

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRR 2338 of 2021

With

CRAN 1 of 2022

Glocal Healthcare Systems Private Limited & Ors.

-vs.-

Dr. Manindra Nath Pal.

Mr. Milon Mukherjee, Sr. Adv.,
Mr. Pradip Kumar Kundu,
Mr. Sk. Mahadi Nawaz,
Mr. Bibhas Das.

...For the Petitioners

Mr. Satadru Lahiri,
Mr. Sourav Paul.

...For the Opposite Party

Reserved on : 27.04.2023

Judgment on : 15.05.2023

Tirthankar Ghosh, J:-

The present revisional application has been preferred for quashing of the proceedings being complaint case no. CNS 501 of 2021 (TR 3607/2021) under Sections 406/420/120B of the Indian Penal Code, filed against the petitioners before the learned Metropolitan Magistrate, 19th Court, Calcutta.

The petition of complainant was filed by Dr. Manindra Nath Paul (hereinafter referred to as 'the complainant') against Glocal Healthcare Systems

Private Limited, Dr. Meleveetil Damodaran, Dr. Syed Sabahat Azim, Mr. Goutam Chowdhury and Mrs. Richa Azim (hereinafter referred to as 'the accused persons').

The allegations in the petition of complaint were to the effect:

- (a) The complainant is a Senior Consultant-Gynaecology and Obstetrics who entered into his services as a retainer of Glocal Healthcare Systems Private Limited and for the said purpose an agreement was entered between the complainant and the accused persons.
- (b) The complainant is a Senior Doctor having 52 years of working experience both in India and Nepal. He received a phone call from the accused persons requesting him to meet at the registered office of the petitioner no.1 at 3B-207, Eco Space, P.S. Techno City, Action Area-II, Rajarhat, New Town, Kolkata, where he was represented by the accused persons that they had excellent reputation in the field of medical services with well built infrastructure and qualified medical professionals in their hospitals where complicated medical problems are dealt. Relying upon such representations the complainant accepted the request of the accused persons and agreed to enter into a retainership agreement for which an agreement was signed between him and GHSPL Jeypore Healthcare LLP.
- (c) The period of retainership agreement was fixed from 16.07.2018 to 15.07.2020 for a period of two years and the retainership fee was

fixed at Rs.2,25,000/- along with other perks and benefits which were part and parcel of the agreement. The terms of the agreement were confirmed by way of e-mail.

- (d) The complainant being assured by the accused persons signed and joined as Senior Consultant of Obstetrics and Gynaecology at GHSPL Jeypore Healthcare LLPP situated at Jeypore, Koraput, Odisha. He commenced his duties from the month of July, 2018.
- (e) Complainant alleges that he pursued his duties from 1st July, 2018 to 21st January, 2019 and in spite of his services he was not paid salary or retainership fee with an excuse that the management was suffering from local unrest. The request of the complainant for recruiting junior doctors, staffs fell in the deaf years of the management and because of non-payment of salary most of the staff left their service. On 21.01.2019 complainant suffered cardiac arrest at midnight and on an earlier date the different department including OT, ICU, OPD were closed as the nurses and other staff left their duty. The complainant at the time of dire need had to travel in an ambulance another 200 km for which he suffered another cardiac arrest and the management during the said period remained silent.
- (f) Thereafter the complainant took a short break for post operative medical need and he requested the management that he would continue his duty but the management informed him that due to

some local issues and administrative problems the complainant should not immediately join and wait for some time. Such waiting of the complainant continued till the end of tenure of his agreement and as such the complainant could not engage himself with any other institutions, as he was bound by the agreement. Each and every time when the complainant asked the management to release or terminate him after clearing his dues, the accused persons refused to do the same. After considerable period of time the accused did not make any payment and on different pretext postponed the issue thereby stretching the time with some request. The accused persons thereafter stopped communicating with the complainant and lastly on March, 2020 the complainant went to the office of the accused persons at Kolkata for demanding full and final payment along with release order when the accused persons became furious and abused the complainant with filthy and derogatory language.

- (g) The complainant thereafter through his Advocate on or about January, 2020 demanded disbursal of his dues which was sent to the accused persons, in reply to the same the accused persons refused to pay and replied through an Advocate with contradictory and wild narratives denying any agreement. The complainant alleged that because of the conduct of the accused persons and the loss suffered by him as he could not engage himself because of the management refusing to release him his dues accumulated to an amount of

Rs.54,00,000/-. The representation and fraudulent assurance given by the accused persons knowing fully well of the retainership of the complainant resulted in huge wrongful loss to him and wrongful gain to them. As such the accused persons committed offence under Section 406/420/120B of the Indian Penal Code and they should be tried in a Court of Law for the same.

Mr. Milan Mukherjee, learned Senior Advocate appearing for the petitioners submitted that the continuation of the present proceedings as also the orders relating to cognizance and issuance of the process so far as the accused/petitioners are concerned are beyond the scope and adjudication by a Criminal Court as the nature of the allegations reflect that a civil dispute has been given the cloak of a criminal proceedings. Learned Senior Advocate pointed out that the genesis of the complaint case was on the foundation of a retainership agreement between the complainant and the accused as is alleged in the complaint. The complainant relied upon the legal notice issued by him and its reply by the accused persons which are part of the complaint. The same would reflect that there is a claim and counter claim. In order to substantiate the issue that predominantly a claim which should be adjudicated before the Civil Court, by using colour of generalised expressions has been converted into a criminal proceedings is against the principles settled by the Hon'ble Supreme Court, the petitioners relied upon the following judgments:

Sagar Suri –Vs. – State of UP reported in (2002) 2 SCC 636; Indian Oil Corpn. –Vs. – NPEC India Ltd. reported in (2006) 6 SCC 736; V.Y. Jose –Vs. – State of Gujarat reported in (2009) 3 SCC 78; Manoj Mahavir Prasad Khaitan – Vs. – Ram Gopal Poddar reported in (2010) 10 SCC 673; Paramjeet Batra –Vs. – State of Uttarakhand reported in (2013) 11 SCC 673; Vesa Holdings P. Ltd. – Vs. – State of Kerala reported in (2015) 8 SCC 293; Med Meme LLC –Vs. – iHorse BPO Solutions (P) Ltd. reported in (2018) 13 SCC 374; R.K. Vijayasathathy –Vs. – Sudha Seetharam reported in (2019) 16 SCC 739.

Learned Senior Advocate drew the attention of the Court to the agreement which was enclosed along with the revisional application and submitted that the agreement itself would show that the complainant had no relationship with Glocal Healthcare Systems Pvt. Ltd as the retainership agreement was executed between Jeypore LLP and the complainant. It was further contended that if the allegations in the complaint are assumed to be true the same do not disclose any offence and to that effect learned Advocate for the petitioners relied upon the following judgments of the Hon'ble Apex Court:

S.K. Alagh –Vs. – State of U.P. reported in (2008) 5 SC 662; Suryalakshmi Cotton Mills Ltd. –Vs. – Rajvir Industries Ltd. reported in (2008) 13 SCC 678; Binod Kumar –Vs. – State of Bihar reported in (2014) 10 SCC 663 and R.K. Vijayasathathy –Vs. – Sudha Seetharam reported in (2019) 16 SCC 739.

Additionally it was submitted that the complaint being inconsistent and vague, fails to make out any facts on ground of cheating as defined under Section 420 of the Indian Penal Code and the process being issued under the said Section is also not tenable in the eye of law. The following judgments were relied upon in support of such claim:

Anil Mahajan –Vs. – Bhor Industries Ltd. reported in (2005) 10 SCC 228; Indian Oil Corpn –Vs. – NPEC India Ltd. reported in (2006) 6 SC 736; B. Suresh Yadav –Vs. – Sharifa Bee reported in (2017) 13 SCC 107; V.Y. Jose –Vs. – State of Gujarat reported in (2009) 3 SCC 78; Dilip Kaur –Vs. – Jagnar Singh reported in (2009) 14 SCC 696 and R.K. Vijayasathy –Vs. – Sudha Seetharam reported in (2019) 16 SCC 739.

Learned Advocate also submitted that the allegations in the complaint failed to take into account the nature of participation of each of the accused persons for which the offence has been complained. According to him the settled proposition of law that criminal offence is being a serious issue and ordinarily process should not be issued without ascertaining the complicity of each of the accused persons, reliance was placed on the following judgments:

Pepsi Foods Ltd. –Vs. - Special Judicial Magistrate reported in (1998) 5 SCC 749; Sunil Bharti Mittal –Vs. – CBI reported in (2015) 4 SCC 609 and Mehmood ul Rehman & Ors. –Vs. – Khazir Muhamood & Ors. reported in (2015) 12 SCC 420.

Lastly, the learned Advocate prayed for quashing the entire criminal proceeding as the continuance of the same according to him would result in miscarriage of justice.

Mr. Lahiri, learned Advocate appearing for the complainant on the other hand insisted that the accused persons took the service of the petitioner under a retainership agreement. They did not pay a farthing to the complainant when he was working till January, 2019 and after about more than six months of working the accused persons took the plea that the complainant was entitled only for 67 days of remuneration. Learned Advocate further pointed out that the conduct of the accused persons who worked hand in gloves with each other reflect that they not only had no intention to pay from the inception but also they took up a plea of counter claim in order to harass him which shows their modus operandi of deception. According to the learned Advocate the complainant is not the only casualty of such non –payment for services rendered but whole of the staffs including the Junior Doctors and Nurses who were working at the said hospital suffered for such default committed by the accused persons. Learned Advocate emphasised that the present case is distinguishable from other cases in view of the fact that there was no payment in the present case in spite of the services being rendered for more than six months and the accused persons tried to manipulate the working days for the purpose of non-payment and further when the complainant prayed for his release they used his name without paying him. The purpose of not releasing him also adds to the intention of the accused persons, as the complainant

would be bound and unable to join any other organisation and the accused persons would be successful in using his name for the full period of agreement. It was stressed by the learned Advocate for the complainant that the present case being of distinct character do not fall within the general category of simple demand of money and non-payment. Learned Advocate reiterated that the present complaint should be allowed to be taken to its logical conclusion as the case do not fall within the category of rarest of rare case, thereby calling for interference of this Court at the initial stages.

The petitioners were directed to produce all the orders along with copy of the initial deposition under Section 200/202 of the Code of Criminal Procedure. The same was submitted before this Court and it reflects that the complainant examined himself along with one R. Shaw. The contents of the deposition which was recorded by the Learned Metropolitan Magistrate, 19th Court Calcutta in respect of both the witnesses were a summary of the allegations made in the petition of complaint filed before the Court. I have also considered the order dated 19.08.2021 where the learned Magistrate was pleased to observe *“complainant is examined on S/A under Section 200 of Cr.P.C. I have considered his evidence as well as documents placed in support of his versions. The other witness is also examined. In the light of the Hon’ble Apex Court guidelines deposition there is sufficient ground to proceed against the accused persons for committing the offence under Sections 406/420/120B of the Indian Penal Code. Accordingly, issue summons against the accused persons.....”*

I have considered the submissions advanced by the learned Advocates for the respective parties and also the documents which have been enclosed and I find from the petition of complaint that the petitioner claimed in the petition of complaint that he entered into the retainership agreement with the accused persons at IMA House, 53 Nilratan Sarkar Row, Mahamaya Sarani Road, Kolkata-14 which is within the jurisdiction of the Taltala police station. From the retainership agreement it is reflected that the complainant was residing at H. No.11, Gomeco Cooperative Society, Bambolim, Goa 403202. The address of all the accused persons as is reflected in the cause title are outside the territorial jurisdiction of the Learned Metropolitan Magistrate, 19th Court, Calcutta. Having considered the judgment of the Hon'ble Apex Court in ***National Bank of Oman -Vs. - Barakara Abdul Aziz & Anr.*** reported in ***(2013) 2 SCC 488***, I am unable to satisfy myself relating to the territorial jurisdiction of the learned Court issuing process to continue with the proceedings.

Further, in ***M N G Bharateesh Reddy -Vs. - Ramesh Ranganathan & Anr.*** reported in ***2022 SCC OnLine SC 1061***, while dealing with offences relating to cheating and criminal breach of trust under the Indian Penal Code the Hon'ble Supreme Court was pleased to hold in paragraphs 16, 17, 18, 21, 22 and 23 as follows:

“16. In Hridaya Ranjan Prasad Verma v. State of Bihar, a two-judge bench of this Court interpreted sections 415 and 420 of IPC to hold that fraudulent or dishonest intention is a precondition to

constitute the offence of cheating. The relevant extract from the judgment reads thus:

“14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he 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.

15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.”

(emphasis supplied)

17. In *Dalip Kaur v. Jagnar Singh* a two-judge bench of this Court held that a dispute arising out of a breach of contract would

not amount to an offence of cheating under section 415 and 420. The relevant extract is as follows:

“9. The ingredients of Section 420 of the Penal Code are:

“(i) Deception of any persons;

(ii) Fraudulently or dishonestly inducing any person to deliver any property; or

(iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.”

*10. The High Court, therefore, should have posed a question as to whether any act of inducement on the part of the appellant has been raised by the second respondent and whether the appellant had an intention to cheat him from the very inception. If the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the part of the appellants by non-refunding the amount of advance the same would not constitute an offence of cheating. Similar is the legal position in respect of an offence of criminal breach of trust having regard to its definition contained in Section 405 of the Penal Code. (See *Ajay Mitra v. State of M.P.* [(2003) 3 SCC 11 : 2003 SCC (Cri) 703])”*

(emphasis supplied)

18. *Applying the above principles, the ingredients of Sections 415 and 420 are not made out in the present case. The grievance of the first respondent arises from the termination of his services at the hospital. The allegations indicate that there was an improper billing in respect of the surgical services which were rendered by the complainant at the hospital. At the most, the allegations allude to a breach of terms of the Consultancy Agreement by the Appellant, which is essentially in the nature of a civil dispute.*

21. *The offence of criminal breach of trust contains two ingredients : (i) entrusting any person with property, or with any dominion over property; and (ii) the person entrusted dishonestly misappropriates or converts to his own use that property to the detriment of the person who entrusted it.*

22. *In Anwar Chand Sab Nanadikar v. State of Karnataka a two-judge bench restated the essential ingredients of the offence of criminal breach of trust in the following words:*

“7. The basic requirement to bring home the accusations under Section 405 are the requirements to prove conjointly (1) entrustment, and (2) whether the accused was actuated by the dishonest intention or not misappropriated it or converted it to his own use to the detriment of the persons who entrusted it. As the question of intention is not a matter of direct proof, certain broad tests are envisaged which would generally afford useful guidance in deciding whether in a particular case the accused had mens rea for the crime.”

23. *In Vijay Kumar Ghai v. State of West Bengal another two-judge bench held that entrustment of property is pivotal to constitute an offence under section 405 of the IPC. The relevant extract reads as follows:*

“28. “Entrustment” of property under Section 405 of the Penal Code, 1860 is pivotal to constitute an offence under this. The words used are, “in any manner entrusted with property”. So, it extends to entrustments of all kinds whether to clerks, servants, business partners or other persons, provided they are holding a position of “trust”. A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is

liable for a criminal breach of trust and is punished under Section 406 of the Penal Code.””

The subject matter of the reported judgment relate to a Consultant Neurosurgeon being employed at BGS Apollo Hospital, Mysore on a monthly guaranteed fee of Rs.50,000/- and a contract in the nature of Consultancy Agreement being entered between the parties. On a subsequent date the management of the hospital enhanced the emoluments of the doctor by way of which the assured sum was Rs.4,25,000/-, thereafter differences arose between the two parties and a complaint under Section 200 of the Code of Criminal Procedure was filed before the learned Magistrate, Mysore under Section 120A/405/415/420/499/500 of the Indian Penal Code. Learned Additional Sessions Judge by its order was pleased to set aside the order taking cognizance, holding that the complaint did not disclose the ingredients of cheating and defamation. Subsequently the Hon'ble High Court was approached and the High Court was pleased to set aside the order of the Learned Sessions Judge. The Hon'ble Supreme Court under such circumstances in the background of the facts was pleased to set aside the order of the High Court and restored the order passed by the learned Sessions Additional Sessions Judge setting aside the order of taking cognizance by the learned Magistrate.

In the present case also similar circumstances arise. There is a retainership agreement and there is dispute between the parties regarding non-payment of the retainership fee under the said agreement. The complainant is

aggrieved by number of issues regarding infrastructure of the hospital and non-payment of salary to other staffs as also not receiving any assistance at the time of his dire need when he suffered from cardiac arrest. However, the main issue for invoking cause of action is in respect of the offence complained under Section 420 and 406 of the Indian Penal Code. Considering the principles set out by the Hon'ble Supreme Court in ***M N G Bharateesh Reddy (supra)***, I am of the opinion that the present case do not make out any offence under the Indian Penal Code as complained of.

Accordingly all further proceeding arising out of complaint case no. CNS 501 of 2021 (TR 3607/2021) under Sections 406/420/120B of the Indian Penal Code pending before the learned Metropolitan Magistrate, 19th Court, Calcutta is hereby quashed.

Thus, CRR 2338 of 2021 is allowed.

Pending applications, if any, are consequently disposed of.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)