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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CRL.M.C. 2294/2022 & CRL.M.A. 9678/2022**

NIRMAL GARG .....Petitioner

Through: Mr. Ram Kawar Garg (AR)

versus

SMC GLOBAL SECURITIES LTD. .....Respondent

Through: Mr. Amar Nath Saini, Mr. Karan Gupta & Mr. Rohit Singh, Advs.

\+ **CRL.M.C. 2295/2022 & CRL.M.A. 9681/2022**

RAM KAWAR GARG .....Petitioner

Through: Petitioner in person

versus

SMC GLOBAL SECURITIES LTD .....Respondent

Through: Mr. Amar Nath Saini, Mr. Karan Gupta & Mr. Rohit Singh, Advs.

CORAM:
HON'BLE MR. JUSTICE AMIT MAHAJAN

ORDER

% **17.12.2024**

1. The present petition is filed challenging the common order dated 28.03.2022 (hereafter '**impugned common order**'), passed by the learned Additional Sessions Judge ('**ASJ**'), Central, Tis Hazari Courts, Delhi in CR Nos. 253/2020 and 254/2020.

2. By the impugned common order, the learned ASJ dismissed the revision petitions preferred by the petitioners against the order dated 16.09.2020 (hereafter '**impugned order dated 16.09.2020**'), passed by the learned Trial Court, in Case No. 516368/2016, whereby summons were issued upon the petitioners for offences under Sections 420/34 of the Indian

Penal Code, 1860 ('**IPC**'). The brief facts of the present case are as follows:

2.1. The petitioners are married to each other, and had entered into an agreement with the respondent/ complainant company namely– M/s SMC Global Securities Ltd., for the petitioners to avail trading facilities provided by the respondent company, in National Stock Exchange and Bombay Stock Exchange. Consequently, the petitioners were allotted three Unique Client Codes in respect of three separate demat accounts opened in the name of the petitioner namely– Mrs. Nirmal Garg, petitioner namely– Mr. Ram Kawar Garg and in the name of Ram Kawar HUF, and the same were uploaded on the exchange.

2.2. The petitioner namely– Mr. Ram Kawar Garg *vide* his authority letter requested the respondent company to treat all the three abovementioned accounts as family accounts and adjust payments within these accounts.

2.3. During the course of trading, on 05.11.2011, the said accounts came under a debit of around Rs. 23,00,000/- in consolidation and thereafter on 10.01.2012, the said accounts came under a debit of Rs. 28,56,300/-. In order to settle the debt, the petitioner namely– Mr. Ram Kawar Garg had issued two cheques, one for a sum of Rs. 11,00,000/- dated 05.11.2011 and a post-dated cheque for a sum of Rs. 15,00,000/- dated 05.01.2012, however, the said cheques got dishonoured for the reasons "*insufficiency of funds*".

2.4. The respondent company filed a police complaint dated 24.02.2012 alleging that the accused persons/ petitioners issued cheques in favour of the complainant/ respondent company which got dishonoured, and that the accused persons/ petitioners had *malafide* intentions to dishonestly cheat the complainant/ respondent company, since inception of the business relationship. Thereafter an application under Section 156(3) of Criminal Procedure Code, 1973 ('**CrPC**') was filed by the respondent company in this regard, on 23.03.2012.

2.5. The said application under Section 156(3) of CrPC was dismissed *vide* order dated 28.02.2013 passed by the learned Metropolitan Magistrate, Central, Delhi while observing that mere non-payment of dues, as per the terms of the agreement, would not give rise to a criminal offence and that a case under Section 138 of the Negotiable Instruments Act, 1881 ('**NI Act'**) is already pending adjudication. The matter was then fixed for pre-summoning evidence.

2.6. The learned Trial Court, while noting the pre-summoning evidence, came to a conclusion that a *prima facie* case under Section 420/34 of the IPC has been made out and issued summons to the petitioners/ accused persons *vide* its order dated 16.09.2020 ('impugned order dated 16.09.2020').

2.7. Aggrieved by the said impugned order dated 16.09.2020, the petitioners preferred Revision Petitions bearing CR Nos. 253/2020 and 254/2020 that were dismissed *vide* the impugned common order dated 28.03.2022 passed by the learned ASJ on the ground that there is no infirmity or illegality in the impugned order dated 16.09.2020, summoning the petitioners for offence under Section 420 of the IPC, based on *prima facie* material placed before the learned Trial Court and that the grounds taken by the revisionists/ petitioners are defences, which can be considered during trial.

3. The petitioner submits that the impugned common order is erroneous and does not specify the provisions under which cognizance has been taken and summons have been issued by the learned Trial Court.

4. It is the case of the petitioners that the respondent company is a stock broker that earns commissions/ brokerage in respect of stock market transactions of clients, who are approached by the respondent company through advertisements in print/ electronic media, hoarding/ billboards, tele callers and other means. It is submitted that it was the respondent company who had approached the petitioners, at their residence, to open three independent and distinct demat accounts.

5. The petitioner submits that the complaint filed by the respondent company under Section 156(3) of the CrPC regrading the present offence, has already been dismissed *vide* order dated 28.02.2013 passed by the learned Metropolitan Magistrate, Central, Delhi, while observing that the complaint is regarding an issue of non-payment of dues by the accused persons/ petitioners in terms of an agreement and would not give rise to a criminal offence under Section 420 of the IPC.

6. He submits that it was noted in the said order dated 28.03.2013, that as per the police report, no cognizable offence was made out and that the proceedings under Section 138 of the NI Act are already pending.

7. He further submits that a breach of contract cannot amount to a criminal prosecution, and that proceedings under Section 138 of the NI Act would not make out a case of Section 420 of the IPC.

8. *Per contra,* the learned counsel for the respondent company submits that the impugned order dated 16.09.2020 is a

well-reasoned order and has been passed after examining the complainant and two witnesses on oath as well as the report of inquiry filed by the Investigating Officer under Section 202 of CrPC.

9. He submits that the petitioners wilfully approached the respondent company and opened a trading account and thereafter participated in several trading facilities, however, on suffering losses, the petitioners have dishonestly cheated the respondent company. He further submits that the cheques in question had been issued by the petitioners, despite knowing that they will be dishonoured on presentation as there was insufficient balance in their bank account and therefore a *prima facie* offence under Section 420 of the IPC is made out.

10. It is settled law that to make out a case for cheating under Section 420 of the IPC, it is essential to establish the presence of a guilty intention and *mens rea* on part of the accused person(s). In ***Ajay Mitra v. State of M.P.,*** **(2003) 3 SCC 11** it was held as under:

> "*16. A guilty intention is an essential ingredient of the offence of cheating. In other words "mens rea" on the part of the accused must be established before he can be convicted of an offence of cheating. (See Jaswantrai Manilal Akhaney v. State of Bombay [AIR 1956 SC 575 : 1956 Cri LJ 1116] .) In Mahadeo Prasad v. State of W.B. [AIR 1954 SC 724 : 1954 Cri LJ 1806] it was held as follows: (AIR paras 4-5)*
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> *Where the charge against the accused is under Section 420 in that he induced the complainant to part with his goods, on the understanding that the accused would pay for the same on delivery but did not pay, if the accused had at the time he promised to pay cash against delivery with an intention to do so, the fact that he did not pay would not convert the transaction into one of cheating. But if on the other hand he had no intention whatsoever to pay but merely said that he would do so in order to induce the complainant to part with the goods then a case of cheating would be established.*"

11. The intention of the accused is judged after the evidence is

led. However, in some circumstances, can be ascertained *prima facie* from the evidence indicating the nature of relationship between the complainant and the accused and the transactions between them.

12. In the present case, the petitioners and the respondent company entered into an agreement on 22.02.2011 for trading in shares, whereafter the trades were regularly conducted and several payments were made and received on the execution of trades, however on 05.11.2011, the accounts of the petitioners came under a debit of about Rs. 23,00,000/- and thereafter on 10.01.2012, the said accounts came under a debit of Rs. 28,56,300/-. To settle the said amount, the petitioners had issued two cheques in favour of the respondent company, which came to be dishonoured for insufficiency of funds, for which proceedings under Section 138 of NI Act are already pending. Thus, the parties were admittedly in a business relations for a long period of time pursuant to which undisputedly various money transactions took place and the amounts were paid by the petitioners. As per the case of the complainant, petitioners did not pay the amount standing in the debit.

13. The fact of some amount being outstanding in the background of relation between the parties and various financial transactions for a long period of time does not lead to presumption that the petitioner had the guilty intention in transactions with the complainant.

14. Other remedy is available and is, in fact, adopted by the complainant which is stated to be pending.

15. It is a settled law that a breach of contract does not give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the

transaction. Mere allegation of failure to make payment in terms of a contract will not be enough to initiate criminal proceedings and criminal courts are not meant to be used for settling payments or pressurise parties to settle civil disputes.

16. In ***Vir Prakash Sharma v. Anil Kumar Agarwal,*** **(2007) 7 SCC 373,** the Hon'ble Apex Court quashed a criminal complaint, which was filed pursuant to the dishonor of cheques, and observed that non-payment of dues does not amount to commission of an offence of cheating or criminal breach of trust, and that the same is essentially a civil dispute.

> *"13. The ingredients of Section 420 of the Penal Code are as follows:*
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> *(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.*
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> *No act of inducement on the part of the appellant has been alleged by the respondent. No allegation has been made that he had an intention to cheat the respondent from the very inception.*
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> *xxxx xxxx xxxx*
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> *15. In law, only because he had issued cheques which were dishonoured, the same by itself would not mean that he had cheated the complainant. Assuming that such a statement had been made, the same, in our opinion, does not exhibit that there had been any intention on the part of the appellant herein to commit an offence under Section 417 of the Penal Code."*

17. Admittedly, the case of the respondent company was adjudicated upon in the application filed under Section 156(3) of CrPC, which was dismissed *vide* order dated 28.03.2012, passed by the learned Metropolitan Magistrate, Central, Delhi wherein it was rightly observed as under:

> *"In my considered view, the complaint only shows that the accused persons have merely breached the terms and conditions of a civil contract mutually entered into between*

them. The rights and liabilities of the parties are governed by their mutual agreement. ln case of breach of any condition of an agreement, the consequences have to be governed only by the provisions of the said agreement.
There is no requirement of police interference in this case. Even otherwise, the evidence in the present case is well within the reach of the complainant itself and it is well aware of the identity of accused persons and no investigation of technical nature is required which could warrant police intervention. The necessary record can always be summoned from the concerned office/ department and the witnesses can be summoned to prove them. There is no necessity of any custodial interrogation at this stage and nothing identifiable is to be recovered from anyone. As far as dishonour of the cheques is concerned, the matter is pending adjudication before an appropriate forum u/s 138 NI Act."

18. In ***R.K. Vijayasarathy v. Sudha Seetharam,* (2019) 16 SCC 739,** the Hon'ble Apex Court quashed the criminal complaint case filed under Section 420 of the IPC and discussed the power of the High Court under Section 482 of CrPC, to quash criminal proceedings when the essential ingredients required to establish a criminal offence are not made out. The Hon'ble Apex Court observed as under:

19. The ingredients to constitute an offence under Section 420 are as follows:
19.1. A person must commit the offence of cheating under Section 415; and
19.2. 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.

xxxx xxxx xxxx

28. The jurisdiction under Section 482 of the Code of Criminal Procedure has to be exercised with care. ***In the exercise of its jurisdiction, a High Court can examine whether a matter which is essentially of a civil nature has been given a cloak of a criminal offence. Where the ingredients required to constitute a criminal offence are not made out from a bare reading of the complaint, the continuation of the criminal proceeding will constitute an abuse of the process of the court.***
29. In the present case, the son of the appellants has instituted a civil suit for the recovery of money against the first respondent. ***The suit is pending. The first respondent***

> ***has filed the complaint against the appellants six years after the date of the alleged transaction and nearly three years from the filing of the suit. The averments in the complaint, read on its face, do not disclose the ingredients necessary to constitute offences under the Penal Code. An attempt has been made by the first respondent to cloak a civil dispute with a criminal nature despite the absence of the ingredients necessary to constitute a criminal offence. The complaint filed by the first respondent against the appellants constitutes an abuse of process of court and is liable to be quashed.***
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> *(emphasis supplied)*

19. It is settled law that at the stage of issuance of process, the learned Trial Court is supposed to apply its mind to the facts and evidence at hand, as well as the relevant law. After examination of the allegations and material on record, the learned Trial Court is required to record to its satisfaction that sufficient grounds exist for proceeding against the accused. The Hon'ble Apex Court, in the case of ***Pepsi Foods Ltd. v. Special Judicial Magistrate* : (1998) 5 SCC 749**, had observed as under:

> *"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto.* ***He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused.*** *It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."*
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> *(emphasis supplied)*

20. The learned Trial Court failed to take note of the observation made by the learned Metropolitan Magistrate in its

order dated 28.03.2012, that the matter pertains to failure of a party to honour the terms of payment for which a civil remedy under Section 138 of the NI Act has already been resorted to and the same is pending. In such a case, the High Court should not hesitate to quash the criminal proceedings to prevent abuse of process of the court.

21. It has been pleaded in the complaint that the petitioners had issued the cheques despite being aware that the same would return unpaid. The said allegations are merely speculative in nature and not backed by any material except the statement of the witness who is an employee of the respondent company. Mere bald assertions in this regard do not give rise to sufficient ground to proceed against the petitioners.

22. In the opinion of this Court, the nature of allegations in the complaint are majorly civil in nature. The complainant/ respondent company has failed to establish a *prima facie* case that the petitioners had no intention of clearing the debit amount from the very beginning of the transaction. The present case is a fit case to exercise discretionary jurisdiction under Section 482 of CrPC.

23. In view of the above, the present petitions are allowed and the complaint case No. 516368/2016 under Sections 420/34 of the IPC, and all consequential proceedings arising therefrom are quashed *qua* the petitioners.

24. The pending application(s) also stand disposed of.

25. A copy of the order be placed in both the matters.

AMIT MAHAJAN, J

DECEMBER 17, 2024