



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1372 OF 2023

1. Purushottam Gangabhishan Somani
Age: 57 years, Occu. Business,
R/o Ekta Nagar, Pathri,
Tq. Pathri, Dist. Parbhani.

2. Ashish Purushottam Somani
Age: 32 years, Occu. Business,
R/o Ekta Nagar, Pathri,
Tq. Pathri, Dist. Parbhani.

... PETITIONERS

V/s.

1. The State of Maharashtra,
2. Mukund Dinkarrao Chaudhari
Age-48 years, Occ. Agriculture,
R/o Bhakt Niwas, Sai Road,
Pathri, Tq. Pathri, Dist. Parbhani.

... RESPONDENTS

.....
Mr. Sudharshan J. Salunke, Advocate for the Petitioners
Mr. V. M. Chate, APP for the Respondent-State
Mr. S.L. Deshpande, Advocate for the Respondent No.2
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CORAM : Y.G. KHOBRAGADE, J.
RESERVED ON : 09.10.2024
PRONOUNCED ON : 18.10.2024

JUDGMENT:-

1. Rule. Rule made returnable forthwith. Heard finally with consent of both the sides. Heard at length Mr. Sudarshan Salunke the

learned Counsel appearing for the Petitioners, Mr. V.M. Chate the learned APP for the Respondent No.1-State and Mr. S. L. Deshpande the learned counsel appearing for the Respondent No. 2.

2. The present Respondent No.2 is the original complainant in criminal complaint bearing SCC No. 362 of 2015 (original SCC No. 140 of 2014) and the present Petitioner No.1 is the original Accused. (For the sake of brevity, the parties to the present petition would be referred as Complainant and the Accused).

3. Facts giving rise to the filing of present petition is that initially, the Respondent No.1 filed a complaint bearing SCC No. 362 of 2015 (original SCC No.140 of 2014) under Section 138 of the Negotiable Instruments Act on the ground that in the year 2013-2014, he (Complainant) produced more than one thousand quintals of cotton from his agriculture field and he was intending to sell said produce, however, the Accused No.1 (Petitioner No.1) approached him and had shown his willingness to purchase the said cotton. After due negotiations between all stakeholders and the Accused No.1 in presence of son of accused (Petitioner No. 2), wife of Accused No.1 and brother-in-law (i.e. brother in law of wife) who resides at Ambad, the Accused No.1 agreed to

purchase total 1008 quintal of cotton from the complainant @ Rs. 5,500/- per quintal and had agreed to pay price of cotton after three months. Accordingly, on 15.12.2013, the Accused No.1 weighed total 1008 quintal cotton and issued a Cheque bearing No. "465113" dated 31.02.2014 drawn on Buldhana Urban Co-operative Bank, Manwat Branch for repayment of price of the cotton. On 01.04.2014, the complainant deposited the said cheque with his banker for encashment, however, the said cheque returned without encashment with banker's memo for the reason 'Insufficient Fund'. Therefore, on 21.04.2014, the complainant issued a mandatory notice through his counsel by RPAD. The Accused No.1 was duly served with the said notice on 22.04.2014 but the accused neither replied to the said notice nor complied with the same. Therefore, the complainant lodged a complaint bearing SCC No. 362 of 2015 (original SCC No. 140 of 2014) under Sec. 138 of the Negotiable Instruments Act.

4. Needless to say that, on 21.05.2014, the learned Judicial Magistrate First Class, Pathri passed an order below Exh.1 and issued process against the Accused No.1 for the offence punishable u/s 138 of the N.I. Act. However, subsequently, on 17.01.2015, the learned

Magistrate passed an order below Exh.1 and returned the said complaint for presentation before the Court having jurisdiction as per the guidelines framed in **Dashrath Rupsing Rathod V/s. State of Maharashtra & Anr.; 2014 (3) KCCR 2313 (SC)**. Therefore, said complaint was re-registered as SCC No. 37 of 2014 on the file of learned Judicial Magistrate First Class, Manwat. However, on 21.11.2015, the Judicial Magistrate First Class, Manwat passed an order considering (Amendment to the Negotiable Instruments Act) Ordinance No. 7 of 2015 dated 22nd September, 2015 and returned the said complaint to the Court having jurisdiction where the drawee bank is situated. Therefore, the said complaint was further re-registered as SCC No. 362 of 2015 with the Judicial Magistrate First Class, Pathri, Dist. Parbhani.

5. After framing of charges, the Complainant examined himself (C.W. 1) and other witnesses i.e. C.W. 2 Shri Vijay Sonwane, Branch Manager, of Buldhana Urban Co-op., Bank, Pathri and C.W. 3 Shri Rajkumar Sarda, Branch Manager, of Buldhana Urban Co-op., Bank, Manwat.

6. Since, it has come in evidence of the C.W. 3 Shri Rajkumar Sarda that the subject matter of cheque is not issued from the account of

the Accused No.1 Purushottam but the said cheque was issued from the account of the Accused No.2- Ashish Purushottam Somani, the son of the Accused No.1 and as such both father and son are involved in cheating the complainant. Therefore, the complainant filed Exh. 54, an application seeking permission to implead the Accused No. 2 Ashish s/o Purushottam Somani and framing of additional charges punishable under Sec. 420 r/w Sec. 34 of IPC. On 01.08.2017, the learned Trial Court passed an order and partly granted Exh.54 and permitted the complainant to add Ashish Purushottam Somani as the Accused No.2, however, the learned trial Court declined to issue process as against the Accused No.2 for the offence punishable under Sec. 420 of IPC.

7. Being aggrieved by aforesaid order, the Accused No.2 filed Cri. Rev. Appln. No. 108 of 2017 to the extent of joining him as Accused No.2, whereas, the complainant filed Cri. Rev. Appln. No. 110 of 2022 challenging the order dated 01.08.2017 passed below Exh.54 to the extent of refusal for addition of charge under u/s 420 r/w Sec. 34 of I.P.C.

8. On 7th August, 2023, the learned Additional Sessions Judge passed the impugned judgment and order holding that in view of allegations made in para 5 of the application (Exh.54), *prima facie*, it

attracts the ingredients of offence punishable u/s 420 of IPC, as the Accused No.1 deliberately issued the cheque from the account of his son i.e. Accused No.2. Therefore, as per the view taken in case of **Amol Shripal Sheth V/s. Hari Om Trading Com.; 2014 (6) Mh. L.J. 222**, the offence punishable u/s 420 of IPC is also attracted. So also, in evidence of the C.W. 3, Shri Rajkumar Sarda it has come on record that the subject matter of cheque has not been issued from the account of the Accused No.1 - Purushottam but said cheque was issued from the account of the Accused No.2 - Ashish Purushottam Somani, the son of the Accused No.1. Therefore, he has been rightly impleaded.

9. Mr. Sudarshan Salunke, the learned counsel appearing for the Petitioners canvassed in vehemence that the Respondent/Complainant has never issued mandatory notice u/s 138 of the NI Act to the Petitioner No.2, therefore, for want of service of mandatory notice, the proceeding u/s 138 of the NI Act is not maintainable as against the Petitioner/Accused No.2. Therefore, said proceeding needs to be quashed and set aside.

10. He further canvassed that, on 01.08.2017, the learned trial Court passed an order below Exh. 54 thereby permitting the Respondent

No.2/Complainant to add the Petitioner No.2 - Ashish Purushottam Somani as Accused No.2, however, it declined to issue process as against him for the offence punishable under Sec. 420 of IPC, therefore, the learned Revisional Court rightly not permitted to alter the charge for the offence punishable u/s 420 of IPC. Therefore, the impugned order dated 7th August, 2023 is illegal and bad in law.

11. The learned counsel for the Petitioners further canvassed that Sec. 216 of Cri. P.C. provides for alteration or addition to any charge at any time before the judgment is pronounced, however, such powers is required to be exercised, if the evidence of witness suggest about commission of offence other than the charge which is already framed, however, the learned trial Court framed the charge for the offence u/s 138 of the NI Act, hence, there is no need to alter the charge. Therefore, the impugned order passed by the Revisional Court needs to be quashed and set aside.

12. Lastly, the learned counsel for the Petitioners canvassed that while passing the impugned order the learned Revisional Court dismissed the revision of the Petitioners with exemplary cost, though the Petitioners

have opted for statutory remedy, therefore, prayed to quash the order of cost.

13. To buttress these submissions, the learned counsel for the Petitioners placed reliance on the case of **N. G. Narayanswamy V/s. M/s. Vijayanand Roadline Ltd.; 2001 Cri. l.J. 211**, wherein the Karnataka High Court held that the notice as contemplated under Sec. 138 (b) is not issued to the drawer of the cheque within 15 days of receipt of information by him from the bank regarding the return of cheque as unpaid and notice to payee who endorsed the same to the holder in due course, is no compliance of Sec. 138 (b) of the Act.

14. The learned counsel for the Petitioners further relied on case of **Vijay Kumar Ghai & Ors. V/s. State of West Bengal & Ors.; (2022) 2 SCC (Cri) 787**, wherein the Hon'ble Supreme Court observed in para nos. 33 to to 38 as under:

“33. Section 420 IPC defines cheating and dishonestly inducing delivery of property which reads as under: -

“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.”

34. *Section 420 IPC is a serious form of cheating that includes inducement (to lead or move someone to happen) in terms of delivery of property as well as valuable securities. This section is also applicable to matters where the destruction of the property is caused by the way of cheating or inducement. Punishment for cheating is provided under this section which may extend to 7 years and also makes the person liable to fine.*

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

- (i) The representation made by the person was false*
- (ii) The accused had prior knowledge that the representation he made was false.*
- (iii) The accused made false representation with dishonest intention in order to deceive the person to whom it was made.*
- (iv) 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.*

36. *As observed and held by this Court in the case of Prof. R.K. Vijayasarthky & Anr. Vs. Sudha Seetharam & Anr., the ingredients to constitute an offence under Section 420 are as follows:-*

- (i) a person must commit the offence of cheating under Section 415;*
and
- (ii) the person cheated must be dishonestly induced to;*
 - (a) deliver property to any person; or*
 - (b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security. Thus, cheating is an essential ingredient for an act to constitute an offence under Section 420 IPC.*

37. *The following observation made by this Court in the case of Uma Shankar Gopalika Vs. State of Bihar with almost similar facts and circumstances may be relevant to note at this stage: (SCC pp.338-39, paras 6-7)*

“6. Now the question to be examined by us is as to whether on the facts disclosed in the petition of the complaint any criminal offence whatsoever is made out much less offences under Section 420/120-B IPC. The only allegation in the complaint petitioner against the accused person

is that they assured the complainant that when they receive the insurance claim amounting to Rs. 4,20,000, they would pay a sum of Rs. 2,60,000 to the complainant out of that but the same has never been paid. It was pointed out that on behalf of the complainant that the accused fraudulently persuaded the complainant to agree so that the accused persons may take steps for moving the consumer forum in relation to the claim of Rs. 4,20,0000. It is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases of breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In the present case, it has nowhere been stated that at the very inception that there was intention on behalf of the accused person to cheat which is a condition precedent for an offence under 420 IPC.

“7. In our view petition of complaint does not disclose any criminal offence at all much less any offence either under Section 420 or Section 120-B IPC and the present case is a case of purely civil dispute between the parties for which remedy lies before a civil court by filing a properly constituted suit. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of court and to prevent the same it was just and expedient for the High Court to quash the same by exercising the powers under Section 482 Cr.P.C which it has erroneously refused.”

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 & Ors. Vs. State of Bihar & Anr., 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.”

15. Per contra, Adv. S.L. Deshpande, the learned counsel appearing for the Respondent No.2/Complainant supported the impugned order and canvassed that the learned Additional Sessions Court

rightly held that both the Petitioners have *prima facie* cheated and dishonestly issued the cheque in question and directed the learned trial Court to frame the charge for the offence punishable u/s 420 of IPC and converted from summons to warrant case. Therefore, findings recorded by the learned Revisional Court are just and proper and no interference is needed at the hands of this Court, hence, prayed for dismissal of the petition with cost.

FINDINGS

16. Having regard to the rival submissions canvassed on behalf of both the sides, I have gone through the record. It is a matter of record that, initially, the Respondent No.2/Complainant instituted a complaint bearing SCC No. 362 of 2015 (original SCC No. 140 of 2014) under Sec. 138 of the Negotiable Instruments Act claiming that on 15.12.2013, the Accused No. 1 issued a Cheque bearing No. “465113” dated 31.02.2014 in his favour for an amount of Rs. 55,40,000/- drawn on Buldhana Urban Co-operative Bank, Manwat Branch for repayment of price of 1008 quintal cotton @ Rs. 5,500/- per quintal. On 01.04.2014, he deposited said cheque with his banker for encashment but said cheque was dishonored for the reason ‘Insufficient Fund’ of drawer. Thereafter, on

21.04.2014, he issued a mandatory notice by RPAD. The Accused No.1 was duly served with the said notice on 22.04.2014 but the Petitioner/Accused No.1 neither replied to the said notice nor complied the same. Therefore, the Petitioner/Accused No. 1 committed an offence under Sec. 138 of the Negotiable Instrument Act.

17. It is a matter of record to mention here that on 21.05.2014, the learned Judicial Magistrate F. C., Pathri passed an order below Exh.1 and issued process against the Accused No.1 for the offence punishable u/s 138 of the N.I. Act. Accordingly, charge as against the Petitioner No.1 was framed for the said offence. In evidence of the C.W. 3, Shri Rajkumar Sarda, Branch Manager, of Buldhana Urban Co-op., Bank, Manwat it was first time revealed that the subject matter - cheque is not issued from the account of the Petitioner No.1/Accused No. 1 but it was issued from the account of the Accused No.2- Ashish Purushottam Somani, the son of the Accused No.1. The Respondent No.2/Complainant made specific averment that both father and son were in collusion at the time of issuance of the cheque with *mala fide* intention of cheating the Complainant because at the time of negotiations, the Accused No.1, his wife and brother-in-law (i.e. brother in law of wife) who resides at

Ambad were present. Since the Respondent No.2 sold huge quantity of cotton for the consideration and the Petitioner No. 1 handed over cheque in question for payment of price of the cotton, therefore, there is a presumption that the Petitioner No.1 issued said cheque to discharge the legal debt and liability. However, said cheque was issued from the bank account of the Petitioner No.2 for which the Complainant was not made aware. Therefore, intention of the Petitioner No.1 certainly falls within the ambit of definition of cheating as contemplated u/s 415 of I. P. C., which reads as under:

“Sec. 415. Cheating.—

Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”.”

18. On face of record it appears that the Petitioner No.2 was very much aware of the fact regarding issuance of cheque from his account but the Petitioners have not stated the ground that the Respondent No.2 /Complainant was made aware of the fact of issuance of cheque for repayment of cotton price from the account of the Petitioner No.2. Therefore, the Respondent No.2/Complainant being an innocent

agriculturist presumed that the said cheque was issued by the Petitioner No.1/Accused No.1 and, therefore, there was no occasion to the complainant to issue mandatory notice u/s 138 of N.I. Act to the Petitioner No.2. If the complainant could have made aware the fact of handing over the cheque in question by the Petitioner No.1 from the Bank account of the Petitioner No.2 then in that event the Respondent No. 2/Complainant could have issued the mandatory notice u/s 138 of the NI Act. Therefore, it clearly depicts that the intention of both the Petitioners was to only issue the cheque for payment of price of cotton to the Complainant and to deprive him from actual payment.

19. Needless to say that issuance of cheque in question from the account of the Petitioner No.2 came to the knowledge of the Respondent No.2 after he examined the C.W. 3, Shri Rajkumar Sarda, Branch Manager, of Buldhana Urban Co-op., Bank, Manwat. Therefore, the Respondent No. 2/Complainant filed Exh. 54 and prayed for impleading the Petitioner No. 2 as Accused No.2 and framing of additional charge for the offence punishable u/s 420 of IPC.

20. Sec. 216 of the code of 1973, provides for alteration, modification of charge at any time before pronouncement of judgment, which reads as under:

“Sec. 216 Court may alter charge:-

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge has been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may, either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.”

21. Sec. 319 of Code of 1973, provides to proceed against other persons appearing to be guilty of offence, which reads as under:

“319. Power to proceed against other persons appearing to be guilty of offence:-

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) *Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.*

(3) *Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.*

(4) *Where the Court proceeds against any person under sub-section (1), then—*

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.”

22. Therefore taking into consideration the provisions of Sec. 216 of Cri. P.C., it *prima facie* appears that adding to any charge is addition of new charge and meaning of alteration of a charge is changing or variation of an existing charge meaning thereby addition to and alteration of a charge or charges implies one or more existing charge or charges as held by Hon'ble Supreme Court in case of **Sohanlal V/s. State of Rajasthan; 1990 SCC (Cri.) 650**. Therefore, new charge can be added only if there is material before the Court either in the complaint or in the evidence to justify such action. However, for alteration of charge there should be material either in the complaint or in the evidence.

23. In **Amol Shripal Sheth V/s. Hari Om Trading Co.; 2014 (6) Mh. L.J. 222**, this Court has held that the Criminal Court has power to proceed against a person other than the accused, if it appears from evidence that other person not being accused has committed any offence for which he needs to be tried in the case already before the Court. It has observed in para 15 as under:

“15. Section 319 of Cr.P.C. shows that the Criminal Court has the power to proceed against person other than the accused, if it appears from the evidence that other person not being the accused, has committed any offence for which he needs to be tried in the case already before the Court. In the case reported as (2008) 9 SCC 140 [Bholu Ram Vs. State of Punjab and Anr.], the Apex Court has laid down that the power given to Criminal Court under section 319 of Cr.P.C. is incidental and ancillary to main power given to Criminal Court to take cognizance of the offence. It is observed that the power under section 319 of Cr.P.C. is a part of normal process in the administration of justice. The power under section 319 is discretionary in nature. The observations of the Apex Court and this provision of Cr.P.C. again show that the Magistrate takes cognizance of the offence and not of the offender.”

24. No doubt, the legal position is that it is not necessary that a Complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor it is necessary that the complaint should state in so many words, the the intention of the accused was dishonest or fraudulent state, as held by the Hon’ble Supreme Court in case of **Rajesh Baja V/s. State of Delhi; 1999 SCC (Cri.) 401**.

25. In the case in hand, on 01.08.2017, the trial Court passed an order and partly granted Exh.54 and permitted the Complainant to add Ashish Purushottam Somani as the Accused No.2 but declined to issue process as against the Accused No.2 for the offence punishable under Sec. 420 of IPC. On 7th August, 2023, the learned Additional Sessions Judge passed the impugned judgment and order holding that in view of allegations made in para 5 in Exh. 54 application, *prima facie*, ingredients of offence punishable u/s 420 of IPC are attracted, as the Accused No.1 deliberately issued the cheque which has been drawn on the account of his son i.e. Accused No. 2. Therefore, as per the view taken in case of **Amol Shripal Sheth V/s. Hari Om Trading Com.; 2014 (6) Mh. L.J. 222**, the offence punishable u/s 420 of IPC is attracted. So also, in evidence of the C.W. 3 Shri Rajkumar Sarda, it has come on record that the subject matter - cheque was not issued from the account of the Accused No.1- Purushottam but the said cheque was issued from the account of the Accused No.2- Ashish Purushottam Somani, the son of the Accused No.1. Therefore, he has been rightly impleaded. Therefore, I do not find that the findings recorded by the learned Revisional Court are perverse, illegal.

26. Apart from above, the Petitioners challenged the impugned order in respect of imposition of cost of Rs. 50,000/-. However, it is submitted that on 15.12.2013, the Respondent No.2 - Agriculturist sold 1008 quintal cotton @ Rs. 5,500/- per quintal. The Petitioner No.1 had agreed to pay price of cotton after three months. On 31.02.2014, the Petitioner No.1 handed over a cheque bearing No. "465113" for an amount of Rs. 55,40,000/- which has been dishonored and since the Respondent No.2 was deprived from receiving payment of cotton. Therefore, if said amount carries the rate of interest @ 12% per annum it will be more than the amount of cost awarded by the learned Revisional Court, which certainly appears justifiable and no *bona fide* grounds are set out to interfere with the said findings.

27. In view of above discussion, the present petition is hereby dismissed.

[Y.G. KHOBRAGADE, J.]