.

Urgent photostat certified copies of this order may be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.

(AJAY KUMAR MUKHERJEE, J.)