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CRR 634 of 2016

Subrata Ghose Chaudhuri & Anr.
Vs.
The State of West Bengal & Anr.

Mr. Sourav Chatterjee
Mr. Sujan Chatterjee
Mr. Rohan Bavishi ... for the Petitioners

Ms. Arfeen Begum ...for the O.P. no. 2

Mr. Rana Mukherjee, Ld. APP
Mr. Manoranjan Mahata ...for the State

Being aggrieved and dissatisfied with the order dated 27th November, 2015 passed by the learned Metropolitan Magistrate, 16th Court at Kolkata in G.R. case no. 1032 of 2006, present application has been preferred by the petitioners/accused persons. By the order impugned, learned court below refused the petitioners' prayer for discharge made under Section 239 of the Code of Criminal Procedure.

The background of the present case is that the opposite party no. 2 as a complainant filed one complaint alleging that the complainant is carrying on business of distribution and supply of various products which includes honey throughout the State of West Bengal. M/s. Krysti Foodtech Pvt. Ltd. being the distributor of "Mouban Honey" under the West Bengal Forest Development Corporation Limited (in short, WBFDCL) the accused persons, on behalf of M/s. Krysti Foodtech Pvt. Ltd. purchased "mouban honey" from WBFDCL from time to time and the corporation supplied "Mouban Honey" to the said company from time to time as per order placed by them and challans were issued by the corporation and subsequently bills were raised by the corporation which have been duly received by M/s. Krysti Foodtech Pvt. Ltd.

The allegation is that M/s. Krysti Foodtech Pvt. Ltd. though purchased mouban honey from the corporation but they were very irregular in making payment and as on 31.03.2004, a sum of Rs. 2,78,106.20 p was due and payable by the said M/s. Krysti Foodtech Pvt. Ltd. to WBFDCL. They sold entire quantity of "mouban honey" and diverted the entire amount for another purpose by not making payment, thus, they have committed offence of cheating and as well as offence of criminal breach of trust. After completion of investigation, police submitted charge-sheet under Section 420/34 of the IPC against the petitioners/accused persons. Thereafter, the petitioners herein preferred an application under Section 239 of the Code for their discharge. Learned Trial court by the impugned order, was pleased to reject the said prayer made by the petitioners.

Being aggrieved by the said order, Mr. Sourav Chatterjee, learned counsel for the petitioners submits that the dispute is purely civil in nature arising out of contractual relationship between the complainant company and the accused persons/petitioners herein who are the manufacturer and distributer respectively. In fact, the agreement between the complainant company and the accused persons/petitioners entered long back on 2nd August, 2000 when the petitioners were carrying on business as partnership firm in the name and style of M/s. Gazelle but subsequently, the accused persons formed the company under the name and style of M/s. Krysti Foodtech Pvt.

Ltd. and continued with their business on same terms and conditions. He further submits that it is an admitted position that the accused persons/petitioners have made part payment to the complainant company and it can therefore be easily inferred that there was no fraudulent and dishonest intention of making false representation by the accused persons to cheat the complainant company at the very inception.

He further submits that the FIR itself discloses that payments are made from time to time by the company of the accused persons to the complainant company and actually an amount of Rs. 39,122/- is due and payable by the complainant company to the company of the accused persons. The same was demanded by the company of the accused persons vide their letter dated 9.3.2005 which was subsequently reminded by the letter dated 24.6.2005 and lastly by the letter dated 23rd August, 2005.

It is the case of the petitioners that their company made excess payment to the complainant company and in terms of the agreement between the parties, they are entitled to get refund of the said excess amount as reflected in the letters sent through their lawyers. He further submits that during investigation, nothing transpired which may constitute the offence of cheating and in the absence of a culpable intention at the time of making the initial promise, being absent in the present case, no offence under Section 420 of the IPC has been made out. Accordingly, he submits that the Trial court was not justified in rejecting the petitioners' prayer for discharge.

In this context, he relies upon the judgment of **Uma Shankar Gopalika Vs. State of Bihar and another reported in (2005) 10**

SCC 336 and Anil Mahajan Vs. Bhor Industries (2005) 10 SCC 228 to substantiate his claim that even if there is non-payment of assured amount, it does not constitute offence of cheating in the absence of any allegation in the complaint that at the very inception, there was an intention about the accused to cheat.

Referring the judgment of **Maksud Saiyed Vs. State of Gujarat and others reported in (2008) 5 SCC 668**, learned counsel for the petitioners submits that in the present context, the company has not been charge-sheeted and petitioners who are the Director and the Managing Director of the company cannot be implicated in the absence of company as Indian Penal Code does not contain any provision for attaching vicarious liability on the part of the Director or the Managing Director of the accused company.

In this context, learned counsel for the petitioners also relied upon a judgment of **Sunil Bharti Mittal Vs. Central Bureau of Investigation reported in (2015) 4 SCC 609** and **Sushil Sethi and another Vs. State of Arunachal Pradesh and others** reported in **(2020) 3 SCC 240.**

Ms. Arfeen Begum, learned counsel for the opposite party submits that the contents of the FIR clearly discloses the offence of cheating as it shows that the petitioners in spite of selling Mouban Honey in the market, did not deposit the amount to the complainant company but diverted the same to some other parties in order to make illegal gain. She further submits that the *mens rea* that is the guilty mind was present from the very beginning of the transaction and as such, the Trial court has not committed any mistake in rejecting the petitioners' prayer for discharge. She further submits that the truth will come out only after the conclusion of trial and at this stage, it would not be proper to quash the proceeding by invoking jurisdiction of the court under Section 482 of the Code of Criminal Procedure.

Learned counsel for the State placed the case diary and submits that during investigation, the prosecution has recorded statement of three witnesses and it is an undisputed fact that an amount of Rs. 2,78,106.20/- has been cheated by the petitioners which is the money of WBFDCL and as such, the parties should go for trial and thereby, learned counsel for the State also opposed the prayer for discharge.

From the charge sheet it appears that only allegation allegedly established during investigation is that petitioner committed the offence under section 420 IPC and the case of complainant is that though there is a long standing business relationship but the petitioners/accused persons are very irregular in making payment and as on 31.3.2004, a sum of Rs. 2,78,106.20 P has become due and after setting the product accused persons diverted the entire amount for another purpose by not making payment to the complainant.

On bare perusal of the materials available in record there is nothing to show that complainant was induced or dishonestly deceived by the petitioners. A commercial transaction took place between the parties during which the parties consensually agreed for the sale of the property of complainant and petitioner herein paid the part consideration. The default in payment of alleged due amount is not reflective of petitioner's deceitful intention towards the complainant in view of the fact that petitioners herein have made counterclaim by saying that certain amount of money is due and payable by the complainant company to the accused persons.

However, it is required to be noted, there is no specific allegation and averment in the FIR and/or even in the charge-sheet that fraudulent or dishonest intention of the accused was from the very beginning of the transaction, which is a must to constitute offence under Section 420 IPC.

It is undoubtedly true that a complaint disclosing civil transaction may also have a criminal texture. But trial court must see while framing charge against the accused, whether a dispute which is essentially of a civil nature is given a cloak of criminal offence. In such a situation, if a civil remedy is available and is, in fact, adopted here by the complainant by filing civil suit, being Money Suit no. 229 of 2006, continuation of criminal proceeding becomes mere abuse of process of Court.

Learned Trial court while dismissing petitioner's discharge petition has made some erroneous observation, which needs to be reproduced below:-

> *"After considering the submission from both sides, I am of the view that ld. Defence lawyer rightly stated that for bring a case home u.s. 420, it is necessary for the prosecution to prove that the accused had prior intention of cheating, but in order to find out the said fact trial is necessary. I may also further like to add that intention of cheating may be absent at the beginning of any business transaction, but it may at any point of time of the series of transaction can be developed. In that circumstances, the case u.s 420 of IPC is sustainable. There is amply materials in the charge sheet and the C.D for which eloquently speaks for a trial by a competent court. It is true that breach of contract and cheating are different. I do take paid to consider the fact that the defence has partially paid the dues. This is surprising for me. In the one hand the defence lawyer advocating for a case of breach of contract on the other hand he doesn't take any initiative to fulfill his part contract. This is also an element of cheating, intentional breach of contract if made with view to cause wrongful loss to others is within the ambit cheating u.s 420 of IPC. Whatever it may be the prosecution is required to be given a modest chance of trial to prove their case. The material sin the case record doesn't give me the judicial assent to discharge the accused without trial. I have perused the judgments cited by the defence lawyer in this regard. All the judgments are very much*

> *helpful to understand the true prospect of law, but doesn't fit to the facts and circumstances of the present case. Ld. Defence lawyer has also filled several Xerox copies of documents which is also relevant to find out the truth and the same may be considered at the time of trial. Without trial this court can't give any evidential value of the papers relied on by the defence."*

Such observation in support of dismissal of the discharge prayer is perverse because the settled proposition of law is that if the intention to cheat has developed later on, the same cannot amount to cheating. In other words for the purpose of constituting an offence of cheating the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation as held by Apex Court in **Vesa Holding P. Ltd. & another Vs. State of Kerala & others (2015) 8 SCC 293.** Accordingly, mere failure of a person to keep up promise subsequently, a culpable intention right at the beginning, that is when the accused made the promise or made the representation, cannot be presumed. There is always a distinction between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test.

While passing the impugned order, learned court below was swayed away by the emotion about alleged non-payment of arrear amount. It is well settled that while considering the question of framing the charges, the court has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out or not and he must satisfy himself that the evidence produced before him give rise to grave suspicion. Here the court below while passed the impugned order did not keep in mind the well-settled principle of law but left everything for trial. He ought to have considered, that prima facie evidence to constitute offence under Section 420 IPC is conspicuously absent and as such it would be unjust, if the petitioners are forced to go through the tribulations of a trial. Courts must exercise caution in such cases to prevent misuse of legal provisions, legal process and unnecessary harassment. Criminal proceeding can never be allowed to be taken as a short cut of other remedies available in law.

In such view of the matter, the revisional application being CRR 634 of 2016 is allowed. The impugned order dated 27.11.2015 is hereby set aside.

The impugned proceeding being G.R. case no. 1032 of 2006, presently pending before the learned Metropolitan Magistrate, 16th Court at Kolkata stands quashed.

Urgent photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all requisite formalities.

(Dr. Ajoy Kumar Mukherjee, J.)