16-11-2022
Subha
Item no.17
Ct no.34

IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction

CRR 1396 of 2021

Kunal Gupta & Anr.
-versus-
Rakman Commotrade Pvt. Ltd.

Re : An application under Sections 482 of the Code of Criminal Procedure.

Mr. Karan Dudhwewala
Mr. Rishav Singh
….for the petitioner.

Ms. Priyanka Agarwal
….for the opposite party.

This revisional application has been preferred challenging the proceedings being C.S. Case No. 27570 of 2020 under Sections 420/406/409/120B of the Indian Penal Code pending before the learned Metropolitan Magistrate, 13th Court, Calcutta wherein the learned Magistrate after examining the two witnesses along with the complainant was pleased to issue process under Sections 406/409/420 of the Indian Penal Code.

Learned advocate for the petitioners submits that the present complaint was for recovery of a loan amount from a proprietorship concerned to which the petitioner no.3 was not at all associated.

Learned advocate for the petitioners also submits that the complainant has also initiated case under Section 138 of the N. I. Act which has been suppressed in the present petition of complaint.

According to the complaint, the nature of the transactions itself speaks that there was a breach of the agreement which was open for adjudication before a civil forum and none of the offences as complained of under Sections 420/406/409 IPC is made out.

It has also been submitted that the proprietor/petitioner no.2 has expired during the pendency of the revisional application and as such, so far as the petitioner no. 1 who was in no way associated with the proprietorship firm should not be allowed to face the rigors of trial.

Learned advocate to that aspect has relied upon the judgement of the Hon'ble Supreme Court in ***Satishchandra Ratanlal Shah –versus- State of Gujarat & Anr.***, reported in (***2019) 9 Supreme Court Cases 148***. The attention of this court has been drawn to the paragraphs 11 and 13 which are set out as follows":-

> **11**. *"Having observed the background principles applicable herein, we need to consider the individual charges against the appellant. Turning to Section 405 read with Section 406 IPC, we observe that the dispute arises out of a loan transaction between the parties. It falls from the record that Respondent 2 knew the appellant and the attendant circumstances before lending the loan. Further it is an admitted fact that in order to recover the aforesaid amount, Respondent 2 had instituted a summary civil suit which is still pending adjudication. The law clearly recognizes a difference between simple payment/investment of money and entrustment of money or property. A mere breach of a promise, agreement or contract does not, ipso facto, constitute the offence of the criminal breach of trust contained in Section 405 IPC without there being a clear case of entrustment."*
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> **13.** *"Now coming to the charge under Section 415 punishable under Section 420 IPC. In the context of contracts, the distinction between mere breach of contract and cheating would depend upon the fraudulent inducement and mens rea. (See Hridaya Ranjan Prasad Verma v. State of Bihar). In the case before us, admittedly the appellant was trapped in economic crisis and therefore, he had approached Respondent 2 to ameliorate the situation of crisis. Further, in order to recover the aforesaid amount, Respondent 2 had instituted a summary civil suit seeking recovery of the loan amount which is still pending adjudication. The mere inability of the*

> *appellant to return the loan amount cannot give rise to a criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, as it is this mens rea which is the crux of the offence. Even if all the facts in the complaint and material are taken on their face value, no such dishonest representation or inducement could be found or inferred."*

Learned advocate submits that there was an inducement for parting with the sum of Rs. 10 lakhs, although the same was by the petitioner no. 2, but the complaint specifically alleges that there was involvement of the petitioner no.1 as he was the person who had handed over the cheque.

Learned advocate appearing for the complainant/opposite party relies upon a judgement of the Hon'ble Supreme Court in Vijayander Kumar and Others –versus- State of Rajasthan & Another reported in (2014) 3 Supreme Court Cases 389. Learned advocate draws the attention of this court to paragraph 12 which is set out as follows :-

> "12. ....*The real test is whether the allegations in the complaint disclose a criminal offence or not. This proposition is supported by several judgments of this Court as noted in para 16 of the judgement in Ravindra Kumar Madhanlal Goenka v. Rugmini Ram Raghav Spinners(P) Ltd."*

It has been candidly submitted by the learned advocate appearing for the complainant/opposite party that no offence under Sections 406/409 of the Code of Criminal Procedure has been made out, but the proceedings should continue under Sections 420/120B of the Indian Penal Code.

To that extent, the process issued under Sections 406/409 of the Indian Penal Code, which was passed by the learned Magistrate by its order dated 27th January, 2021 is quashed.

So far as the issue relating to the continuance of the process is concerned, the procedure to be adopted in such case is warrant cases instituted otherwise than on police report. In such a procedure, the complainant is to place its evidence prior to consideration of charges. The case relied upon by the petitioner is where a chargesheet was submitted pursuant to an investigation being conducted where the materials were already collected by the Investigating Agency.

The factum which is to be assessed in such cases where facts are hazy are whether there was an inducement at the inception and as to whether it was a mere failure of non-payment or a case of deception.

Having regard to the stage of the case at which the petitioner approached this court wherein only the complaint has been filed and the complainant is yet to adduce any evidence before charge it is not possible for a court of law to appreciate whether there was a deception from the initial stage of the representations being made by the accused firm or the petitioner no. 1 was associated with the firm at the relevant point of time.

Having regard to the same, I direct that the proceedings before the learned Metropolitan Magistrate, 13th Court, Calcutta would continue under Sections 420/120B of the Indian Penal Code. Petitioner no. 1 would be at liberty to canvass such points at the time of consideration of charges at the stage of Section 245/Section 246 of the Code of Criminal procedure.

In view of the nature of the transaction, the petitioner no. 1

should not be insisted to be physically present on each and every day in course of the trial by the learned Magistrate until and unless his presence deters the progress of the trial.

So far as the petitioner no.2 is concerned, it has been submitted that he has expired during the pendency of the revisional application before this court. To that effect the learned Metropolitan Magistrate, 13^{th} Court, Calcutta would call for a report from the concerned Police Station to ascertain the genuinity of such applications.

With the aforesaid observations, the revisional application being CRR 1396 of 2021 is disposed of.

Pending applications, if any, are consequently disposed of.

Interim order, if any, is hereby vacated.

All concerned parties are to act on the server copies of the order duly downloaded from the official website of this court.

[Tirthankar Ghosh, J]