
(1998) 09 DEL CK 0077

In the Delhi High Court

Case No : Criminal W. No. 640 of 1998 and Criminal M. 4529 of 1998

Gagan Kishore Srivastava

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 02-09-1998

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 420

Citation : (1998) 6 AD 817 : (1999) 1 Crimes 39 : (1998) 75 DLT 717 : (1998) 47 DRJ 438

Hon'ble Judges : N.G. Nandi, J;Devinder Gupta, J

Bench : Division Bench

Advocate : Mr. Arun Jaitley and Mr. G.S. Sharma, for the Appellant; Mr. S.S. Gandhi and Mr. Asim Mehrotra, for the Respondent

Judgement

Devinder Gupta, J.—In this petition filed under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, the petitioner has sought quashing of FIR No. 212/98 registered with P.S. Chittranjan Park, South District, New Delhi dated 30.5.1998 for offence under Sections 420/34, IPC, on the complaint of respondent No. 5.

2. The main ground on which quashing is sought is that assuming all the allegation in the complaint to be true, the same does not disclose commission of any cognizable offence; the same at the most amounts to breach of contract. It could not give rise to a criminal prosecution and that too after a lapse of almost four years. Respondent No. 5 in connivance with the police has managed to get a civil wrong converted into a criminal one, which is nothing, but gross abuse of the process of law. As per the complainant's own showing, the goods were exported to the petitioner in March, 1995 against valid documents against part payment of the value of the goods. There was dispute with respect to quality of goods and late arrival thereof. As such, in October, 1995, the petitioner agreed to compensate the complainant and agreed to make payment of an agreed amount,

which was less than the amount of the original balance amount. Payment of this agreed amount could not be made. Therefore, non-payment of such amount of compensation will not give rise to any criminal liability as it was not on account of any dishonest intention or fraudulent inducement.

3. In order to appreciate the respective submission made at the Bar, it will be but proper to extract the complaint, which respondent No. 5 addressed to the Station House Officer, P.S. Chittranjan Park, which led to registration of the FIR. The complaint reads :

"To

The Station House Officer,

Police Station Chittranjan Park,

New Delhi.

Sub: Registration of FIR against Mr. Gagan Srivastava, Mrs. Renu Srivastava and Harsh Garg all residing at D-29, Saket, New Delhi and having their office at B-25/1, Okhla Ind. Area, Phase-II, New Delhi - 110020.

Sir,

We M/s. Passion Apparel Private Limited. manufactures and exporters of Textiles and ready made garments, having our office at E- 107, Masjid Moth, Greater Kailash-III, New Delhi-110048 bring to your notice the following facts :

1. That we are engaged in the business of manufactures and exports of Textiles and ready made garments for the last 4 years;

2. That on 15th November, 1994, one Mr. Gagan Srivastava, Managing Director of M/s. Avren Junge Mode Gmbh Haus Der Mode, 1/8 Kolna STR 1 65768 Eschborn, Germany- approached for purchase of various readymade garments. The total prices of the goods to be purchased by him was worth 4,46,597.25. Deutsch marks. The said good were to be exported to Germany by us and Mr. Gagan Srivastava induced to believe that we would make the payment of the said goods on receipt of the same. Copies of the order placed by Mr. Gagan Srivastava are appended hereto as Annexure-1 sent to the complainant. That as per the understanding agreed between us, we and Mr. Gagan Srivastava, it was agreed that Mr. Gagan Srivastava would make the payment within 15 days from the date of the invoice of the goods which were to be dispatched by us to Germany. It would be relevant to mention that we were not exporting goods earlier and it is only at the instance and inducement of Mr. Srivastava that we exported goods for the first time.

3. That believing the statement made by Mr. Gagan Srivastava, we dispatched the goods worth 4,46,597.25 D.M. in the months of March, April, 1995 via and Air through Kuwait Airways and Lufthansa Cargo to Mr. Srivastava. The said goods were received by 37 different invoices and the goods were received 105

Eschborn at Germany and were released by him and were sold as subsequently. Copy of the release certificate is appended as Annexure-2 to the complaint.

4. That despite of having received the goods worth 4,46,597.25 D.M. Mr. Gagan Srivastava made payment for 1,15,194.00 D.M. and the balance payment of 3,31,403.25 D.M. was not made.

5. That in the month of October, 1995 our director Mr. Rajesh Bajaj had to go to Germany for Realizing the said payment and on October 7th, 1995 an understanding was reached with Mr. Gagan Srivastava that he would make the payment of 2,00,000 D.M. by end of May, 1996 and will not make any claim on the quality or any other account on said goods. It was agreed by him that we will have to send new documents to his Bank i.e. Frankfurter Sparkasse. A true copy of the Minute of Meeting dated 7th October, 1995 is appended hereto as Annexure-3 to the complaint.

6. That on return from Germany we presented documents worth 2,13,572 D.M. for payment for which acceptance was granted by the Bank. However, the said documents were also returned unpaid by the Bank of Mr. Gagan Srivastava. True copy of the said documents is appended hereto as Annexure-4 to the complaint.

7. That on June 21, 1996 one Mr. Harsh Garg who is a relative and also empowered jointly on behalf of Avren Junge Mode GMBH agreed to make the payment of 2,13,372/- D.M. by end of December, 1996. A true copy of the letter dated 21 June, 1996 is appended hereto as Annexure-5 to the complaint.

8. However, this commitment was also not honoured later by Mr. Gagan Srivastava or Mr. Harsh Garg.

9. That later on we came to know that by the aforesaid *modus operandi* Mr. Gagan Srivastava has also duped other manufacturers in India and it is believed that he owes Rs. 10 crores in all to the various parties. That in order to get our money back we approached the Indo-German Chamber of Commerce at New Delhi, the President of Germany, the Embassy in India and Deutsch Bundus Bank of Germany. That the Indo-German Chamber of Commerce was not able to trace Mr. Gagan Srivastava or Mr. Harsh Garg. Similarly Frankfurter Sparkasse Bank was also not able to trace Mr. Gagan Srivastava.

10. That we also came to know that Mr. Gagan Srivastava had left Germany and was residing at Poland and thereafter Russia.

11. That the aforesaid facts clearly reveal that Mr. Gagan Srivastava had induced to believe that he was a genuine person and on that belief he had sold goods to him. However, it appears that his intentions were not clear from the beginning and he has sold the goods which were received by him and he has pocketed the money into his own account knowing fully well that he has no right on the said amount. The said fact is also clear that Mr. Gagan Srivastava has induced us to send the bill of exchange for payment for the goods but the said bill of exchange was not honoured by his Bank and thus from the very beginning the intention of

Mr. Gagan Srivastava were not clear and he has cheated us to the extent of 2,13,372/- D.M. That we have come to know that Mr. Gagan Srivastava is presently at New Delhi and is residing at D-29 Saket, New Delhi Along with his wife Mrs. Renu Srivastava and Mr. Harsh Garg. Mrs. Renu Srivastava is a share holder of the company of which Mr. Gagan Srivastava is the Managing Director. Therefore, she and Mr. Harsh Garg are equally responsible for the act of Mr. Gagan Srivastava. We have also come to know that Mrs. Gagan Srivastava has an office at B-25/1 Okhla Industrial Area, Phae-II, New Delhi.

12. That due to the non payment by Avren Junge Mode GHBH of which Mr. Gagan Srivastava is the Managing Director, we are facing problems from Reserve Bank of India and we had to sell our Factory S-34, Okhla Ind. Area Phase-II, New Delhi in order to make payment to our suppliers. We, Therefore, request you to register an FIR against Mr. Gagan Srivastava, Mrs. Renu Srivastava and Mr. Harsh Garg and appropriate action against them.

Sd/.

English Rajesh Bajaj"

4. The facts, as stated in the aforementioned complaint, do suggest that on 15.11.1994 on the petitioner approaching respondent No. 5, goods worth 4,46,597.25 Deutsch Marks were agreed to be exported by respondent No. 5 against part payment of 1,15,194.00 D.M. As per the understanding, the balance amount of 3,31,403.25 D.M. was to be paid by the petitioner within fifteen days from the date of the receipt of invoice of the goods. Though the goods were received by the petitioner and were sold subsequently, the payment, as agreed, was not made. As such, in October, 1995, respondent No. 5 went to Germany. On 7.10.1995, an understanding was arrived at. Instead and in place of 3,31,403.25 D.M., the petitioner agreed to pay 2,00,000.00 D.M. by the end of May, 1996 and not to make any claim on the quality or on any other account on the said goods, for which respondent No. 5 had to send fresh documents to the petitioner's Bank. On arrival of respondent No. 5 back to India, when fresh documents for 2,13,372 D.M. were sent, the same on presentation were returned unpaid by the petitioner's banker. As such, in June, 1996 petitioner's relation Harsh Garg agreed to make the said payment of 2,13,372 D.M. by the end of December, 1996, which commitment was also not honoured. Respondent No. 5 says that by such modus operandi, the petitioner had also duped other manufacturers in India and had left Germany for Poland and thereafter to Russia. Thus according to respondent No. 5, the petitioner had induced him that he was a genuine person. On that belief alone, the goods were sent to the petitioner, who had now failed to honour his commitment.

5. The question, Therefore, arising for our consideration would be that whether the facts, as disclosed in the complaint, constitute an offence of cheating, as defined in Section 415 of the Penal Code, punishable u/s 420, IPC. Cheating has been defined in Section 415, IPC as:

"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 anything which he would not do or omit if he were not so deceived, and which act or omission causes or is like to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Illustration (g) to Section 415 says :

"(g) A intentionally deceives Z into a belief that A mean to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract."

A bare reading of definition of cheating would suggest that there are two elements thereof, namely, deception and dishonest intention to do or omit to do something. In order to bring a case within the first part of Section 415, it is essential, in the first place, that the person, who delivers the property should have been deceived before he makes the delivery; and in the second place that he should have been induced to do so fraudulently or dishonestly. Where property is fraudulently or dishonestly obtained, Section 415 would bring the said act within the ambit of cheating provided the property is so obtained by deception. Supreme Court in Hari Prasad Chamaria Vs. Bishun Kumar Surekha and Others, , upheld the decision of Patna High Court quashing the proceedings launched against Bishun Kumar Surekha by Hari Prasad Chamaria for offence u/s 420, IPC. It was held :

"We have heard Mr. Maheshwari on behalf of the appellant and are of the opinion that no case has been made out against the respondents u/s 420 Indian Penal Code. For the purpose of the present appeal, we would assume that the various allegations of fact which have been made in the complaint by the appellant are correct. Even after making that allowance, we find that the complaint does not disclose the commission of any offence on the part of the respondents u/s 420, Indian Penal Code. There is nothing in the complaint to show that the respondents had dishonest or fraudulent intention at the time the appellant parted with Rs. 35,000/-. There is also nothing to indicate that the respondents induced the appellant to pay them Rs. 35,000/- by deceiving him. It is further not the case of the appellant that a representation was made by the respondents to him at or before the time he paid the money to them and that at the time the representation was made, the respondents knew the same to be false. The fact that respondent subsequently did not abide by their commitment that they would show the appellant to be the proprietor of Drang Transport Corporation and would also render accounts to him in the month of December might create civil liability for them, but this fact would not be sufficient to fasten criminal liability

on the respondents for the offence of cheating."

6. Applying the ratio of the decision of Hari Prasad's case (supra) to the facts as stated in the complaint in the instant case, which we for the purposes of the present proceedings presume to be correct, it must be held that the complaint does not disclose commission of any offence of cheating punishable u/s 420, IPC on the part of the petitioner. There is nothing in the complaint to suggest that the petitioner had dishonest or fraudulent intention at the time the respondent exported goods worth 4,46,597.25 D.M. by 37 different invoices. There is also nothing to indicate that the petitioner by deceiving respondent No. 5 induced him to export goods worth, 4,46,597.25 D.M.

7. The fact, as disclosed in the complaint suggest that after the goods were dispatched, some dispute had been raised by the petitioner due to which the balance payment of 3,31,403.25 D.M. was not made by him. The dispute admittedly was about the quality of the goods and late delivery thereof. In order to settle the dispute, the complainant does suggest that a meeting took place in Germany. On 7.10.1995 an understanding was reached under which the petitioner agreed that he will not now make any claim on the quality or the other dispute about late delivery of goods and will make payment of 2,00,000 D.M. by the end of May, 1996, for which respondent No. 5 had to send fresh documents to the petitioner's Bank. When this commitment was not honoured as the documents, when presented, were not accepted for payment by the petitioner banker, respondent No. 5 approached Harsh Garg, who assured that payment would be forthcoming in December, 1996. Thus, it is also not suggested from the complaint that even at that stage when settlement was arrived at on 7.10.1995 at Germany, there was any dishonest intention.

8. Learned Counsel for the petitioner contended that the admitted position, as has now become apparent from the material placed on record of this case by respondent No. 5 is that w.e.f. 9.12.1996, the petitioner had applied for commencement of bankruptcy proceedings, for which notice dated 6.2.1997 (copy of which has been produced by respondent No. 5 along with his reply) was duly served by the petitioner's lawyer on respondent No. 5. Sending of such notice to respondent No. 5 suggest that the concerned Court at Germany had been apprised by the petitioner of the debt payable to respondent No. 5. Respondent No. 5 deliberately did not disclose in his complaint the fact of the commencement of such bankruptcy proceedings by the petitioner. Thus by concealment of material facts, criminal action has been set in motion, which is nothing but total abuse of the process of law.

9. We need not go into the legality, validity or motive of initiating the bankruptcy proceedings except to remark that in case respondent No. 5 had become aware of bankruptcy proceedings on receipt of the notice dated 6.2.1997, his remedy would be to approach the appropriate Court where bankruptcy proceedings are pending laying claim for the debt and not to resort to criminal proceedings. Commencement or pendency of such proceedings of bankruptcy has not been

taken as a ground by the petitioner for quashing of FIR and for that reason, we need not dilate any more on this aspect. We are concerned with the quashing of FIR on the grounds aforementioned.

10. The law is well settled that extraordinary power under Article 226 of the Constitution or the inherent powers under the Code of Criminal Procedure for quashing of criminal proceedings should be exercised sparingly and with circumspection and that too, as laid down in *State of Haryana and others Vs. Ch. Bhajan Lal and others*, , to prevent abuse of the process of any Court or otherwise to secure ends of justice. In the said decision, the Supreme Court by way of illustration categorized the following seven types of cases in which such power could be exercised saying 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 kind 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 F.I.R. do not disclose a cognizable offence, justifying an investigation by Police Officers u/s 156(1) of the Code except under an order of a Magistrate within the preview 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 F.I.R. 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 u/s 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.

11. It is equally true that the investigation into an offence is a statutory function

of the police and the superintendence thereof is vested in the State Government and the Court is not justified, as held in *M/s. Jayant Vitamins Ltd. Vs. Chaitanyakumar and another*, , without any compelling and justifiable reasons to quash the investigation mid-way.

12. If the ratio of the two cases aforementioned is applied to the facts of the instant case, taking the allegations made in the complaint and documents accompanied therewith on their face value and accepting in entirety, they do not prima facie constitute any offence against the petitioner, what to say the offence of cheating.

13. In the words of Supreme Court in *Hari Prasad Chamaria's case* (supra), the mere fact that the petitioner after having agreed to pay the balance within 15 days of the receipt of invoices and thereafter in the negotiations, which took place on 7.10.1995, failed to honour his commitments, the same would not expose him to any criminal liability, but only to civil liability. On the face of it on the basis of the allegations, as made in the complaint, it is purely a commercial transaction, which in nutshell is that the seller did not pay the balance amount of the goods received by him, as per his assurance, firstly because of certain disputes regarding quality and late delivery of goods, where after when an understanding was arrived at, under which the buyer agreed to compensate the seller without raising any dispute which commitment was also not honoured. This act would be a breach of commitment giving rise to a civil action and not a criminal one. Neither it is suggested that at the time of delivery of goods, there was any dishonest or fraudulent intention on the part of the petitioner, nor at the time when the goods were received by the petitioner that the same were done by him by inducing respondent No. 5 or by deceiving him. Failure to pay the amount by the petitioner would only give rise to a civil liability for breach of agreement. Needless to add that respondent No. 5 resorted to criminal proceedings and that also after a period of almost four years from the date of supply of goods and after a period of almost one year and three months of the date of receipt of notice from the petitioner's Counsel that the petitioner had applied for commencement of bankruptcy proceedings on 9.12.1996. Filing of such complaint in these circumstances is nothing but gross abuse of the process of law.

14. For the reasons aforementioned, the petition is allowed. The impugned FIR and all the proceedings taken there under are quashed and set aside. Observations made while disposing of this petition will not affect or prejudice the petitioner and respondent No. 5 in any other proceedings.