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(2016) 02 BOM CK 0058

In the Bombay High Court

Case No : Criminal Writ Petition No. 1094 of 2012

Babusingh Pokarsingh Rajpurohit APPELLANT

Vs

The State of Maharashtra and Others RESPONDENT

Date of Decision : 10-02-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 34, Section 405, Section 406, Section 420

Citation : (2016) 02 BOM CK 0058

Hon'ble Judges : R.V. More and V.L. Achliya, JJ.

Bench : Division Bench

Advocate : N.S. Mundargi and Rohan Lavkumar i/b. M.S. Prasad, for the Appellant; J.P. Yagnik, APP, for the Respondent

Final Decision : Dismissed

Judgement

1. Rule. Rule, returnable forthwith. By consent of the parties, petition is taken up for final hearing.

2. By this petition under Article 226 of the Constitution of India and Section 482 of the Criminal Procedure Code, 1973, the petitioner herein is seeking quashing of criminal case instituted at the instance of respondent No. 2 / complainant for offence punishable under sections 420 and 406 read with 34 of the Indian Penal Code registered vide F.I.R. / C.R. No. 104/2010 with Shivaji Nagar police station, Kolhapur.

3. Before adverting to the submissions advanced, it is necessary to consider the few facts leading to the filing of criminal proceedings against the petitioner. On 17th December, 2010, respondent No. 2 filed complaint with Shivaji Nagar police station, Kolhapur alleging therein that during the period April, 2007 to December, 2009 Narpatsingh Pokarsingh Rajpurohit (accused No. 1) and Babusingh Pokarsingh Rajpurohit (accused No. 2 / petitioner) had purchased cloth

measuring 965760 meters worth Rs. 1,06,14,411/-. Out of the said amount, accused have made payment of Rs. 81,98,842/- and an amount of Rs. 24,15,569/- was due against them. Respondent No. 2 demanded the balance amount by repeatedly approaching them. However, they have not repaid the same and thereby they have cheated him and also committed breach of trust. On the basis of that complaint lodged, police registered F.I.R. for committing offences punishable under sections 420 and 406 read with 34 of the Indian Penal Code vide C.R. No.104/2010 as against Narpatsingh Pokarsingh Rajpurohit (accused No. 1) and the present petitioner. On completion of investigation, police filed charge against the petitioner and his brother. Being aggrieved, the petitioner has filed the present petition.

4. The petitions filed by the petitioner as well as his brother were dismissed by an order dated 20th July, 2015 passed by the Division Bench of this Court after observing that as charge-sheet is already filed in the matter and the petitioners have alternate and efficacious remedy available under the law to file an application for discharge before the trial Court invoking the inherent jurisdiction is not called for while dismissing petitions. It was observed that in case the petitioners file application for discharge before the trial Court, the same shall be disposed of expeditiously on its own merits without being influenced by order of dismissal passed by the Court.

5. The order dated 20th July, 2015 passed by this Court was challenged before the Apex Court by filing Special Leave to Appeal (Cri) No. 7381/2015. Vide order dated 11th September, 2015 impugned order dated 20th July, 015 was set aside and remitted the case to the High Court with direction to reconsider the matter afresh.

6. Pursuant to order dated 11th September, 2015, the petition has been restored to its original number and placed for hearing. By consent of parties, the petition is taken up for final disposal.

7. We have heard counsel for the petitioner, APP for the State and counsel representing respondent No. 2 and further perused the copy of the charge-sheet.

8. Learned counsel for the petitioner has strenuously contended that even if the entire evidence gathered by the investigating agency and placed on record in the form of charge-sheet goes unchallenged, unrebutted and uncontroverted, still no conviction can be warranted in the matter. He has pointed out that as per the case of prosecution during the period April, 2007 to December, 2009, the accused Nos. 1 and 2 had purchased cloth on credit and made various part payment towards the outstanding dues in the open and current account opened by respondent No. 2 in the name of accused. According to case of prosecution, during the period April, 2007 to December, 2009, cloth material worth Rs. 1,06,14,411/- was purchased and during the said period accused had made various payments in said account to the tune of Rs. 81,98,842/- and balance amount of Rs. 24,15,569/- was due against them which lead to registration of

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offence and consequential filing of charge-sheet against the petitioner and co-accused. He has submitted that if the allegations contained in the complaint and evidence gathered during the investigation is taken into consideration, it discloses no offence punishable under sections 420 and 406 of the Indian Penal Code. In order to attract an offence punishable under section 420 of the Indian Penal Code, fraudulent and dishonest intention must exist on the part of accused from the very beginning in a case involving supply of goods on credit. In absence of any fraudulent and dishonest intention on the part of the purchaser of the goods, who allegedly made part payment and failed to make balance payment, he cannot be prosecuted for committing an offence punishable under section 420 of the Indian Penal Code. In support of the contention, learned counsel has placed reliance upon the decision of Apex Court in case of , (2005) 10 Supreme Court Cases 228 Anil Mahajan V/s. Bhor Industries Ltd. and Anr. He has further submitted that there must be an act amounting to ''criminal breach of trust'' as defined under section 405 of Indian Penal Code to attract the offence under section 406 of Indian Penal Code. But complaint discloses no such act of committing criminal breach of trust on the part of the petitioner.

9. On the other hand, learned counsel for respondent No. 2 strenuously contended that there is sufficient material to proceed against the petitioner / accused and the case in hand cannot be said to be a case without evidence. He has submitted that there is sufficient evidence to connect the petitioner with the commission of offence punishable under sections 420 as well as 406 of the Indian Penal Code.

10. We have thoroughly considered the submissions advanced in the light of the charge-sheet filed against the petitioner. If we consider the very foundation of criminal proceedings initiated against the petitioner, then, it can be seen that the prosecution has approached with a case that from April, 2007 to December, 2009 cloth material worth Rs. 1,06,14,411/- was purchased by accused and during that period total amount of Rs. 81,98,842/- has been paid to respondent No. 2 towards the goods purchased and amount of Rs. 24,15,569/- was lying due against the petitioner. Thus, the very basis of the criminal case initiated against the petitioner is an unpaid amount of Rs. 24,15,569/- due against accused towards the goods purchased on credit during April, 2007 to December, 2009. Therefore, if we consider the entire case of the prosecution to be true and correct, then still no offence punishable under sections 420 and 406 of the Indian Penal Code can said to be attracted as against the petitioner.

11. Dishonest intention from the very beginning is sine qua non to attract the commission of offence under section 420 of Indian Penal Code. Even if we consider the allegations made in the complaint as true and correct, still the petitioner cannot be said to have committed offence of cheating. Admittedly, the goods in question were purchased on credit in the account opened by complainant-respondent No. 2 in the name of accused. As against purchase of goods worth Rs. 1,06,14,411/- an amount of Rs. 81,98,842/- has been paid to

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complainant-respondent No. 2. The criminal proceedings has been instituted against the petitioner and co-accused for the reason that Rs. 24,15,569/- which was due and payable by them in the account was not paid by them in spite of repeated demands by complainant respondent No. 2. Thus, the allegations made in the complaint and evidence gathered by the prosecution as presented in the form of charge-sheet no where discloses that the petitioner had acted with dishonest intention from the very beginning. If they had any intention to deceive the complainant from the beginning, then, payment of Rs. 81,98,842/- would not have been made by them. Only for the reason that certain amount was due and not paid, dishonest intention on their part cannot be inferred in law. In this context, learned counsel for the petitioner has rightly placed reliance on the decision of the Apex Court in the case of Anil Mahajan V/s. Bhor Industries Ltd. and Anr. (supra) wherein in a case based upon identical facts, the Apex Court has held that mere breach of contract would give no right to prosecute the person for offence of cheating unless a fraudulent and dishonest intention is shown to exists from the very beginning of the transaction. It is further observed that substance of the complaint has to be seen and mere use of the expression ''cheating'' in the complaint is of no consequence. In paragraph 8, the Apex Court has observed as under:-

"8. The substance of the complaint is to be seen. Mere use of the expression cheating in the complaint is of no consequence. Except mention of the words "deceive" and "cheat" in the complaint filed before the Magistrate and "cheating" in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MOU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay. According to the complainant, a sum of Rs. 3,05,39,086 out of the total amount of Rs. 3,38,62,860 was paid leaving balance of Rs. 33,23,774. We need not go into the question of the difference of the amounts mentioned in the complaint which is much more than what is mentioned in the notice and also the defence of the accused and the stand taken in reply to notice because the complainants own case is that over rupees three crores was paid and for balance, the accused was giving reasons as above-noticed. The additional reason for not going into these aspects is that a civil suit is pending inter se the parties for the amounts in question."

12. The decision in the case of Anil Mahajan V/s. Bhor Industries squarely applicable to the present case, as the facts of the present case are more or less identical to the facts of the cited case. Thus, on due appreciation of submission advanced, we have no hesitation to accept the contention of learned counsel for the petitioner that no case to prosecute the petition under section 420 of Indian Penal Code is made out even if allegations are accepted to be true and correct and continuation of such proceeding would amount to gross abuse of process of law.

13. Similarly, on the face of the charge-sheet filed against the petitioner, no

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offence punishable under section 406 of the Indian Penal Code is attracted in the matter. In order to attract offence under section 406 of the Indian Penal Code, there must be an act amounting to criminal breach of trust as defined under section 405 of the Indian Penal Code. In the present case, the very foundation of the case of prosecution is non payment of amount shown due against the petitioner and co-accused in the account books of complainant-respondent No. 2. Admittedly, number of transactions of purchase as well as payments had taken during the period April, 2007 to December, 2009. It is alleged that during the said period as against goods purchased worth Rs. 1,06,14,411/-, an amount of Rs. 81,98,842/- has been paid and balance amount of Rs. 24,15,569/- which was due in the account books of complainant-respondent No. 2 has not been paid. Therefore, even if we accept the case of the prosecution to be true still the said act of non payment of the amount due in the account books of complainant-respondent No. 2 cannot be treated as an act of criminal breach of trust as defined under section 405 of the Indian Penal Code. The transaction in question is a simple transaction of purchase of goods on credit in open and current account opened by complainant-respondent No. 2 in his account books in the name of accused No. 1. Therefore, even if the allegations made in the complaint given a face value and are taken to be correct in their entirety, still they do not disclose the offence under section 406 of Indian penal Code.

14. In order to attract offence of 406 of Indian Penal Code, there must be an act of criminal breach of trust committed by the accused. Section No. 405 of Indian Penal Code describes the meaning of the word criminal breach of trust. The basic requirement to bring home the accusations under section 405 of the Indian Penal Code are the requirement to prove conjointly (i) entrustment and (ii) whether the accused was actuated by dishonest intention or not, misappropriated it or converted it to his own use to the detriment of the persons who entrusted it. In order to attract offence of criminal breach of trust, there must be a property in respect of which an offence is alleged to have been committed and the same was vested in some person other than the accused and that accused held that property on behalf of the person. Thus, there must be an entrustment of the property by the owner of the property. It is further necessary that that person was actuated by dishonest intention of the property has dishonestly misappropriated or converted it to his own use that property or dishonestly used or disposed of that property in violation of law prescribing mode in which such trust to be discharged or legal contract which he has made touching the discharge of such trust. On examining the case in hand, no such act of criminal breach of trust has been stated in the complaint to attract offence under section 406 of Indian Penal Code. Non payment of dues or price of the goods purchased on credit cannot be a ground to attract offence under section 406 of Indian Penal Code. In the complaint filed by complainant -respondent No. 2, the complainant has alleged as under:-

" Regardless of this 1) Narphatsingh Pokersingh Rajpurohit R/o. Kaludi, Taluka Balotra, District Badner, State of Rajasthan 2) Babubhai Pokersingh Rajpurohit R/

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o. Haripriya Darshmini Society, Ahmedabad, Gujarat had purchased cloth measuring 965760 meters during the time span of April, 2007 to December, 2009 which cost them a total of Rs. 1,06,14,411/- out of which an amount of Rs. 81,98,842/- has been paid in the form of cheque to gain my trust while an amount of Rs. 24,15,569/- wasn''t paid by them hence they breached my trust and they appropriated the said monies by conspiring together. Hence I am lodging the present complaint and the same may be investigated into."

15. The contents of the complaint nowhere discloses any offence under section 406 or under section 420 of Indian Penal Code committed on the part of petitioner/ accused No. 2. Mere use of the words ''cheating'' or ''criminal breach of trust'' in the complaint are not sufficient to prosecute a person for offence under sections 420 or 406 of Indian Penal Code. Thus, in the light of the allegations made in complaint itself, no case is made out to prosecute the petitioner for offence under section 420 of 406 of Indian Penal Code.

16. Apart from this, if we consider the allegations made in the complaint, then the allegations are mainly directed against Narpatsingh Pokarsingh Rajpurohit i.e. accused No. 1. Criminal complaints under section 138 of the Negotiable Instruments Act, 1881 on account of dishonour of cheque seems to be filed only against Narpatsingh Pokarsingh Rajpurohit. In the notices issued the entire transaction relating to purchase of goods on credit as against payment made has been attributed to Narpatsingh Pokarsingh Rajpurohit (accused No. 1). Similarly, in the criminal complaints filed in respect of the cheques dishonoured on account of payment due, the allegations are directed against accused No. 1 only. The name of petitioner (accused No. 2) is even not remotely referred in the criminal complaint filed under section 138 of the Negotiable Instruments Act, 1881 as joint purchaser of goods. In this context, it is useful to refer to copy of criminal complaint bearing S.C.C. No. 439/2010 filed by respondent No. 2 as against Narpatsingh Pokarsingh Rajpurohit on account of dishonour of cheque. The complaint is filed only against Narpatsingh Pokarsingh Rajpurohit. Paragraphs 2, 3 and 4 of the complaint read as under:-

" 2) That accused is a cloth purchaser at Ichalkaranji and also an cloth agent at Ahmedabad. That accused use to do business of purchasing cloth goods from Ichalkaranji and other cities and sells them at Ahmedabad, Gujarat and other states. That accused approached to the Complainant to purchase cloth goods at Chandur. That as per mutual understanding, between Complainant and accused, it was agreed between complainant and accused that complainant will supply cloth goods to accused on credit as per demand and that for which accused has kept open and current account with complainant in his name with consent and knowledge. Accused himself looks towards receipt and payment of his transactions and he is personally liable for all receipts and payments.

3) That as per demand of accused, the complainant has sent to him cloth goods from time to time as per various bills. Also as per say of Accused complainant has sent certain cloth goods to other parties in his name which was accepted by

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them and that for the same bills were issued to accused. Accused had accepted the said bills and promised to make the payments as per his accounts. Accused used to pay from time to time the amount of cloth goods purchased as per account maintained by the complainant.

4) That as on 31/3/09 total outstanding due on account of Accused was Rs. 6,23,975-00 for the satisfaction of the said amount as a part payment. Accused gave to complainant at Chandur cheque No. 419191 dt. 30/11/09 amounting to Rs. 1,00,000/- drawn on State Bank of Bikaner and Jaipur Branch Ahmedabad. The said cheque was signed by Accused before complainant. The accused promised to complainant to honour the said cheque on presentation. As per say of Accused, complainant accepted the said cheque and presented the same for realization at State Bank of India on 22/1/2010. But the same was returned on 8/3/2010 with remark "Opening balance Insufficient". After return of cheque, complainant tried to contact the accused, but accused intentionally avoided to be in touch with complainant and only to cheat the complainant has dishonoured the above mentioned cheque."

17. Thus, in view of the fact that transaction which is alleged to have taken place is basically a transaction in between respondent No. 2 and accused No. 1, the stand of petitioner (accused No. 2) that he is not concerned with the transaction between respondent No. 2 and accused No. 1 deserves to be accepted. According to the petitioner, he was serving at Ahmedabad during the alleged period and he has been unnecessarily made an accused in the present case. The stand taken by the petitioner during the course of investigation is found to be fortified by various witnesses examined during the course of investigation from Ahmedabad who have consistently stated before the investigating officer that the petitioner was working with G.D. Paridhan Pvt. Ltd., Ahmedabad as an accountant. Besides, Mr. Ghanshyamdas Agarwal, the Director of the said Company, number of other persons have made statements to that affect before the investigating officer and those statements are also part of the charge-sheet filed against the petitioner.

18. On 20th October, 2012 when the petition was listed for hearing before this Court for direction, this Court noted as under:-

" 1. Heard the learned Counsel appearing for the petitioner and the learned Counsel appearing for the 2nd respondent.

2. Learned Counsel appearing for the 2nd respondent, on instructions, does not dispute that on 15th June, 2012, there was a Pursis filed by the 2nd respondent before the Trial Court. The second respondent, who is the first informant, has stated in the Pursis that the allegations in the criminal case are baseless and, therefore, the case should be disposed of by acquitting the accused. On the basis of the said Pursis, the learned Judge passed an order reiterating that the parties have settled the dispute, but he observed that the offence cannot be compounded. Today, the learned Counsel for the 2nd respondent tries to contend that some part of the settlement was not recorded which has not been complied

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with.

3. Prima facie, in view of what is stated in the Pursis, we are of the view that continuation of criminal proceedings will amount to abuse of process of law. Hence, we issue Rule. Learned APP waives service for the State. Learned Counsel for the 2nd respondent waives service. There will be interim relief in terms of prayer clause (b)."

19. A copy of an application and pursis referred in the order 20th October, 2012 clearly depicts that respondent No. 2 and five other persons had filed pursis before the learned Judicial Magistrate First Class, Ichalkaranji mentioning therein that they have settled the matter with the accused and prayed for discharge of the accused. The learned Judge has passed an order that as an offences are compoundable with the permission of the Court and no such permission is sought before for compounding the offence, request to discharge the accused on the basis of pursis cannot be passed in law and granted liberty to the file separate application to compound the offence.

20. Thus, considering the totality of facts and circumstances of the case as discussed in the foregoing paras, we are of the view that on the face of charge-sheet filed against the petitioner, no offence under section 420, 406 read with 34 of Indian penal Code is made out against the petitioner. In absence of any triable case being made out against the petitioner, prosecution of the petitioner for an offence under sections 420 and 406 of Indian Penal Code or continuation of the proceedings would amount to gross abuse of process of law. We, therefore, deem it fit to invoke inherent jurisdiction under Article 226 of the Constitution of India as well as under the provisions of section 482 of the Criminal Procedure Code to quash and set aside the subject F.I.R. and consequential criminal proceedings arising therefrom to the extent of the petitioner (accused No. 2.).

21. Accordingly, rule is made absolute in terms of prayer clause (a) in respect of the subject F.I.R. against the petitioner.

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