

IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 713 of 2020

Sri Kapil Gupta & Anr.

Vs.

The State of West Bengal & Anr.

For the Petitioners : Mr. Angshuman Chakraborty,
Mr. S.S. Saha.

For the State : None.

For the Opposite Party : Mr. Imtiaz Ahmed,
No. 2 Ms. Ghazala Firdaus,
Mr. Sk. Saidullah,
Mr. Mithun Mondal,
Mr. Md. Arsalan.

Heard on : 27.07.2023

Judgment on : 18.08.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the proceeding being Complaint Case No. 0088326/2016 under Sections 406/420 of the Indian Penal Code now pending before the Learned Metropolitan Magistrate, 8th Court, Calcutta.

2. The petitioners' case is that the opposite party no. 2 in the complaint dated 25.05.2016 has stated as follows :-

- i. *That during the period 2008 to 2016 the petitioners supplied defective goods worth Rs.4,52,61,889/- which is still lying in the godown and the petitioners herein have failed to pay or refund the amount nor did they replace the defective goods with new one and that letter of credit that is required to be made within 90 days had already been made in terms of the agreement.*
- ii. *That the complainant company on several occasions requested the petitioners to pay the money back but a total sum of Rs.4,52,61,889/- is still lying outstanding to be payable by the petitioners herein and that the complainant being the opposite party no. 2 is entitled to get an interest on the sum outstanding at the rate of 18% per annum and also to have a sum of Rs.68,460/- as compensation for blocking the godown of the complainant with the defective goods of the petitioners.*
- iii. *That the complainant has also sent a demand notice to the petitioners through their learned advocate but the petitioners have not cleared the outstanding dues.*
- iv. *That the petitioners have cheated and caused breach of trust by having mislead the opposite party to enter into the agreement which ought not to have been entered into if the complainant knew that they will not get the money back on complaint of defective goods.*

3. That M/s. Compact Lamps Pvt. Ltd., a company registered under the provisions of Companies Act by an order dated 11.01.2019 passed by National Company Law Tribunal, New Delhi Bench, in connection with an application under Section 9 of the Insolvency and Bankruptcy Code being No. (IB)1372(PB)/2018, was declared insolvent and an order or moratorium was passed.

4. The petitioner also has a claim of dues that the opposite party no. 2 owes to the petitioners to the tune of Rs.8.5 crores in course of their commercial business relationship.
5. The opposite party no. 2 has also filed another complaint case almost on similar allegation against the sister concern of the petitioner no. 1 being CS 0088331/2016 which is also pending before the same court.
6. **Mr. Angshuman Chakraborty, learned counsel for the petitioners** has submitted that the allegations as labeled in the petition of complaint is solely private and purely civil in nature since the same revolves around allegations regarding breach of terms of an agreement, and moreover the averments in the petition of complaint is expressive that the opposite party has claimed a sum of money with interest which can never be the domain of the sections in which the case has been started and is pending against the petitioners and hence the same is liable to be quashed.
7. The following judgments have been relied upon by the petitioners:-
 - (i) **Prem Kumar vs. State of Rajasthan & Anr.** reported in **(2020) 20 SCC 623;**
 - (ii) **Nageshwar Prasad Singh alias Sinha vs. Narayan Singh & Anr.** reported in **(1998) 5 SCC 694.**

Both these judgments relate to dispute in respect of landed property.

8. **Mr. Imtiaz Ahmed, learned counsel for the opposite party no. 2** has submitted that the complainant has all along been demanding replacement of defective articles and his dues, but the petitioners have failed to do so in spite of notice. The complainant has made out a prima

facie case against the petitioners as alleged and as such the case should be permitted to proceed towards trial and the revision be dismissed.

9. The relevant statements made by the complainant in the written complaint are:-

- i) **The complaint was filed** by the complainant being authorized by the Board of Directors resolution dated 12th February, **2016**.
- ii) The parties herein entered into an agreement in the year **2008**.
- iii) The procedure which was followed by the complainant company was that they would place orders with the accused no. 1 for supply of goods and the accused nos. 2 and 3 used to accept and act upon the same. The essential terms of the agreement between the parties are recorded in the purchase orders. The terms include delivery period of 30 days from the date of receipt of purchase orders and replacement of goods having manufacturing defect within 16 months from the date of manufacturing. The purchase orders were accepted and acted upon by the accused person nos. 2 and 3.
- iv) **During the period from 2008 to 2016**, there have been goods supplied by the accused persons under the agreement and purchase orders, which have been found to have manufacturing defect. The value of such goods is Rs.4,52,61,889/- and is still lying in the godown of the complainant company. The accused persons have failed to refund the amount and also did not replace the defective goods. Since the terms of payment in terms of the purchase orders and/or agreement are to be made within 90 days through letter of credit, payments in respect of the aforesaid defective goods have already been made.
- v) The complainant company on several occasions requested the accused persons to make payments of the outstanding amount but each and every time the accused persons refused and/or neglected to do so for reasons best known to them. That a total sum of Rs.4,52,61,889/- (Rupees Four Crore Fifty Two Lacs Sixty One Thousand Eight Hundred Eighty Nine) is outstanding, to be payable by the accused persons.

- 10. From the said materials on record,** it is evident that the parties had entered into an agreement, with the terms and conditions clearly laid down. The terms include delivery period of 30 days from the date of receipt of purchase orders and replacement of goods having manufacturing defect within 16 months from the date of manufacturing. It is alleged that all payment had already been made.
- 11.** The case of the complainant is that during the period 2008 (year of agreement) to 2016 (year of complaint), there have been defective goods supplied **but there is no documents to prove or substantiate that the products supplied from 2008 was defective. It is for the first time that a demand notice was issued on 18th April, 2016 (after 8 years of business relationship), after a Board resolution.**
- 12. In *M/s. Indian Oil Corporation vs. M/s Npec India Ltd. & Ors., Appeal (crl.) 834 of 2002*** decided on 20.07.2006, the Supreme Court considered the following point among the two points decided.

8. The High Court by common judgment dated 23.3.2001 allowed both the petitions and quashed the two complaints. It accepted the second ground urged by the Respondents herein, but rejected the first ground. The said order of the High Court is under challenge in these appeals. On the rival contentions urged, the following points arise for consideration :

(i) Whether existence or availment of civil remedy in respect of disputes arising from breach of contract, bars remedy under criminal law?

(ii) Whether the allegations in the complaint, if accepted on face value, constitute any offence under sections 378, 403, 405, 415 or 425 IPC ?

Re : Point No. (i) :

9. *The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few - Madhavrao Jiwaji Rao Scindia v. Sambhajirao Chandrojirao Angre [1988 (1) SCC 692], State of Haryana vs. Bhajanlal [1992 Supp (1) SCC 335], Rupan Deol Bajaj vs. Kanwar Pal Singh Gill [1995 (6) SCC 194], Central Bureau of Investigation v. Duncans Agro Industries Ltd., [1996 (5) SCC 591], State of Bihar vs. Rajendra Agrawalla [1996 (8) SCC 164], Rajesh Bajaj v. State NCT of Delhi, [1999 (3) SCC 259], Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. [2000 (3) SCC 269], Hridaya Ranjan Prasad Verma v. State of Bihar [2000 (4) SCC 168], M. Krishnan vs Vijay Kumar [2001 (8) SCC 645], and Zandu Phamaceutical Works Ltd. v. Mohd. Sharaful Haque [2005 (1) SCC 122]. The principles, relevant to our purpose are :*

(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with malafides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few

ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out : (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceedings are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

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. Such a tendency is seen in several family disputes also, leading to irretrievable break down 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 vs. State of UP [2000 (2) SCC 636], this Court observed :**

"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."

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. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under section 250 Cr.P.C. more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may.

Now in the lines of the judgment under reference let us see if the allegations in the complaint in the present case, if accepted on face value, constitute the offences under Sections 406/420 IPC.

13. Section 406 of the Indian Penal Code, lays down:-

"406. Punishment for criminal breach of trust.—
Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Ingredients of offence.—*The essential ingredients of the offence under Sec. 406 are as follows:-*

- (1) Mens rea is essential ingredient of offence.*
- (2) There must be an entrustment, there must be misappropriation or conversion to one's own use, or use in violation of a legal direction or of any legal contract.*
- (3) The accused was entrusted with the property or domain over it.*
- (4) He dishonestly misappropriated or converted to his own use such property;*

(5) *He dishonestly used or disposed of that property or willfully suffered any other person to do so in failure of-*

(a) Any direction of law prescribing the mode in which such trust is to be discharged, or

(b) Any legal contract made touching upon the discharge of such trust."

14. Section 405 of the Indian Penal Code defines:-

"405. Criminal breach of trust.—*Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".*"

15. In *M/s. Indian Oil Corporation vs. M/s Npec India Ltd. & Ors.*

(supra) the Supreme Court also held:-

"18. *In Chelloor Mankkal Narayan Ittiravi Nambudiri v. State of Travancore, Cochin [AIR 1953 SC 478], this Court held :*

" to constitute an offence of criminal breach of trust, it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or power over it. It has to be established further that in respect of the property so entrusted, there was dishonest misappropriation or dishonest conversion or dishonest use or disposal in violation of a direction of law or legal contract, by the accused himself or by someone else which he willingly suffered to do.

It follows almost axiomatically from this definition that the ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit."

[Emphasis supplied]

In Jaswantraï Manilal Akhaney v. State of Bombay [AIR 1956 SC 575], this Court reiterated that the first ingredient to be proved in respect of a criminal breach of trust is 'entrustment'. It, however, clarified :

".. But when S. 405 which defines "criminal breach of trust" speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event."

19. *The question is whether there is 'entrustment' in an hypothecation? Hypothecation is a mode of creating a security without delivery of title or possession. Both ownership of the movable property and possession thereof, remain with the debtor. The creditor has an equitable charge over the property and is given a right to take possession and sell the hypothecated movables to recover his dues (note : we are not expressing any opinion on the question whether possession can be taken by the creditor, without or with recourse to a court of law). The creditor may also have the right to claim payment from the sale proceeds (if such proceeds are identifiable and available). The following definitions of the term 'hypothecation' in P. Ramanatha Aiyar's Advanced Law Lexicon (Third (2005) Edition, Vol.2, Pages 2179 and 2180) are relevant :*

"Hypothecation : It is the act of pledging an asset as security for borrowing, without parting with its possession or ownership. The borrower enters into an agreement with the lender to hand over the possession of the hypothecated asset whenever called upon to do so. The charge of hypothecation is then converted into that of a pledge and the lender enjoys the rights of a pledgee."

'Hypothecation' means a charge in or upon any movable property, existing in future, created by a borrower in favour of a secured creditor, without delivery of possession of the movable property to such

creditor, as a security for financial assistance and includes floating charge and crystallization of such charge into fixed charge on movable property. (Borrowed from section 2(n) of Securitisation and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002)"

But there is no 'entrustment of the property' or 'entrustment of dominion over the property' by the hypothecatee (creditor) to the hypothecator (debtor) in an hypothecation. When possession has remained with the debtor/owner and when the creditor has neither ownership nor beneficial interest, obviously there cannot be any entrustment by the creditor.

20. *The question directly arose for consideration in Central Bureau of Investigation v. Duncans Agro Industries Ltd., Calcutta [1996 (5) SCC 591]. It related to a complaint against the accused for offences of criminal breach of trust. It was alleged that a floating charge was created by the accused debtor on the goods by way of security under a deed of hypothecation, in favour of a bank to cover credit facility and that the said goods were disposed of by the debtor. It was contended that the disposal of the goods amounted to criminal breach of trust. Negating the said contention, this Court after stating the principle as to when a complaint can be quashed at the threshold, held thus :*

"a serious dispute has been raised by the learned counsel as to whether on the face of the allegations, an offence of criminal breach of trust is constituted or not. In our view, the expression 'entrusted with property' or 'with any dominion over property' has been used in a wide sense in Section 405, I.P.C. Such expression includes all cases in which goods are entrusted, that is, voluntarily handed over for a specific purpose and dishonestly disposed of in violation of law or in violation of contract. The expression 'entrusted' appearing in Section 405, I.P.C. is not necessarily a term of law. It has wide and different implications in different contexts. It is, however, necessary that the ownership or beneficial interest in the ownership of the property entrusted in respect of which offence is alleged to have been committed must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit. The

expression 'trust' in Section 405, I.P.C. is a comprehensive expression and has been used to denote various kinds of relationship like the relationship of trustee and beneficiary, bailor and bailee, master and servant, pledger and pledgee."

In the present case, the petitioners are admittedly the persons who delivered the products (alleged to be defective) and as such there was no "entrustment" in favour the petitioners by the complainant.

As such the ingredients required to constitute the offence of criminal breach of trust as alleged, is not prima facie present against the petitioner and the cognizance taken by the Magistrate is thus bad in law.

16. Section 420 of the Indian Penal Code, lays down:-

"420. Cheating and dishonestly inducing delivery of property.—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Ingredients of offence.— The essential ingredients of the offence under Sec. 420 are as follows:-

- (1) There should be fraudulent or dishonest inducement of a person by deceiving him;
- (2) (a) The person so induced should be intentionally induced to deliver any property to any person or to consent that any person shall retain any property, or
 - (b) The person so induced to do anything which he would not do or omit if he were not so deceived, and

(c) In cases covered by second part of clause (a), the act or omission should be one which caused or was likely to cause damage or harm to the person induced in body, mind or property.

The two essential ingredients of the offence under this section are –

- (A) Deceit, that is to say dishonest or fraudulent misrepresentation, and
- (B) Inducing the person deceived to part with property.”

In the present case, the parties had a business transaction for 8 years, after which the present complaint has been filed. Thus there was no fraudulent or dishonest inducement by the petitioners.

17. The Supreme Court in **Deepak Gaba and Ors. vs State of Uttar Pradesh and Anr., Criminal Appeal No. 2328 of 2022, on January 02, 2023**, held:-

“21. We are, therefore, of the opinion that the assertions made in the complaint and the pre-summoning evidence led by respondent no. 2 - complainant fail to establish the conditions and incidence of the penal liability set out under Sections 405, 420, and 471 of the IPC, as the allegations pertain to alleged breach of contractual obligations. Pertinently, this Court, in a number of cases, has noticed attempts made by parties to invoke jurisdiction of criminal courts, by filing vexatious criminal complaints by camouflaging allegations which were ex facie outrageous or pure civil claims. These attempts are not to be entertained and should be dismissed at the threshold. To avoid prolixity, we would only like to refer to the judgment of this Court in **Thermax Limited and Others v. K.M. Johny (2011) 13 SCC 412, as it refers to earlier case laws in copious detail. In **Thermax Limited and Others** (Supra), it was**

pointed that the court should be watchful of the difference between civil and criminal wrongs, though there can be situations where the allegations may constitute both civil and criminal wrongs. The court must cautiously examine the facts to ascertain whether they only constitute a civil wrong, as the ingredients of criminal wrong are missing. A conscious application of the said aspects is required by the Magistrate, as a summoning order has grave consequences of setting criminal proceedings in motion. Even though at the stage of issuing process to the accused the Magistrate is not required to record detailed reasons, there should be adequate evidence on record to set the criminal proceedings into motion. The requirement of Section 204 of the Code is that the Magistrate should carefully scrutinize the evidence brought on record. He/she may even put questions to complainant and his/her witnesses when examined under Section 200 of the Code to elicit answers to find out the truth about the allegations. Only upon being satisfied that there is sufficient ground for summoning the accused to stand the trial, summons should be issued. Summoning order is to be passed when the complainant discloses the offence, and when there is material that supports and constitutes essential ingredients of the offence. It should not be passed lightly or as a matter of course. When the violation of law alleged is clearly debatable and doubtful, either on account of paucity and lack of clarity of facts, or on application of law to the facts, the Magistrate must ensure clarification of the ambiguities. Summoning without appreciation of the legal provisions and their application to the facts may result in an innocent being summoned to stand the prosecution/trial. Initiation of prosecution and summoning of the accused to stand trial, apart from monetary loss, sacrifice of time, and effort to prepare a defence, also causes humiliation and disrepute in the society. It results in anxiety of uncertain times.

24. *We must also observe that the High Court, while dismissing the petition filed under Section 482 of the Code, failed to take due notice that criminal proceedings should not be allowed to be initiated when it is manifest that these proceedings have been initiated with ulterior motive of wreaking*

vengeance and with a view to spite the opposite side due to private or personal grudge. Allegations in the complaint and the pre-summoning evidence on record, when taken on the face value and accepted in entirety, do not constitute the offence alleged. The inherent powers of the court can and should be exercised in such circumstances. When the allegations in the complaint are so absurd or inherently improbable, on the basis of which no prudent person can ever reach a just conclusion that there is sufficient wrong for proceeding against the accused, summons should not be issued.”

18. In the present case, there is no materials to show that there was any dishonest intention on the part of the petitioners from the beginning of the agreement that is from the year 2008 to 2015. Nor was there any inducement by the petitioners to entrust any property to the petitioners.

The total dispute is based on agreement for business transaction.

There is also no materials to show that the petitioners had any dishonest intention to cause loss to the opposite party no. 2/complainant by inducing delivery of property **(property herein was delivered by the accused, which the petitioner claims to be defective after 8 years).**

The demand for the first time has been raised after 8 years of business. As such the ingredients required to constitute the offences alleged are clearly absent in the present case. There is no prima facie materials to constitute the offence alleged. As such the proceeding in this case is liable to be quashed.

19. CRR 713 of 2020 is accordingly allowed.

20. The proceeding being Complaint Case No. 0088326/2016 under Sections 406/420 of the Indian Penal Code now pending before the Learned Metropolitan Magistrate, 8th Court, Calcutta, is quashed.

- 21.** All connected applications, if any, stands disposed of.
- 22.** Interim order, if any, stands vacated.
- 23.** Copy of this judgment be sent to the learned Trial Court for necessary compliance.
- 24.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)