

SUPREME COURT OF INDIA

V.Y. Jose

Vs.

State of Gujarat

CrI.A.No. 2048 of 2008

(S.B. Sinha and Cyriac Joseph JJ)

16.12.2008

JUDGMENT

S.B. SINHA, J.

1. Leave granted.

2. This appeal is directed against a judgment and order dated 4.12.2006 passed by the High Court of Gujarat at Ahmedabad dismissing an application filed by the appellants herein under Section 482 of the Code of Criminal Procedure.

3. Appellant No.1 is a partner of a partnership firm known as M/s. Premionics (hereinafter referred to as 'the firm' for the sake of brevity). Appellant No.2 is an employee of the said firm.

Respondent No.2, the complainant is also a partnership firm. On or about 18.10.1997, it placed an order on the firm to manufacture and install a machine to purify and desalt the dyes of a particular quality and quantity with the firm. The total manufacturing cost of the said machine worked out to be at Rs.17,96,488/- including excise duty and other incidental charges. Second respondent paid a sum of Rs.3,00,000/- to the firm as advance and part payment of the said consideration. There has been a change in the specifications of the said machine purported to be on the request of the second respondent in terms whereof two extra modules thereto were provided. A revised offer was made. The said machine, although was to be manufactured and supplied within a period of three months, the same was not complied with.

4. A partner of the second respondent along with its technical engineer visited the site of the firm. Allegedly, it was found that the said machine did not conform to the specifications contained in the order placed with the firm. It refused to take the delivery thereof. To the said effect, the second respondent, by a letter dated 7.4.1998 called upon the firm to return the amount of advance, stating :

"Please take a trial your Laboratory as discussed and concentrate between 25 to 30% & collect it in a new plastic drum after good cleaning. I am quite sure that this dye has got a molecular wt. around 400 and p/h in between 4.5 to and I am hopeful that your R.O. Machine should work for this dye only and you have manufactured for another. This is not fair and if you cannot manufacture accordingly, please return our money. As per specific order an advance 3 lacs of Rupees in October 1997, please send stamped receipt which we have not received so far."

5. Second respondent by another letter dated 9.7.1999 called upon the firm to refund the said amount together with interest thereon, stating :

"Please send demand draft payable at Nadiad of Rs.3,97,674/- as per accounts below :

Rs.3,00,000

Rs. 22,500 Interest of 5 months.

Rs.3,22,500

Rs. 58,050 Interest of 1998-99

Rs.3,80,550

Rs. 17,124 Interest of 1999-200

(April, May & June)

Rs.3,97,674

We hope you will do the needful immediately."

The firm, by its letter dated 14.7.1999, responded to the said letter of the Second respondent as under :

"We are in receipt of your letter No.KPH/31/99- 2000 dated 9.7.1999 and are surprised to note your content therein. As per your order we have manufactured the system and you had inspected the system also. We have been reminding you to take delivery of the system but no action had been taken from your end so far. We have blocked material worth more than fourteen lakhs for the last so many months."

6. Thereafter, a criminal complaint was filed. The learned Chief Judicial Magistrate took cognizance of the offences against the appellants under Section 417, 420 read with Section 114 of the Indian Penal Code. Summons were issued. Appellants filed an application for quashing of the said proceedings before the Gujarat High Court which by reason of the impugned judgment has been dismissed.

7. Mr. Dayan Krishnan, learned counsel appearing on behalf of the appellant, would submit :

1. The allegations made in the complaint petition even if given face value and taken to be correct in its entirety do not disclose an offence under Section 420 of the Indian Penal Code.

2. A breach of contract simpliciter does not constitute an offence under Section 420 of the Indian Penal Code.

3. There is no averment in the complaint petition to the effect that the appellant has an intention to cheat at the time of entering into the contract.

8. Mr. Sushil Kumar Jain, learned counsel appearing on behalf of the respondent No.2, on the other hand, would urge :

(1) The firm manufactured a machine different from the one for which order was placed which was found out on inspection of the site of the firm.

(2) Although a sum of Rs.3,00,000/- was paid by way of advance, the said amount has not been returned which manifests dishonest intention on the part of the firm.

(3) In any event, the High Court has rightly refused to exercise its jurisdiction under Section 482 of the Code of Criminal Procedure which can be resorted to only in rarest of rare cases.

9. We have been taken through the complaint petition in its entirety. Indisputably, the parties entered into a contract in terms whereof the firm was to manufacture a machine to purify and desalt the dyes of a particular quality and quantity. The specifications for the machine were changed. First appellant issued a letter dated 20.2.1998 to the complainant, stating :

"Further to our letter No.P:G:971:97 dated 2.2.98 and subsequent visit of our Mr. Sunil Rao. Please find enclosed herewith our revised offer for your reference. You may note that we are giving two module extra free of charge in the system so that the total number of modules becomes 105 no's instead of the committed 103 no's. We are also enclosing herewith the detailed assembly drawing for your reference. Since the system is totally skid mounted the system can be installed on a leveled platform. I am sure this will fulfill your pre-dispatch requirement. In case you need any additional details kindly let us know so that we can provide the same."

10. Inspection of the machine was admittedly made on 6.4.1998. During the period 18.10.1997 (when the order was placed) and 6.4.1998, no allegation was made in regard to any false design or bad intention on the part of the appellants. The complainant-respondent No.2 in letters dated

7.4.1998 and 9.7.1999 did not also make any allegation in regard to existence of a dishonest intention on the part of the appellants herein when the contract was entered into.

Ordinarily, we would not have referred to the correspondences passed between the parties but, indisputably, the said correspondences have been referred to in the complaint petition itself. Even before us, a contention had been raised by Mr. Jain that the appellants' letter dated 7.4.1998 was not replied to.

11. Section 415 of the Indian Penal Code defines cheating as under :

"Section 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'." An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied :

"i) deception of a person either by making a false or misleading representation or by other action or omission;

(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."

12. 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. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out.

13. No exception can be taken to the submission of Mr. Jain that it is not necessary to reproduce the wordings of a penal provision in the complaint petition, but, there cannot be any doubt whatsoever

that the facts disclosing the ingredients of the offence must be averred. There cannot, furthermore, be any doubt that only because civil law can be taken recourse to would not necessarily mean that criminal proceedings should be barred as has been opined by this Court in *Pratibha Rani v. Suraj Kumar & Anr.* [(1985) 2 SCC 370]. We are, however, not concerned in a case of this nature where the allegations were clear, specific and unambiguous and, therefore, the complainant should have been given a chance to prove her case as has been noticed by the High Court in the said judgment. This Court therein also, while laying down the law that the High Court would have no jurisdiction to examine the correctness of the allegations, opined :

"In case no offence is committed on the allegation and the ingredients of Section 405 and 406, IPC are not made out, the High Court would be justified in quashing the proceedings." Reliance has also been placed by Mr. Jain on *Rajesh Bajaj v. State NCT of Delhi & Ors.* [(1999) 3 SCC 259], wherein Thomas, J. opined :

"10. It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions. One of the illustrations set out under Section 415 of the Indian Penal Code (Illustration f) is worthy of notice now : '(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.'" Similar observations have also been made by the same learned Judge in *Trisuns Chemical Industry v. Rajesh Agarwal & Ors.* [(1999) 8 SCC 686] in the following terms :

"9. We are unable to appreciate the reasoning that the provision incorporated in the agreement for referring the disputes to arbitration is an effective substitute for a criminal prosecution when the disputed act is an offence. Arbitration is a remedy for affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the agreement. Hence, those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases as indicated in *State of Haryana v. Bhajan Lal.*"

14. We may hereat refer to the decision of this Court in *State of Haryana & Ors. v. Bhajan Lal & Ors.* [(1992) Supp.(1) SCC 335], whereupon reliance has been placed by this Court. In the aforementioned decision relied upon by Mr. Jain, it was stated : "102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of

illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the

institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge. 103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly

and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

The High Court, although noticed some of the principles laid down in Bhajan Lal (supra), failed to assign any reason as to why in a case of this nature the provisions of Section 482 of the Code of Criminal Procedure should not be applied and how the allegations made in the complaint petition, even if given face value and taken to be correct in its entirety, make out an offence.

15. There exists a distinction between pure contractual dispute of civil nature and an offence of cheating. Although breach of contract per se would not come in the way of initiation of a criminal proceeding, there cannot be any doubt whatsoever that in absence of the averments made in the complaint petition wherefrom the ingredients of an offence can be found out, the court should not hesitate to exercise its jurisdiction under Section 482 of the Code of Criminal Procedure.

We may reiterate that one of the ingredients of cheating as defined in Section 415 of the Indian Penal Code is existence of an intention of making initial promise or existence thereof from the very beginning of formation of contract.

Section 482 of the Code of Criminal Procedure, saves the inherent power of the court. It serves a salutary purpose viz. a person should not undergo harassment of litigation for a number of years although no case has been made out against him.

It is one thing to say that a case has been made out for trial and as such the criminal proceedings should not be quashed but it is another thing to say that a person should undergo a criminal trial despite the fact that no case has been made out at all.

16. In Hira Lal Hari Lal Bhagwati v. CBI [(2003) 5 SCC 257], this Court held :

"40. It is settled law, by a catena of decisions, that for establishing the 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. From his making failure to keep promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed. It is seen from the records that the exemption certificate contained necessary

conditions which were required to be complied with after importation of the machine. Since the GCS could not comply with it, therefore, it rightly paid the necessary duties without taking advantage of the exemption certificate. The conduct of the GCS clearly indicates that there was no fraudulent or dishonest intention of either the GCS or the appellants in their capacities as office-bearers right at the time of making application for exemption. As there was absence of dishonest and fraudulent intention, the question of committing offence under Section 420 of the Indian Penal Code does not arise. We have read the charge-sheet as a whole. There is no allegation in the first information report or the charge-sheet indicating expressly or impliedly any intentional deception or fraudulent/dishonest intention on the part of the appellants right from the time of making the promise or misrepresentation. Nothing has been said on what those misrepresentations were and how the Ministry of Health was duped and what were the roles played by the appellants in the alleged offence. The appellants, in our view, could not be attributed any mens rea of evasion of customs duty or cheating the Government of India as the Cancer Society is a non-profit organization and, therefore, the allegations against the appellants levelled by the prosecution are unsustainable. The Kar Vivad Samadhan Scheme certificate along with Duncan and Sushila Rani judgments clearly absolve the appellants herein from all charges and allegations under any other law once the duty so demanded has been paid and the alleged offence has been compounded. It is also settled law that once a civil case has been compromised and the alleged offence has been compounded, to continue the criminal proceedings

thereafter would be an abuse of the judicial process. [See also Indian Oil Corporation v. NEPC India Ltd. & Ors. [(2006) 6 SCC 736]

17. Recently, in Vir Prakash Sharma v. Anil Kumar Agarwal [(2007) 7 SCC 373], noticing, inter alia, the aforementioned decisions, this Court held:

"13. The ingredients of Section 420 of the Penal Code are as follows:

- (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.

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.

14. What has been alleged in the complaint petition as also the statement of the complainant and his witnesses relate to his subsequent conduct. The date when such statements were allegedly made by the appellant had not been disclosed by the witnesses of the complainant. It is really absurd to opine that any such statement would be made by the appellant before all of them at the same time and that too in his own district. They, thus, appear to be wholly unnatural.

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.

16. Furthermore, admittedly, their residences are in different districts. Whereas the appellant is a resident of the district of Ajamgarh, the respondent is a resident of the district of Rampur. Cheques were admittedly issued by the appellant at his place. There is nothing on record to show that any part of the cause of action arose within the jurisdiction of the court concerned. Even if such statements had been made, the same admittedly have been made only at the place where the appellant resides. The learned Magistrate, therefore, had no jurisdiction to issue the summons. (See *Mosaraf Hossain Khan v. Bhagheeratha Engg. Ltd.*)"

The said principle has been reiterated in *All Carogo Movers (I) Pvt. Ltd. v. Dhanesh Badarmal Jain & Anr.* [2007 (12) SCALE 391], stating :

"For the said purpose, allegations in the complaint petition must disclose the necessary ingredients therefor. Where a civil suit is pending and the complaint petition has been filed one year after filing of the civil suit, we may for the purpose of finding out as to whether the said allegations are prima facie cannot notice the correspondences exchanged by the parties and other admitted documents. It is one thing to say that the Court at this juncture would not consider the defence of the accused but it is another thing to say that for exercising the inherent jurisdiction of this Court, it is impermissible also to look to the admitted documents. Criminal proceedings should not be encouraged, when it is found to be mala fide or otherwise an abuse of the process of the Court. Superior Courts while exercising this power should also strive to serve the ends of justice."

18. A matter which essentially involves dispute of a civil nature should not be allowed to be the subject matter of a criminal offence, the latter being not a shortcut of executing a decree which is non-existent. The Superior Courts, with a view to maintain purity in the administration of justice, should not allow abuse of the process of court. It has a duty in terms of Section 483 of the Code of Criminal Procedure to supervise the functionings of the trial courts.

19. An offence of cheating may consist of two classes of cases :

(1) where the complainant has been induced fraudulently or dishonestly. Such is not the case here;

(2) When by reason of such deception, the complainant has not done or omitted to do anything which he would not do or omit to do if he was not deceived or induced by the accused.

20. It is in that sense, a distinction between a mere breach of contract and the offence of cheating should be borne in mind. We, having regard to the facts and circumstances of the case, are of the opinion that no case has been made out and against the appellant so as to hold that he should face the criminal trial.

21. Before parting, however, we may notice a decision of this Court in *State of Madhya Pradesh v. Awadh Kishore Gupta* [(2004) 1 SCC 691] whereupon strong reliance has been placed by Mr. Jain. This Court, therein upon referring to *Bhajan Lal (supra)* opined as under :

"11. As noted above, the powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so, when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage. (See *Janata Dal v. H.S. Chowdhary and Raghbir Saran (Dr) v. State of Bihar*) It would not be proper for the High Court to analyze the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In proceedings instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that

the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in the court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by it be the basis for quashing the proceedings." (Emphasis supplied)

22. No exception can be taken to the aforementioned principles of law, as therein also it has categorically been held that exercise of inherent power under Section 482 is permissible where allegations set out in the complaint do not constitute the offence for which cognizance has been taken by the Magistrate. It is evidently a case of that nature.

23. For the reasons aforementioned, the judgment of the High Court cannot be sustained. It is set aside accordingly. Criminal proceedings against the appellants are quashed. The appeal is allowed.