IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 31 of 2001

Prabir Kumar Dey
-Vs-

Biswaroop Khatua @ Khokan & Anr.

For the Appellant	: Mr. Arunabha Jana, Mr. Dhiman Banerjee
For the State	: Mr. Avishek Sinha
For the Respondent	: Mr. Debarshi Brahma
Heard on	: 01.02.2023, 12.09.2023.
Judgment on	: 12.12.2023

Ananya Bandyopadhyay, J.:-

1. This instant criminal appeal is directed against an order and judgment dated 29.08.2000 passed by the Learned Chief Judicial Magistrate, Howrah acquitting the accused opposite party no. 1 in connection with Complaint Case No. 704C of 1997 filed under Section 420 of the Indian Penal Code.

2. The complainant/appellant filed a petition of complaint on 17.07.1997 before the Learned Chief Judicial Magistrate stating himself to be the sole proprietor of M/s. Kalpataru Marketing Division, at 62, Netaji Subhas Road, Howrah- 711101. The accused had been the sole proprietor of M/s. Sourav Agency previously, who used to purchase biscuits from the complainant's firm on cash or on credit. On 26.11.1996 the accused with a *mala-fide*

intention to cheat the complainant placed an order for supply of biscuits of different brands of Jain products to the tune of Rs. 46,686.99/- only. On the basis of the said order, the complainant delivered 257 cases of biscuits to the accused on the same date on credit by a van bearing no. WB V 7453 and the accused received the entire 257 cases of biscuits on 26.11.1996 upon acknowledgment in the road challan. Thereafter the complainant waited for several months for payment of dues. The complainant conceded to the oral request of the accused, who prayed for time to clear up his dues but ultimately failed in paying the dues. Consequently, the complainant sent a lawyer's notice dated 19.05.1997 requesting the accused to clear up the dues amounting to Rs. 46,686.99/-. However, receiving the said notice the accused denied all previous transactions between the parties in his reply through his lawyer's letter dated 28.05.1997. According to the complainant the accused dishonestly and fraudulently deceived the complainant and misappropriated the entire amount as stated and therefore committed an offence under Section 420 of the Indian Penal Code.

3. After taking the evidence of the complainant/appellant and other two witnesses, the Learned Magistrate framed the charge under Section 420 of the Indian Penal Code, which was read over and explained to the accused persons who pleaded not guilty and claimed to be tried.
4. The appellant examined three witnesses to prove his case and the defence examined none.
5. Subsequently, the Learned Magistrate found the accused not guilty and acquitted him.

6. The Learned Advocate for the appellant submitted that:-

    i. According to the evidence of PW-1, complainant the accused had discontinued the business which was not informed to the complainant which proved the criminal intention of the accused.

    ii. PW-1, complainant stated that he went to the house of the accused for payment but the accused intimidated to assault the complainant which clearly established the criminal intention of the accused.

    iii. The evidence of PW-2, the Manager of the complainant's company corroborated the evidence of PW-1 who stated that he went with Prabir Babu to claim money at the shop of the accused at Uttarpara but found the said shop to be closed. On enquiry local people stated that the shop was closed for many days.

    iv. The evidence of PW-3, the employee of the complainant's company also stated in evidence that the accused took articles previously and thus they had faith in him. The accused did not pay the money and thus cheated them. They went with Prabir Kumar Dey twice to claim the money but the shop of the accused was closed.

7. The Learned Advocate for the State submitted that the opposite party should have acknowledged the payment of dues and taken steps accordingly. However, the opposite party acted otherwise, though the previous transactions between the parties are contractual and civil in nature and left it to the discretion of this Court.

8. The evidence of the prosecution witnesses revealed as follows:

i. The PW-1 in his deposition stated himself to be the sole proprietor of Kalpataru Marketing Division at 300, N.S Road, Howrah-1 and its godown at 62 N S Road, Howrah-1. PW-1 was super stockist of biscuits for the Districts Howrah and Hooghly of different companies. He had connection with the opposite party in respect of business transaction, who took biscuits from him and paid the necessary prices. On placement of order on 21.11.96 for 257 cases of biscuits, accused took delivery on 26.11.96 at a total price of Rs. 46686.77paise from the godown by the accused himself by Matador No. WBV 7453. He did not pay anything on that date and assured to pay within seven days, but failed to comply. PW-1 met the accused twice or thrice for payment who ultimately did not pay. PW-1 came to know on enquiry that he had closed his business. PW-1 then went to his house for payment but he threatened to assault him and denied to pay anything. PW-1 lodged diary at Uttarpara P.S., sent lawyer's letter for the said amount which was received by him but he did not pay, though he replied to the lawyer's letter. The bill dt. 26.11.97 was prepared by PW-1 and signed by him which was marked Ext.1 and the challan dt. 26.11.97 was written and signed by PW-1 which was marked Ext.2 which bore the signature of the accused. The copy of requisition dt. 26.11.96 was signed by the accused and his signature was marked Ext.3. The lawyer's letter dt.19.5.97 was marked Ext. 4 and the registered receipt was marked

Ext.5 and the A/D which bore the signature of the accused marked Ext.6. The reply dt. 28.5.97 of the accused was marked Ext.7.

PW-1 further stated that the articles were sent as per normal transaction, by matador van no. WBV 7453. PW-1 could not state the name of the driver of that van. PW-1 sent goods as per order. He supplied articles as per Ext. 2 which was the road challan. PW-1 stated that accused sent a reply to the lawyer's letter and he gave the price of articles supplied along with it. The answer to the lawyer's letter was marked as Ext.7. The accused had calculated 1 to 17 items as piece and item no. 18 had been shown as case and he had calculated the price as Rs.4217.73 paise. He agreed to pay as per his accounts. The challan was written by staff and he mentioned the same by red ink. The accused's address was 15 A B Pal Raod and the address was same in challan a transaction was made at that address.

ii. PW-2 and PW-3 the Manager and staff of the company of the PW-1 reiterated and corroborated the evidence of PW-1 in essence.

iii. The examination of the opposite party under Section 313 of Cr.P.C., inter alia, states as follows:-

"*Q. It appears from the depositions made on behalf of the appellant that, on 26.11.97 you told the appellant to supply 257 cases of biscuits of different brands and the appellant as per your order supplied all the items and you received that delivery- what do you want to say?*

A. I, through my lawyer intimated the appellant that I was ready to pay entire sum of money for the biscuits that were received by me. I was ready to pay according to the road challan."

9. In the case of ***Khemraj vs. State of Madhya Pradesh[1],*** the Hon'ble Supreme Court observed as follows :

> *"14. … Sub-section (1) of Section 417 is in general terms and would take in its purview all types of cases since the expression used in that sub-section is "in any case". We do not see any limitation on the power of the State Government to direct institution of appeal with regard to any particular type of cases."*

10. In the case of ***The Assistant Registrar of Companies, West Bengal Vs. Standard Paint Works (P) Ltd. and Ors[2].,*** the Hon'ble Supreme Court observed as follows :

> *5. Section 417 of the Code of Criminal Procedure speaks of appeal in case of acquittal. Sub-section (3) of that section is as follows :*
>
> *"If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it my the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court."*

11. In the case of ***Khetrabasi Samual Etc. Vs. State of Orissa[3],*** the Hon'ble Supreme Court observed as follows :

"11. In K. Chinnaswamy Reddy vs. State of Andhra Pradesh. The court proceeded to define the limits of the jurisdiction of the High Court under

[1] (1976) 1 SCC 385
[2] 1971(2) SCC 85
[3] (1969) 2 SCC 571

Section 439 of the Criminal Procedure Code while setting aside an order of acquittal. It was said:

> *"… this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure and there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice…. It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be: where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial court or by the appeal court, or where the acquittal is based on a compounding of the offence, which is invalid under the law."*

12. In the case of ***Dhian Singh Vs. Municipal Board, Saharanpur***[4]**,** the Hon'ble Supreme Court held as follows :

> *"4. … Section 417(3) of the Criminal Procedure Code provides that if an order of acquittal is passed in any case instituted upon complaint, the High Court may grant to the complainant special leave against the order of acquittal. It is clear from that section that special leave under that provision can only be granted to the complainant and to no one else."*

13. Section 420 Indian Penal Code deals with cheating. Essential ingredients of Section 420 Indian Penal Code are:

    (i) cheating;

[4] (1969) 2 SCC 371

(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.

14. In the case of ***Hira Lal Hari Bhagwati Vs. C.B.I., New Delhi*[5]*,*** the Hon'ble Supreme Court held as follows:

> "*33. Section 415 of the Indian Penal code deals with cheating. To hold a person guilty of cheating as defined under Section 415 of the Indian Penal Code, it is necessary to show that he has fraudulent or dishonest intention at the time of making the promise with an intention to retain the property. In other words, Section 415 of the Indian Penal code which defines cheating, requires deception of any person (a) inducing that person to: (i) to deliver any property to any person, or (ii) to consent that any person shall retain any property OR (b) intentionally inducing 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, anybody's mind, reputation or property. In view of the aforesaid provisions, the appellants state that person 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.*
>
> *…*
>
> *39. It is settled law, by catena of decisions, that for establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise of representation. From his making failure to keep up promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed."*

[5] (2003) 5 SCC 257

15. In the case of ***Indian Oil Corpn. Vs. NEPC India Ltd. and others*[6],** the Hon'ble Supreme Court held as follows:

> *"25. 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,*
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> *(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.*
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> *10. 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."*

16. The dispute between the parties is pivotal on the amount of dues to be paid. The opposite party did not deny to pay the dues however disagreed on the computation of the same. The evidence of PW-1 too, corroborated his intention to pay on reply to the lawyer's letter but at a varied rate. The initial intention to cheat or deceive is absent. Criminal proceedings cannot be an instrument to pressurize the opponent to surrender to demand, where there are appropriate forums to deal with such demands arising out of civil dispute. The dispute between the parties is primarily civil in nature and cannot be the subject matter of a criminal proceeding. The impugned judgment of acquittal does not suffer from any error apparent in terms of appreciation of evidence as well as on point of law.

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[6] (2006) 6 SCC 736

17. In view of the above discussions, Criminal Appeal being CRA 31 of 2001 is accordingly dismissed
18. There is no order as to cost.
19. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
20. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)