IN THE HIGH COURT AT CALCUTTA
(Criminal Revisional Jurisdiction)
Appellate Side

Present:

Justice Bibhas Ranjan De

C.R.R. 1440 of 2018

Dinesh Sherawat @ Dinesh Kumar

Vs.

The State of West Bengal & Anr.

For the Petitioner : Mr. Nauroz Rahber, Adv.
Mr. Anit Ranjan Pati, Adv.
Mr. Muhammad Jawwad, Adv.
Ms. Swastika Chowdhury, Adv.

For the opposite party no. 2 : Ms. Soni Ojha, Adv.
Ms. Sambrita B. Chatterjee, Adv.
Ms. Sonia Nandy, Adv.

Heard on : 14.09.2023, 22.11.2023, 08.12.2023, 13.12.2023

Judgment on : 22nd December, 2023

Bibhas Ranjan De, J.

1. The application under Section 482 of the Code of Criminal Procedure,1973 (for short CrPC) has been filed with a prayer for quashing of the proceeding being CS case no. 0030362/2015 under Section 418/420 of the Indian Penal Code,1860 (for short IPC), pending before the Ld. Metropolitan Magistrate, 6th Court, Calcutta.

2. The facts of the case in brief are that the opposite party being M/s. Transafe Services Limited (formerly known as Indian Container Leasing Limited) a company incorporated under the Companies Act, 1956, filed an application under Section 200 of CrPC before the Ld. Chief Metropolitan Magistrate, Calcutta, against the petitioner/accused alleging, *inter alia*, that the complainant company engaged in the business of providing containers on operating lease basis. On being approached by petitioner/accused, opposite party/ company entered into a lease agreement with the petitioner/accused on 15.10.1999 with the assurance of the petitioner/accused to make regular payment of lease rentals in time and returned the assets to the opposite party /company as an when they would be requested by the opposite party/ company to do so. Since April, 2012 petitioner/accused started defaulting in paying the lease rentals to the opposite party/company. Opposite party/company sent demand notice on 29.07.2015 requesting the accused to liquidate the outstanding within stipulated period and thereby an outstanding principal lease rental of Rs. 19,99,675/- (rupees nineteen lakh ninety nine thousand six hundred seventy five only) along with late payment charges and compound interest at monthly rest made it to a total sum of Rs. 1,40,67,683.25/- (one crore forty lacks sixty seven thousand six hundred eighty three and twenty five paise only).

3. It is alleged that petitioner/accused neither pay any heed to the notice nor made any payment and thereby committed an offence under Section 418/420 of the IPC.

4. After taking cognizance Ld. Chief Metropolitan Magistrate transferred the case to the Court of 6th Metropolitan Magistrate, for inquiry and disposal. Ld. Metropolitan Magistrate after inquiry issued process against the petitioner/accused. The present petition is filed challenging the registration of complaint under Section 200 Cr.PC on the allegations made in the complaint which is sought to be quashed on various grounds.

5. The main ground urged in the petition is that the complaint is frivolous and untenable as failure to perform the obligation under the lease agreement does not constitute an offence under Section 418/420 of the IPC and at best, it would give rise to cause of action for filing civil suit. Further ground is that the dispute arose as to the method of computation of lease rental from July, 2007 when the petitioner/accused began returning the containers and till April when the last container was returned back to the opposite party no. 2/complainant. On further ground that the petitioner/ accused issued a letter dated 09.01.2012 offering Rs. 5,00,000/- towards final settlement in response to demand notice sent by opposite party no. 2/complainant.

Argument Advanced:-

6. Mr. Md. Nauroz Rahber, Ld. Counsel, appearing on behalf of the petitioner /accused contended that, in the absence of any allegation about existence of fraudulent intention at the time of alleged execution lease agreement, it would not constitute an offence punishable under Section 418/420 of IPC. It is further submitted that when the opposite party no. 2/complainant gave flavor of criminal offence to civil litigation, the proceedings cannot be continued, as it is an abuse of process of law.

7. In support of his contention, Mr. Rahber placed reliance on the judgment of the Hon'ble Supreme Court as follows:-

- ***Binod Kumar and others Vs. State of Bihar and another*** reported in ***(2014) 10 Supreme Court Cases 663.***
- ***Sushil Sethi and another Vs. State of Arunachal Pradesh and others*** reported in ***(2020) 3 Supreme Court Cases 240.***

8. Whereas, Ld. Counsel Ms. Soni Ojha, for the opposite party no. 2 /complainant contended that the dispute is not only civil but also gives rise to cause of action for criminal offence, as the petitioner/accused induced the opposite party no. 2/complainant to part with the containers on payment of agreed rent and other charges and enjoying the property without payment rent may also constitute an offences punishable under Sections 418/420 of IPC.

9. In support of her contention, Ms. Ojha relied on the following case:-

- ***Priti Saraf and another Vs. State (NCT of Delhi) and another*** reported in ***(2021) 16 Supreme Court Cases 142***

Decision

10. The facts narrated in the earlier paragraphs clearly disclosed that both the petitioner/accused and opposite party no. 2/complainant entered into lease agreement no. C-88 dated 15.10.1999. Petitioner/accused committed default in payment of lease rental accumulating to Rs. 1,40,67,683.25/- (one crore forty lacks sixty seven thousand six hundred eighty three and twenty five paise only) including lease rental and late payment charges in terms of compound interest @ 2.5% per month. It is further seen from the correspondences between the parties particularly the correspondence bearing no. S/2015/3827 dated 29.07.2015, before filing of this case, that accused/petitioner paid lease rental up to March, 2012. There was admitted relationship of lessor and lessee and lessee/petitioner regularly paid lease rental for the period of 1999 to March 2012. From another correspondence bearing no. TSL/DN/DTS/2014/3 date February 6, 2014 addressed to petitioner/accused it appears that all containers were returned on 30.04.2012 by the petitioner/accused. From the correspondence between the parties it also appears that petitioner/accused offered Rs. 5,00,000/- to settle the dispute.

By lodging a complaint opposite party no.2/complainant alleges that the accused petitioner committed default in payment of lease rental and thereby committed an offence punishable under Section 418/420 of IPC.

11. The essential ingredient to constitute the offence of cheating are :

I) there should be fraudulent or dishonest inducement of a person by deceiving him;

II (a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property: or (b) the person so deceived should be intestinally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and

(III) in cases covered by (II) (b), the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property.

12. Adverting to the facts of the present case, in view of the lease agreement between the petitioner and opposite party no. 2, the relationship is only lessor and lessee. Petitioner/accused paid all lease rental from 1999 to March 2012, but, the petitioner/accused failed to pay agreed amount thereafter, that, in my opinion, does not amount to constitute any offence punishable under Section 420 of IPC, since the complaint is bereft of any allegation that the petitioner/accused had no intention at the inception to induce the complainant/opposite party or to part with the property, which is *sine-qua-non* to proceed against the petitioner/accused for the offence punishable under Section 420 of the IPC.

13. There is a thin line distinction between mere "breach of agreement /contract" and the "cheating". It depends upon the intention of the accused at the time of inducement which, in my opinion, may be assumed by his subsequent conduct. In this case, immediately after execution of lease agreement petitioner/accused started in paying lease rental regularly for a considerable period and that conduct does not justify any fraudulent or dishonest intention on the part of the petitioner/accused since inception. Mere breach of contract/agreement cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction.

14. In ***Priti Saraf*** (supra) dealt with the following facts:-

"**2.** *The factual matrix of the matter as reflected from the complaint as alleged is that the subject property in question i.e. 37, Friends Colony (East), New Delhi is in the ownership of the second respondent. The said property was mortgaged with State Bank of Patiala and the total legal liability payable to the Bank was Rs 18 crores. That in order to clear the said dues, the second respondent hatched a conspiracy with broker Ashok Kumar so as to cheat and defraud the appellant complainants and to further misappropriate the amounts paid by the complainants as part of the deal, the second respondent breached the trust of the appellant complainants deliberately and falsely stating to the appellant complainants that the second respondent would be liable to pay a sum of Rs 25.50 crores to the complainant if the deal is not carried forward by the second respondent. Keeping in view the overall scenario, the agreement to sell was executed on 24-12-2011 between the second respondent and the first appellant. The second respondent agreed to sell 1205.43 sq yd of the property in question for a total sale consideration of Rs 63,28,50,750. At the time of execution, the first appellant paid a sum of Rs 12.50 crores vide cheque dated 24-12-2011 drawn on HDFC Bank, New Friends Colony, Delhi. As per Clause 3 of the said agreement to sell, the second respondent had to perform and complete three requirements which were compulsory in nature. The said requirements were to be completed by the second respondent latest by 24-3-2012 before any further amount is to be received by her from the first appellant complainant.*

3. *It was further alleged in the complaint that the three requirements in terms of Clause 3 of the agreement to sell were not fulfilled by the second respondent and even after there being a delay in obtaining sanction plans, still the first appellant on demand made a payment of Rs 5.40 crores by a*

> *cheque dated 23-5-2012 and to show her bona fides, the second respondent handed over post-dated cheques worth Rs 25.50 crores towards security for performance of agreement dated 24-12-2011. After the amount was received from the first appellant complainant, the second respondent immediately cleared her outstanding legal liability of State Bank of Patiala and obtained NOC from the bank, however, the fact of obtaining NOC was never divulged by the second respondent to the complainants deliberately. This fact for the first time was disclosed by the second respondent at the stage when post-dated cheques of Rs 25.50 crores handed over as security to the complainant were rendered invalid."*

15. On perusal of the aforesaid facts in ***Priti Saraf*** (supra) with rapt attention it appears that the factual matrix of our case is not at all identical with that of the aforementioned reported decision. Therefore, principle enunciated in the decision is not applicable in the case on hand.

16. In ***Binod Kumar*** (supra) Hon'ble Apex Court came across the following facts:-

> *"**2.** Payment of bill pertaining to the contract executed by the second respondent in Tilka Manjhi Bhagalpur University had a chequered history. The case of the second respondent is that contract was entered into between him and K.S.S. College on 4-9-1990 for the construction of building of K.S.S. College, Lakhisarai, a constituent unit of Tilka Manjhi Bhagalpur University. According to the second respondent, since money and requisite materials were not given to him in time, the work was not completed within the stipulated*

period. The University vide letter dated 9-5-1995, informed Respondent 2 that his contract is terminated and all his dues including final bill, earnest money and security deposit, etc. will be released after consultation with the College Development Committee. The University Engineer vide letter dated 4-6-1996, addressed to the Principal of the College, informed that a payment of Rs 48,505 is payable to the contractor; but Respondent 2 was not paid the aforesaid bill amount. Finally, the respondent was paid Rs 14,000 vide Cheque No. EMGCO-OP.Z No. 0127627, as per the direction of the College Development Committee and balance amount of Rs 34,505 was not paid to him. Aggrieved by the said non-payment of the entire amount, Respondent 2 filed Criminal Complaint Case No. 196-C of 1997 in the Court of the Sub-Divisional Judicial Magistrate, Lakhisarai for criminal breach of trust, alleging that the amount of Rs 34,505 was not paid to him and that the amount was utilised by the appellants in some other work."

17. ***Binod kumar*** (supra) also dealt with an allegation of non-payment of agreed amount in terms of contract. In that case, Hon'ble Apex Court handed down the following principles:-

"12. Coming to the facts of this case, it is no doubt true that the dispute relates to the non-payment of bill amount of Rs 34,505 pertaining to the contract executed by Respondent 2. It is also pertinent to note that Respondent 2 preferred CWJC No. 5803 of 1999 wherein an order dated 5-4-2000 [Mukesh Prasad Singh v. Tilka Manjhi Bhagalpur University, 2000 SCC OnLine Pat 388 : (2000) 3 PLJR 734] was passed by the Patna High Court directing the Vice-Chancellor of Bhagalpur University to release the balance amount of Rs

34,505 with interest @ 18% w.e.f. 1-10-1994 till the date of payment and pay the interest @ 11% on the sum of Rs 14,000 from 1-10-1994 till 9-12-1996. Aggrieved by the said order, Bhagalpur University preferred LPA No. 716 of 2000 wherein it was directed [Tilka Manjhi Bhagalpur University v. Mukesh Prasad Singh, LPA No. 716 of 2000, order dated 17-8-2000 (Pat)] that since it was not a statutory contract, no direction for payment of money could be issued and Respondent 2 can pursue other remedies available in law for the recovery of money. Aggrieved by the said order, Respondent 2 filed SLP (C) No. … CC No. 4832 of 2001 which was dismissed as withdrawn by this Court by the order dated 30-7-2001 [Mukesh Prasad Singh v. Tilka Manjhi Bhagalpur, SLP (C) No. … CC No. 4832 of 2001, order dated 30-7-2001 (SC), wherein it was directed:"The learned counsel for the petitioner seeks permission to withdraw the SLP with liberty to approach the appropriate forum. It is accordingly dismissed as withdrawn."] granting him liberty to approach the appropriate forum. Respondent 2 thereafter filed Money Suit No. 2 of 2002 before the Court of Sub-Judge, first Court, Lakhisarai on 20-4-2002 for recovery of Rs 69,010 i.e. double the amount of Rs 34,505 and the said suit is pending. The second appellant representing the University had also filed Money Suit No. 2 of 2006 before the same court on 4-2-2006 claiming a sum of Rs 1,44,437 with interest against the second respondent contractor. These acts of the parties show that the parties have already had recourse to the civil remedies that are available to them in law.

13. Appellants 1 and 2 were then employed as Principal and Professor, respectively in K.S.S. College, Lakhisarai and Appellant 3 as Bursar of the said College. The appellants have stated that they had no intention to cheat or dishonestly misappropriate the amount of Rs 34,505. The appellants *have stated that there were disputes regarding the quality of work done and also non-return of some cement bags by the second respondent. It is stated that in view of the dispute between the University and the contractor and stoppage of further construction by the second respondent and with the direction and approval of the Vice-Chancellor, contract of the appellant was terminated and his bill was placed before the College Development Committee. In its meeting dated 8-12-1995, the Committee considered the claim of the second respondent and rejected his certain claims and the same was informed to the Vice-Chancellor. The University vide Letter No. E/243 dated 25-3-1998 directed to stop final payment to the second respondent and the University requested the Executive Engineer for verification of quality of work done. The appellants have stated that the amount of Rs 34,505 has been lying in the account of the University and only on instruction from the Vice-Chancellor, the amount was not paid to the second respondent and no dishonest intention could be attributed to the appellants.*

14. At this stage, we are only concerned with the question whether the averments in the complaint taken at their face value make out the ingredients of criminal offence or not. Let us now examine whether the allegations made in the complaint when taken on their face value, are true and constitute the offence as defined under Section 406.

15. Section 405 IPC deals with criminal breach of trust. A careful reading of Section 405 IPC shows that a criminal breach of trust involves the following ingredients:

(a) a person should have been entrusted with property, or entrusted with dominion over property;

(b) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or

dispose of that property or wilfully suffer any other person to do so;

(c) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.

16. Section 406 IPC prescribes punishment for criminal breach of trust as defined in Section 405 IPC. For the offence punishable under Section 406 IPC, prosecution must prove:

(i) that the accused was entrusted with property or with dominion over it; and

(ii) that he (a) misappropriated it, or (b) converted it to his own use, or (c) used it, or (d) disposed of it.

The gist of the offence is misappropriation done in a dishonest manner. There are two distinct parts of the said offence. The first involves the fact of entrustment, wherein an obligation arises in relation to the property over which dominion or control is acquired. The second part deals with misappropriation which should be contrary to the terms of the obligation which is created.

17. Section 420 IPC deals with cheating. The essential ingredients of Section 420 IPC are:

(i) cheating;

(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.

18. In the present case, looking at the allegations in the complaint on the face of it, we find that no allegations are *made attracting the ingredients of Section 405 IPC. Likewise, there are no allegations as to cheating or the dishonest intention of the appellants in retaining the money in order to have wrongful gain to themselves or causing wrongful loss to the complainant. Excepting the bald allegations that the appellants did not make payment to the second respondent and that the appellants utilised the amounts either by themselves or for some other work, there is no iota of allegation as to the dishonest intention in misappropriating the property. To make out a case of criminal breach of trust, it is not sufficient to show that money has been retained by the appellants. It must also be shown that the appellants dishonestly disposed of the same in some way or dishonestly retained the same. The mere fact that the appellants did not pay the money to the complainant does not amount to criminal breach of trust.*

19. Even if all the allegations in the complaint taken at the face value are true, in our view, the basic essential ingredients of dishonest misappropriation and cheating are missing. Criminal proceedings are not a shortcut for other remedies. Since no case of criminal breach of trust or dishonest intention of inducement is made out and the essential ingredients of Sections 405/420 IPC are missing, the prosecution of the appellants under Sections 406/120-B IPC, is liable to be quashed."

18. ***Sushil Shethy*** (supra) also dealt with the following facts:-

*"**2.** That Appellant 1 is the Managing Director of M/s SPML Infra Limited, previously known as M/s Subhas Project Marketing Limited, and Appellant 2 is the Director of the said firm M/s SPML Infra Limited. M/s SPML Infra Limited is a*

public limited company incorporated under the Companies Act, 1956. A contract was entered into between M/s SPML Infra Limited and the Government of Arunachal Pradesh on 18-3-1993 for construction, supply and commissioning of the Nurang Hydel Power Project including three power generating units for a consideration of Rs 24.96 crores approximately. As per Clause 2(c) of the contract, the defect liability period for the works was to be for a period of 18 months. Project was commissioned in the month of July 1996. That the defect liability period for the works of M/s SPML Infra Limited expired in the month of January 1998. That thereafter the project became operational and started generating electricity and according to the appellants till 20-9-1998 the project had generated 90 lakhs KW units. According to the appellants even the said project is also in operation today. There were some disputes with respect to the payment of maintenance by the respondents. The appellants issued notice to the respondents to take over the project before 31-3-2000 on account of non-payment of maintenance, vide notice dated 9-3-2000."

19. Hon'ble Supreme Court in ***Sushil Shethy*** (supra) laid down the principle in terms of the facts mentioned above:-

*"**8.1.** As observed hereinabove, the charge-sheet has been filed against the appellants for the offences under Section 420 read with Section 120-B IPC. However, it is required to be noted that there are no specific allegations and averments in the FIR and/or even in the charge-sheet that fraudulent and dishonest intention of the accused was from the very beginning of the transaction. It is also required to be noted that contract between M/s SPML Infra Limited and the Government was for supply and commissioning of the Nurang Hydel Power Project including three power generating*

units. The appellants purchased the turbines for the project from another manufacturer. The company used the said turbines in the power project. The contract was in the year 1993. Thereafter in the year 1996 the project was commissioned. In the year 1997, the Department of Power issued a certificate certifying satisfaction over the execution of the project. Even the defect liability period ended/expired in January 1998. In the year 2000, there was some defect found with respect to three turbines. Immediately, the turbines were replaced. The power project started functioning right from the very beginning—1996 onwards. If the intention of the company/appellants was to cheat the Government of Arunachal Pradesh, they would not have replaced the turbines which were found to be defective. In any case, there are no specific allegations and averments in the complaint that the accused had fraudulent or dishonest intention at the time of entering into the contract. Therefore, applying the law laid down by this Court in the aforesaid decisions, it cannot be said that even a prima facie case for the offence under Section 420 IPC has been made out.

9. *In view of the above and for the reasons stated above, we are of the firm opinion that this is a fit case to exercise the powers under Section 482 CrPC and to quash the criminal proceedings against the appellants for the offence under Section 420 read with Section 120-B IPC. To continue the criminal proceedings against the appellants would be undue harassment to them. As observed hereinabove, no prima facie case for the offence under Section 420 IPC is made* out."

20. Applying the law laid down by the Hon'ble Apex Court in the aforesaid decisions to the facts of the case on hand, I am unable to come to any conclusion that even if the allegations in the complaint are accepted as true on its face value and in absence of intentional deception on the part of the petitioner/accused at the beginning of the lease agreement, no proceeding can be initiated for the offence punishable under Section 420 IPC.

21. With regard to an offence under Section 418 of the IPC, I would like to reproduce the Provision as follows:-

"**418. Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect**.—

Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound, either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

22. The words **"whoever cheats"** i.e. two initial words of the Provision signify presence of ingredients of cheating being sin-qua-non to constitute an offence under Section 418 of the IPC. I have already discussed in earlier paragraphs that the allegation of the complaint petition under Section 200 of CrPC did not disclose any offence of cheating punishable under Section 420 of the IPC. Therefore, where there is no cheating, there is no question of **"cheating with knowledge"** to constitute an offence under Section 418 of the IPC.

23. In view of the aforesaid discussion, it is evident that the complainant/opposite party no. 2 gave colour of criminal offence to civil litigation. The allegation made in the complaint under section 200 even if accepted on its face value, do not constitute offence punishable under Section 418/420 of IPC. Thus being the position I am of the view that it is a fit case to quash the proceeding by exercising power under Section 482 CrPC.

24. Thus, the proceeding in connection with CS case no. 0030362/2015 under Section 418/420 of the IPC, pending before the Ld. Metropolitan Magistrate, 6^{th} Court, Calcutta under Section 418/420 of the IPC stands quashed. As a sequel, the revision application being no. 1440 of 2018 stands allowed on contest without costs.

25. Interim order, if there be any, stands vacated.

26. Pending applications, if there be any, stand disposed of accordingly.

27. All parties to this revisional application shall act on the server copy of this order downloaded from the official website of this Court.

28. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]