

(2000) 04 KAR CK 0015

In the Karnataka High Court

Case No : Criminal Petition No. 2426 of 1998

Bharat B. Kurbetti and Others

APPELLANT

Vs

State of Karnataka and Another

RESPONDENT

Date of Decision : 11-04-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 482
Penal Code, 1860 (IPC) — Section 120 B, 34, 417

Citation : (2000) CriLJ 4216 : (2000) 5 KarLJ 125

Hon'ble Judges : S.R. Bannurmath, J

Bench : Single Bench

Advocate : Sri Ravi B. Naik, for the Appellant; Sri G. Balakrishna Shastry, for the Respondent

Judgement

1. The petitioners against whom order of process has been issued by the Judicial Magistrate, First Class, Nippani, by the order dated 2-7-1998 in C.C. No. 1055 of 1998 have come up in this petition for setting aside the order as well as for quashing the entire proceedings against them.

2. The brief facts giving rise to the petition are as follows: The respondent/complainant has filed a private complaint u/s 200 of the Code of Criminal Procedure before the learned Magistrate against the petitioners alleging commission of offences punishable under Sections 417 and 120(b) read with Section 34 of the Indian Penal Code by the petitioners herein on the following grounds, viz., (a) that the complainant and the accused who are permanent residents of Nippani and neighbouring villages and accused 1 to 11 are the past and present Directors of a Bank called "Nippani Urban Co-operative Bank Limited" and accused 12 is the Manager; (b) that the complainant and accused 1 to 11 were the contesting candidates for the election of Board of Directors of the Bank for the years 1997-98 to 1999-2000 and the election was scheduled to be held on 29-6-1997 and the date fixed for withdrawal of candidature was 24-6-1997; (c) that after the expiry of the date of withdrawal of candidature, on

28-6-1997 as the accused were convinced that the complainant will not withdraw his candidature and as a result of which it would be a tough election for the accused they induced and persuaded the complainant not to contest the election with the mediation of certain persons; (d) that the mediators represented to the accused that if the complainant does not contest the election, accused 1 to 11 would deposit a sum of Rs. 40,000/- in the account of the complainant and relying on the promise, the complainant did not contest and the accused were elected unopposed; and (e) that in spite of the fulfillment of the part of the agreement as promised by the complainant, the accused neither paid the money nor deposited the same in the Bank and in spite of repeated reminders including a legal notice, as they had failed to do so, they have committed the offence of cheating. On these allegations, the complainant sought the Court to initiate proceedings against the accused.

3. After taking cognizance and recording the sworn statements of the complainant and one witness, the learned Magistrate by the impugned order held that there is prima facie material to issue process against the accused for the offences punishable under Sections 417 and 120(b) read with Section 34 of the IPC. Hence, the present petition.

4. Sri Ravi B. Naik, learned Counsel for the petitioners, contended that the issue of process by the learned Magistrate was mechanical and without application of mind; that the learned Magistrate has failed to see that as the very allegations disclose that the date of withdrawal of candidature was 24-6-1997 and as such there was no question of the complainant withdrawing his candidature on the date of the election, viz., 29-6-1997, alleged to be on the basis of the promises said to have been made by the petitioners and thereafter the petitioners being elected unopposed; and that the respondent has failed prima facie to substantiate that there was an offence of cheating committed at all. In this regard, the learned Counsel contended that the necessary ingredients of the offence of cheating have not been alleged in the complaint nor even substantiated in the sworn statements of the complainant and his witness and as such taking cognizance and issue of process is liable to be set aside.

5. On the other hand, Sri Balakrishna Shastry, learned Counsel for the complainant, vehemently argued in support of the order of the Trial Court *inter alia* contending that this Court exercising inherent power u/s 482 of the Cr. P.C. should not interfere with the order of taking cognizance and issue of process when the Trial Court on its subjective satisfaction especially after noting the allegations made in the complaint and the sworn statements of the complainant and his witness has come to the conclusion that it is a fit case to take cognizance of and issue of process.

6. Insofar as the jurisdiction and power of this Court u/s 482 of the Cr. P.C. or for that matter even under the revisional jurisdiction is concerned, for interference with the order of the Courts below at the initial stage of criminal proceedings, viz., at the stage of issue of process, taking cognizance, etc., the law is well-

settled. Time and again the Hon"ble Supreme Court has held that generally exercising the inherent jurisdiction or the revisional jurisdiction this Court should not interfere with the order at the stage of issue of process. However, taking note of various aspects, as early as in the year 1976 in the case of Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, , and later in the case of State of Haryana and others Vs. Ch. Bhajan Lal and others, , and in the latest pronouncement in the case of Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, , the Hon"ble Supreme Court has laid down guidelines as to what are the cases in which the High Court in exercise of revisional or inherent jurisdiction can quash the criminal proceedings at the initial stage so as to avoid harassment to the accused persons of lengthy and protracted trial if ultimately there is no chance of conviction. Keeping in view the well-settled principles, let me consider the case on hand.

7. As stated earlier, the offence alleged against the petitioners are cheating and entering into conspiracy to cheat. The basic allegation is that the accused/petitioners promised to pay or deposit a sum of Rs. 40,000/- to the complainant for his withdrawal of candidature from the election and thereafter resiled from the same by not paying it in spite of the complainant fulfilling his part of agreement, viz., withdrawal from the contest, At the outset, it is to be observed that election is a democratic process and the eligible candidates are free to stand for election and depending upon their popularity/capacity get elected. It is also equally a privilege/right of a candidate to withdraw from the contest for whatever reason he deems fit. But, having projected himself as a candidate, withdrawal of the same after obtaining money or any other favour from other candidates would constitute a corrupt practice which is strictly prohibited. Under the Election Laws even a person declared elected, if found to be by corrupt means and the same is proved, law authorises the Courts to set aside such election. The emphasis is on fair and clean election. If a person as in the present case chooses even to withdraw his candidature after obtaining money from the others, he would be a party to a corrupt practice along with others.

8. As such, on the very allegation found in the complaint and spoken to the same in the sworn statement and as the complainant has admitted in clear terms that he withdrew his candidature from contest only after he entered into an agreement with the petitioners who had promised him to pay certain amount for such withdrawal. This agreement in my view, is not only an illegal agreement or contract, but also opposed to public policy. Such agreement is illegal and unenforceable under the law. Even if the part of the agreement is resiled by the other side, the complainant cannot allege the offence of cheating by the other side. For example, can a person be permitted to come before the Court or file complaint alleging that he had entered into an illegal contract with another for killing somebody on payment of money or for kidnapping certain person or for engaging a minor or a woman for prostitution and come before the Court, file a criminal complaint that the other party has not kept his promise by non-payment and hence liable to be punished for cheating or breach of trust? In my view,

when a person enters into an illegal contract, he cannot complain of cheating against the other party for not fulfilling the obligation. The penal provision is not meant for such persons.

9. In this regard, learned Counsel for the respondent has vehemently contended that the agreement for payment of Rs. 40,000/- in lieu of which he (the respondent) was required to withdraw his candidature was not for his personal gain, but for the purpose of construction of a temple and distributing part of the money towards scholarship. In other words, it is contended by the respondent that the cause was noble and in the interest of public at large or the society and as such there is no illegality. It is to be noted that except the words or say of the complainant that this agreement was for payment of money to be utilized for construction of a temple, etc., there is no material available to substantiate the same. Even otherwise, whatsoever reason may be noble that does not permit a candidate from withdrawing from the contest only on the basis of such agreement which would even then amount to corrupt practice. As such, in my view, having entered into an illegal corrupt practice of withdrawal of candidature on payment of money, on failure of fulfillment a part of the agreement the complainant cannot approach the Court with a complaint of cheating by the other side. Such allegations in the complaint being opposed to public policy and contrary to democratic election process should not have been entertained by the Trial Court by taking cognizance of the alleged offence and further by issuing process.

10. Even if it is held that the agreement for withdrawal of the candidature by the respondent was for a good cause and not for personal gain, it is to be noted that no offence of cheating or criminal conspiracy has been made out by him. It is well-settled that to hold a person guilty of the offence of cheating it is required to be shown and proved that an intention of cheating was in existence at the inception of the contract or agreement. Though there is a thin difference between breach of contract and cheating, as held by the Apex Court "Breach of contract is necessarily cheating. The element which convert the breach of contract into an offence is the dishonest or fraudulent intention of the accused at the inception". It is *prima facie* required to be shown that the accused had no intention at all to pay the money and still induced or forced the complainant to do something which he would not have done normally.

11. In the present case, absolutely there is no material allegation available on record. In fact, the calendar of events of the election which is undisputed, if looked into, shows the facts contrary. As per the calendar of election, the date of filing of nomination was 22-6-1997, scrutiny was on 23-6-1997, publication of the list of candidates was on 23-6-1997, date of withdrawal of the candidature was on 24-6-1997 and on the same day the names of the candidates who have withdrawn from the election as well as the list of final contestants was to be published and put up on the Notice Board and thereafter the elections were scheduled to be held on 29-6-1997 and on the same day results were to be

announced.

In the present case, as per the case of the complainant, he has not withdrawn his candidature on 24-6-1997 and as such he must have been shown as one of the contesting candidate in the list so published and put up on the Notice Board. According to the complainant, only on 28-5-1997 the accused induced him to withdraw his candidature and as such on the date of the election viz., 29-6-1997 he did not contest the election and the accused were elected unopposed. The question of withdrawing from the election by the complainant on 29-6-1997 does not arise at all. since the date for such withdrawal expired much earlier. As it is impermissible after such date of withdrawal to withdraw from the contest, there is no question of doing so by the complainant. It is to be noted here itself that the complainant is not an illiterate person. He is an Advocate by profession and as per his say, he being very popular person wanted to contest the election. If that is so, the complainant must have been aware that even if he is forced and induced, he could not have withdrawn his candidature from the election after the date set for doing so has expired. This appears to be a made up story. On the other hand, the petitioners have produced the records of the election to show the following facts: (1) on 23-6-1997 in all 34 nominations were found to be valid out of which 28 were under General Category, 3 were under Women Reserve and 3 were under SC/ST Reserve. Thus in all 34 persons had filed nomination papers for the election to the Board of Directors of the Bank. Thereafter, on 24-6-1997, 23 candidates including the respondent have withdrawn their candidature and thus, only 11 candidates are left for the election. In view of the fact that the number of contesting candidates remain equal to the candidates to be elected as per the bye-laws on 29-6-1997 in the Annual General Body Meeting, they were declared elected unopposed. Thus, the record clearly show that the complainant has withdrawn his candidature on 24-6-1997 itself and not on 29-6-1997, the date of election. No material is placed before the Court to show that the records of the Returning Officer referred to above are false or contrary. Hence, it can be straightaway held that the alleged story put up by the complainant of withdrawing his candidature on 29-6-1997 at the behest and due to the inducement and the promise to pay a sum of Rs. 40,000/- appears to be an afterthought and created story. Further, as strangely admitted by the complainant himself in the complaint that this withdrawal from the candidature by the complainant clearly appears to be a modus operandi of the complainant to make money. At paragraph 5 of the complaint, the complainant himself has stated that even during the election of the year 1990-91 and 1992-93 three of the present accused had entered into similar agreement with the complainant for payment of Rs. 25,000/- each and as they have made payment, he had withdrawn from the contest then also. This fact is again reiterated in the sworn statement of the complainant. Hence, it is clear that the complainant has been filing his nominations for the election only for the purpose of making monetary gain by obtaining money from the other contesting candidates and then withdrawing his candidature. This certainly shows the conduct of the

complainant. The complainant being an Advocate by profession who is and should be aware of such impermissible and corrupt practice has not only dared to admit the same but also has further filed the present complaint of cheating by the other party. As stated, if such theory of illegal agreement opposed to public policy and the breach thereof is encouraged, no sanctity would be left in the election process.

12. Even if at this stage itself for the sake of argument it is held that there was no illegality on the part of the complainant for entering into such contract, in my view, the complainant has failed to prove or even demonstrate the intention of cheating on the part of the accused/petitioners at the inception itself. Unless this necessary ingredient is shown in existence, there cannot be any offence of cheating said to have been committed by the petitioners. As held by the Apex Court right from the case *Jaswantrao Manilal Akhaney Vs. The State of Bombay*, , and in the case of *Hari Prasad Chamaria Vs. Bishun Kumar Surekha and Others*, , the guilty intention is an essential ingredient for the offence of cheating and such intention must be shown to have been in existence at the time of entering into an agreement or contract and failure to demonstrate such intention would necessarily make the Court to come to the conclusion that no offence is said to have been committed by the accused.

13. As such looking from any angle, taking note of the peculiar facts and circumstances I am constrained to hold that the learned Magistrate without application of mind and without considering the basic requirement has mechanically accepted the allegations and proceeded to take cognizance and issued process against the petitioners. This being manifestly illegal, the impugned order is liable to be set aside and the entire proceedings are liable to be quashed.

14. In the result, this petition is allowed and the impugned order dated 2-7-1998 passed by the Judicial Magistrate, First Class, Nippani, in C.C. No. 1055 of 1998 is set aside so also the criminal proceedings initiated are hereby quashed.