IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
(APPELLATE SIDE)

Present:
The Hon'ble Justice Rai Chattopadhyay

C.R.R No. 168 of 2016
With
CRAN 9 of 2020 (Old No: CRAN 567 of 20)
With
CRAN 10 of 2022

Samarendra Kumar Biswas
Vs.
State of West Bengal & Anr.

For the Petitioner	: Mr. Jayanta Narayan Chatterjee, : Mr. Apalak Basu, : Ms. Nandini Chatterjee, : Mr. Bhaskar Mondal.
For the OP No.2	: Mr. Amartha Ghose, : Mr. P. Bera,
For the State	: Mr. S. G Mukherjee Ld. P.P, : Mr. Imran Ali, : Ms. Debjani Sahu

Hearing concluded on: **28/03/2023**

Judgment on: 12/05/2023

Rai Chattopadhyay, J.

1) In this case the petitioner has challenged the order of the trial Court dated August 3, 2015, thereby framing charges against the petitioner in G.R.Case No. 46/14, under sections 420 and

406 of the IPC. The petitioner has also challenged the entire criminal proceeding initiated against him pursuant to registering of the FIR being Bidhannagore (North) Police Station Case No. 11/2014 dated 09.01.2014, under sections 420/406/120B of the IPC. The petitioner has prayed for setting aside of the order of the trial Court framing charges in the said proceeding as well as quashing of the entire criminal proceeding against him as above.

2) Mr Chatterjee, Ld. Advocate appearing for the petitioner, has taken the Court through the complaint and the other documents the petitioner has relied on in this case. The complaint was filed on December 21, 2013, in the Court of Additional Chief Judicial Magistrate at Bidhannagore, under section 156 (3) of the Cr.P.C. The opposite party No. 2 in this case, was the complainant. Pursuant to the directions of the Court, police registered the FIR, as mentioned above. The crux of the allegations made against the present petitioner, has been, that the petitioner has deceived and cheated the complainant/opposite party No. 2 by falsely representing that an amount of Rs.30,00,000/- has been returned to the complainant in terms of a memorandum of understanding, previously entered into between the parties, for settlement of petitioner's immovable property, where as it was not actually done so. Allegedly, the petitioner has with malafide intention and ulterior motive, represented falsely in his letter dated August 21, 2013, to have enclosed an account payee cheque of Rs.30,00,000/-, as a refund of the entire 10% advance, taken earlier by the petitioner from the opposite party No. 2, of the total consideration amount of ₹ 3 crores. It is further alleged that actually there was no account payee cheque enclosed with the petitioner's letter dated August 21, 2013. The complainant has alleged that the petitioner neither had any intention to return the money taken by him in advance nor any bona-fide mindset to perform the terms of the memorandum entered into between them for settling the immovable property of the petitioner. Allegedly, the petitioner having no such intention to comply with or execute the terms of the memorandum, has deceived the opposite party No. 2 from the very inception of their inter se transaction and dishonestly induced him to part with his substantial amount of money. Mr Chatterjee however indicates that the allegations as above against his client is only baseless and unfounded insofar as the entire amount of Rs.30,00,000/-has already been deposited in the office of the Additional Chief Judicial Magistrate, Bidhannagore 24 Parganas (North), by the petitioner for the purpose of keeping the same, in an interest bearing fixed deposit account. He says that the direction of the Court would facilitate withdrawal of the same by the complainant. Therefore, according to Mr Chatterjee, there cannot be held to be existent any prima facie material against the petitioner, so far as the alleged offence of cheating or criminal breach of trust is concerned. By referring to the fact that a suit of specific performance has already been filed by the complainant, Mr. Chatterjee has taken this Court to the order of the Civil Judge Junior Division passed in the said case (being T.S. No.131/2013), to submit that the complainant has failed to secure any order of injunction, there, as the Court found existence of no prima facie case. He has relied on various precedents to substantiate petitioner's ground that in absence of any strong prima facie material as to any cognizable offence against him and the allegations against him, having not made up any case at all, to proceed against the petitioner, would amount only to the gross abuse of the process of Court which is, however, to be prevented by this Court in exercise of its inherent power under section 482 of the Cr.P.C. On this score, according to Mr Chatterjee the trial Court's order, framing charges against the petitioner is suffering from gross impropriety and illegality too. Thus he has prayed for setting aside of the impugned order dated August 3, 2015 and also quashing of the entire criminal proceeding against his client.

3) The following judgments have been relied on by Mr Chatterjee, on behalf of the petitioner:

(i) ***Mitesh Kumar J. Sha vs. State of Karnataka & Ors*** reported in ***2021 SCC OnLine SC 976,*** the relevant portion of this judgment is quoted herein below:-

"28. In the instant case, the complaint levelled against the Appellants herein is one which involves commission of offences of criminal breach of trust and cheating. While a criminal breach of trust as postulated under section 405 of the Indian Penal Code, entails misappropriation or conversion of another's property for one's own use, with a dishonest intention, cheating too on the other hand as an offence defined under section 415 of the Indian Penal Code, involves an ingredient of having a dishonest or fraudulent intention which is aimed at inducing the other party to deliver any property to a specific person. Both the sections clearly prescribed 'dishonest intention', as a pre-condition for even prima facie establishing the commission of said offences. Thus, in order to assess the relevant contentions made by the parties herein, the question whether actions of the Appellants were committed in furtherance of a dishonest or fraudulent scheme is one which requires scrutiny."

41. *******As has been rightly emphasised upon by this court, by way of an observation rendered in the case of M/s Indian Oil Corporation Vs. M/s. NEPC India Ltd & Ors. as under :-

"14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who

> ***initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law."***

42. It was also observed:-

> ***"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....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 though criminal prosecution should be deprecated and discouraged."***

43. On an earlier occasion, in case of G. Sagar Suri and Anr. Vs. State of UP and Ors. this Court has also observed:-

> ***"8. Jurisdiction under Section 482 of the Code has to be exercised with a great care. In exercise of its jurisdiction High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of 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 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."***

46. Recently, this Court in case of Randheer Singh Vs. The State of U.P. & Ors. has again reiterated the long standing principle that criminal proceedings must not be used as instruments of harassment. The court observed as under:-

"33. ....There can be no doubt that jurisdiction under Section 482 of the Cr.P.C. should be used sparingly for the purpose of preventing abuse of the process of any court or otherwise to secure the ends of justice. Whether a complaint discloses criminal offence or not depends on the nature of the allegation and whether the essential ingredients of a criminal offence are present or not has to be judged by the High Court. There can be no doubt that a complaint disclosing civil transactions may also have a criminal texture. The High Court has, however, to see whether the dispute of a civil nature has been given colour of criminal offence. In such a situation, the High Court should not hesitate to quash the criminal proceedings as held by this Court in Paramjeet Batra (supra) extracted above."

(ii) ***Vijay Kumar Ghai & Ors. Vs. State of West Bengal & Ors.*** reported in ***(2022) 7 SCC 124,*** the relevant portion of this judgment of quoted herein below:-

"32. A fraudulent or dishonest inducement is an essential ingredient of the offence. A person who dishonestly induces another person to deliver any property is liable for the offence of cheating.

35. To establish the offence of Cheating in inducing the delivery of property, the following ingredients need to be proved:-

1. The representation made by the person was false

2. The accused had prior knowledge that the representation he made was false.

3. The accused made false representation with dishonest intention in order to deceive the person to whom it was made.

4. The act where the accused induced the person to deliver the property or to perform or to abstain from any act which the person would have not done or had otherwise committed.

38. There can be no doubt that a mere breach of contract is not in itself a criminal offence and gives rise to the civil liability of damages. However, as held by this court

in Hridaya Ranjan Prasad Verma Vs. State of Bihar, the distinction between mere breach of contract and cheating, which is criminal offence, is a fine one. While breach of contract cannot give rise to criminal prosecution for cheating, fraudulent or dishonest intention is the basis of the offence of cheating. In the case at hand, complaint filed by the Respondent No. 2 does not disclose dishonest or fraudulent intention of the appellants."

(iii) ***Deepak Gaba & Ors vs. State of Uttar Pradesh & Anr.*** reported in ***(2023) 3 SCC 423,*** the relevant portion of this judgment of quoted herein below:-

"18. In order to apply Section 420 of the IPC, namely cheating and dishonestly inducing delivery of property, the ingredients of Section 415 of the IPC have to be satisfied. To constitute an offence of cheating under Section 415 of the IPC, a person should be induced, either fraudulently or dishonestly, to deliver any property to any person, or consent that any person shall retain any property. The second class of acts set forth in the section is the intentional inducement of doing or omitting to do anything which the person deceived would not do or omit to do, if she were not so deceived. Thus, the sine qua non of Section 415 of the IPC is "fraudulence", "dishonesty", or "intentional inducement", and the absence of these elements would debase the offence of cheating.

19. Explaining the contours, this Court in Mohd. Ibrahim v. State of Bihar, observed that for the offence of cheating, there should not only be cheating, but as a consequence of such cheating, the accused should also have dishonestly adduced the person deceived to deliver any property to a person; or to make, alter, or destroy, wholly or in part, a valuable security, or anything signed or sealed and which is capable of being converted into a valuable security."

(iv) ***Amita Sen & Ors vs. M/s. Chatterjee Enterprises*** reported in ***2023 SCC OnLine Cal 299***

4) The contentions and prayer of the petitioner have been vehemently opposed to by Mr. Ghosh, Ld. Advocate, who represents the opposite party No 2. He has made out the point that the ill will of the petitioner and the element of cheating and deception by him can be traced out from the modus operandi of the petitioner himself. He has taken this Court to the petitioner's letter dated August 21, 2013 and also letter of his client dated August 26, 2013, in reply to the petitioner's said letter, in order to submit that it is only an untrue statement that any account payee cheque was enclosed with the petitioner's letter dated August 21, 2013, as claimed. He says that his client has intimated the said fact to the petitioner in the reply itself. Mr. Ghosh would further submit that it was only after this Court directed the petitioner to submit the said amount of money to secure a stay order as regards the proceedings in the trial Court, the petitioner has deposited the money in the office of the Additional Chief Judicial Magistrate, Bidhannagore 24 Parganas (North). Therefore, according to Mr Ghosh, the dishonest intention of the petitioner to induce the complainant and deceive him, has sufficiently been brought on the face of the complaint so that those materials strongly suggest about existence of prima facie ingredients of cognizable offence as alleged, against the petitioner. It is the opposite party's case that even though pursuant to the Court's order the petitioner has deposited the amount of money taken by him as advance, from the opposite party No. 2, pursuant to the memorandum, the element of culpability and offence has not been eradicated due to such deposit of money. Since the element of petitioner's malafide and injurious intention has already been brought on record with the strong prima facie materials and allegations, made out in the complaint, the law as settled would not permit stoppage of prosecution against him by way of quashing the proceeding, as prayed for. Hence for these reasons, according to Mr Ghosh, the present case would not sustain in the eye of law and the same may be dismissed.

5) Alleged non performance of the terms of agreement by the petitioner and also his lack of sufficient promptitude in returning the money, taken earlier for performing the contract and allegedly for the reason of his malafide intention to deceive the complainant, are the genesis for the complainant to take recourse in a criminal Court under the criminal justice system. The agreement between the parties that is the memorandum of understanding was entered into on January 20, 2013. It was decided that the complainant would facilitate sale of the immovable leasehold property of the present petitioner, that is a piece of land and a two storied building over there. The consideration value was settled at ₹ 3 crores.10 percent of the said amount was to be remitted by the complainant to the present petitioner on the date of signing of the said agreement, which the complainant did. The fact of the petitioner to have received the said amount is not under challenge in this case. The parties decided amongst themselves that the entire process of transfer of property by way of sale should be completed within 3 months from the date of signing of the agreement. However, they settled a rider too, that such date of completion can be extended by a maximum period of 2 months more, on mutual consent. It was also settled that after the extended period, if any, the MOU should be treated as terminated. The said agreement had specifically provided that the complainant failing to complete the entire process within such a stipulated period of time, the petitioner shall be at liberty to terminate the agreement and get back the original deed of lease and possession certificate, handed over to the complainant for processing the sale of property. The terms in the agreement also postulated that the advance amount of money taken by the petitioner within that period should also be promptly returned back to the complainant less a stipulated amount, which was to be deducted as a penalty.

6) The petitioner has contended that the complainant has shown extreme reluctance and conducted himself in a lackadaisical manner, with the ulterior motive to fetch undue additional benefit over the sale of the said property, by intentionally delaying the whole process, in contravention of the terms of agreement settled between the parties. As a result of which the stipulated action of sale of property as well as collection of the sell proceeds could not be completed in terms of the agreement within the stipulated period that is April 20, 2013 or any extended period that is June 20, 2013. Petitioner says that his efforts to mobilise the complainant in complying with the terms of agreement, in due manner has always gone in vain. He says that the complainant has tried to make him sign a deed with the proposed purchaser, which was not to his benefit and was fetching undue benefit to the complainant and also was not in terms of the previous agreement entered into between him and the complainant. As the petitioner found no justifiable reason and malafide intention of the complainant in not complying with the terms of agreement as above and not executing the job, he cancelled the agreement vide his letter dated August 21, 2013. The claim of the petitioner, that the said letter was sent along with an account payee cheque of the entire amount of money which he received previously from the complainant pursuant to the terms of the said agreement, has been denied by the complainant.

7) Contrarily the complainant has enumerated that it was for the reason of the present petitioner, who did not cooperate in processing the entire matter duly in compliance with the agreed terms, the process of sale of property could not be done within the stipulated time. Allegedly the draft copy of agreement with the proposed purchaser was not accepted by the petitioner on flimsy grounds and thereby he tried to frustrate the rights of the complainant, emanating from the said agreement dated January 20, 2013. Allegedly also the endeavours made by the complainant to get the agreement between the petitioner and the proposed purchaser signed and executed, were frustrated due to the intentional and malafide non-cooperation by the present petitioner. The complainant rushed to the civil Court to file a suit for specific performance of contract against the present petitioner, on June 10, 2013. In the same, however, the complainant was unsuccessful in securing any order of injunction and his prayer for interim injunction was rejected by the Court on June 10, 2013. The complainant was further infuriated in view of the alleged act of flippancy of the petitioner, when he found no account payee cheque along with the petitioner's letter dated August 21, 2013, though in the said letter, the petitioner, over and above informing about his intention to terminate the said MOU, has also mentioned about remitting an account pay cheque of the stipulated amount, to return the advance money already taken by him. The opposite party immediately replied the complainant, more particularly about absence of any account payee cheque, as was claimed to have been given. All these facts and events have ultimately resulted into filing of the present complaint by the opposite party No.2 in the trial Court, on December 21, 2013.

8) Now, regarding existence of prima facie materials of cheating, the settled principles of law would require this Court to look for if an amount of deception was involved in the conduct of the petitioner from the inception of his transaction with the complainant/opposite party or not. Dishonest inducement by the petitioner of the complainant, to make the complainant hand him over the said sum of money of Rs.30,00,000/- would be the component and the relevant material, prima facie availability of which may prompt the Court to find this to be a fit case where the accused person/petitioner should stand for the trial. As a matter of fact, subsequent failure to live up to the promises agreed in an indenture, would not denounce bona fide intentions of the petitioner, when he entered into the same, with the complainant. This Court may seek guidance in this regard, from the ratio of the decision of the Supreme Court, in the case of ***Uma Shankar Gopalika vs State of Bihar, reported in (2005) 10 SCC 336***, where the Court says that ***" It is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception"***. The Court went that far to hold that, ***" If the intention to cheat has developed later on, the same cannot amount to cheating"***.

9) Parties reduced their intentions, to writing, in a memorandum of understanding dated January 20, 2013. In lieu of Rs.3

Crores to be given to the petitioner, the complainant agreed to facilitate sale of lease hold property of the petitioner, within a stipulated date. The time limit was April 20, 2013, extendable to June 20, 2013, if both of them had agreed. Stipulated 10% of the total proceeds, that is Rs.30,00,000/-, was handed over the petitioner, on the date of execution of the deed. As it is discussed earlier, certain glitches developed between them at a later stage. Resultantly the job was not completed within the stipulated time frame. Hence the petitioner sends his letter dated August 21, 2013, informing termination of the MOU, previously entered into between the parties. He says that along with his said letter he has enclosed an account payee cheque to return the money already advanced to him by the complainant/opposite party. However according to the opposite party, the petitioner had not enclosed any such cheque along with his letter as above and thus the petitioner had deceived and cheated him.

10) As the settled law has already been discussed earlier that prima facie material should be there to show that the petitioner had culpable intentions from the very inception to dishonestly induce the complainant to part with his property, any such material is, however, not available in this case against the petitioner. A false pretence made by the petitioner with the intention to defraud the complainant as alleged, should encompass within its diameter something more than merely having failed to duly enclose the cheque with his letter as alleged, that too after expiry of the stipulated period. It is not an allegation that immediately after receipt of that money, the petitioner turned back. Instead, it is an admitted fact in the case that the petitioner sent letter for termination of MOU, only after the stipiulated period had exhausted. None of the materials in this case would suggest any wrongful gain by the petitioner due to the alleged act of cheating or criminal breach of trust. In this case it is submitted and also the records confirm the same, that the petitioner has already deposited the said amount of money, in an interest bearing account, through Court. There is nothing on record to show that the petitioner did intend to fraudulently induce the complainant to part with his money or that he never intended to return the money to the complainant. Non-fulfilment of the project undertaken to be done in the MOU, is a fact both the parties are confirming. Therefore in terms of the MOU itself, the same terminates after the specified period of time. So far as the money paid in advance by the opposite party/complainant is concerned, which is now kept in account through the Court , would be immediately released in favour of the opposite party/complainant, since it is not in dispute that in the event of failure of the MOU within the stipulated period of time, the said amount of money should naturally be redirected to its owner, that is the complainant. From the four corners of the complaint, no material would be available so as to understand from that, any intention of the petitioner, as alleged, to cheat the opposite party/complainant, that too, from the very inception. Chronology of incidents show that there may have something intervened in between, for which the terms of the MOU, could not be fulfilled. That however may at best be the subject matter of a civil litigation but shall not have anything to do with any criminal injury caused to any person. Law would require something culpable and injurious as regards the intention, that is, *'mens rea'* of the accused person to inculcate criminality into an act of non-fulfilment of the terms of contract. In absence of the same, any criminal cause of action is only a non-est factum in the eye of law. In the case of ***Medchl Chemicals & Pharma (P) Ltd. Vs Biological E. Ltd reported in (2000) 3 SCC 269***, the Hon'ble Supreme Court has held that in order to attract the provisions of section 420 of the IPC, the guilty intent, at the time of making the promise is a requirement and an essential ingredient thereto and subsequent failure to fulfil the promise by itself would not attract the provisions thereof. It has been held that mens rea is one of the essential ingredients of the offence of cheating under section 420 IPC. The Court noted *Illustration (g)* to section 415 and said that the same clearly indicate that mere failure to deliver in breach of an agreement would not amount to cheating but is liable only to a civil action.

11) In this case, by no stretch of imagination, the prima facie ingredients of offence of cheating as alleged against the present petitioner are available, to warrant that the petitioner should stand for trial in this case. On the contrary, the FIR having not made out any case against the petitioner, on the basis of the allegations made therein, so far as the offences of cheating or criminal breach of trust are concerned, any further proceedings would amount to gross abuse of the process of Court. Therefore, this case is found to be a fit one, when the inherent power of this Court under section 482 of the Cr.P.C. shall be exercised, to quash the entire criminal proceeding now pending in the trial Court. Under the circumstances, the order of the trial Court, dated August 3, 2015, to frame charges and commence the trial would also not be tenable in the eye of law and be liable to set aside.

12) Hence the revision succeeds. CRR No. 168 of 2016 is allowed. The entire proceeding in the trial Court pursuant to Bidhannagore (North) Police Station Case No. 11/2014 dated 09.01.2014, under sections 420/406/120 B of the IPC, being G.R.Case No. 46/14, including trial Court's order dated August 3, 2015,is quashed and set aside.

13) The opposite part/complainant shall immediately withdraw the entire amount of Rs.30,00,000/- kept in Bank through the office of the Additional Chief Judicial Magistrate, Bidhannagore 24 Parganas (North), along with the interest over the same, if any.

14) CRR No. 168 of 2016 is disposed of along with pending applications, if any.

15) Urgent certified copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

RAI CHATTOPADHYAY

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Date: 2023.05.12 13:48:03 +05'30'

(Rai Chattopadhyay,J.)