

(2003) 09 GUJ CK 0049
In the Gujarat High Court

Case No : Criminal Revision Application No. 85 of 2001

Lalitbhai Bhanubhai Limbasia

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 03-09-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 401
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2003) 09 GUJ CK 0049

Hon'ble Judges : D.P. Buch, J

Bench : Single Bench

Advocate : R.R. Trivedi, for the Appellant; P.B. Sheth, APP for Respondent No. 1 and R.S. Sanjanwala, for the Respondent

Final Decision : Allowed

Judgement

D.P. Buch, J.—The petitioner herein, has preferred this revision application u/s.397 read with s.401 of the Code of Criminal Procedure, 1973 (for short, "the Code") in order to challenge an order dated 16/12/2000 recorded by the learned J.M.F.C., Dakor in Criminal Case No.58/1998 under which the learned Magistrate dismissed the said application of the present petitioner, original accused, in the said criminal case, for his discharge from the offences punishable as aforesaid.

2. The second respondent herein, being the original complainant, filed a complaint before the learned J.M.F.C. at Dakor stating that the second respondent was a manufacturer of fertilizers in the name of "Nicko Agro Manufacturers" at Dakor; that, the present petitioner used to purchase fertilizers from the second respondent and used to sell it in the name of Ganesh Baya Seeds at Gondal; that, the petitioner used to purchase fertilizers on credit and used to pay for the same; that in 1996-97 similar transactions were entered into between the parties and on the settlement of accounts, it was noticed that an amount of Rs.1,03,767/- was due to the second respondent by the petitioner and therefore, the petitioner issued a cheque on 01/07/98 for the aforesaid amount.

The cheque was entrusted to the second respondent having a date of 31/08/98; that, the petitioner had given an assurance that the cheque would be encashed on due date; that accordingly, the cheque was presented to the bank on 31/08/98, but, it was dishonored on 03/09/98, on account of "insufficient balance". The second respondent contacted the petitioner who assured that the said amount would be paid within two days; that, ultimately, the amount was not paid, despite Notice u/s.138 of the Negotiable Instruments Act, 1881 (for short, "the Act"); that, therefore, the petitioner purchased the goods on credit, issued cheque for the value of goods and assured that the cheque would be honored. But, ultimately, the cheque was not honored and the amount was not paid and thereby, the petitioner committed offences of cheating and criminal misappropriation punishable u/s.406 and 420 of IPC.

3. On the strength of the aforesaid complaint, on 09/12/98, the learned Magistrate referred the said complaint to the police station, for investigation u/s.156(3) of the said Code. After investigation, the police investigating agency submitted chargesheet before the trial court. At the stage of framing of charge, the petitioner submitted an application before the trial court at Ex.3 stating that no offence was made out and therefore, no charge was required to be framed and therefore, the petitioner be discharged. After hearing, the learned Magistrate found that it was not a case for discharge and therefore, the learned Magistrate dismissed the said application of the petitioner by order dated 16/12/2000.

4. Feeling aggrieved by the said order of the trial court, the petitioner has preferred this revision application before this Court u/s.397 of the said Code. It has been contended here that there was a civil dispute between the parties; that, no offence is made out, either punishable u/s.406 or punishable u/s. 420 of IPC; that, these two offences cannot stand together; that, the trial court has committed serious illegality in not discharging the present petitioner; that, on the whole the judgement and order of the trial court are illegal and erroneous and deserve to be set aside. The petitioner has, therefore, prayed that the present revision application be allowed, the above order of the trial court be set aside and the petitioner be discharged from the aforesaid two offences.

5. On receiving the revision application, Notice was issued at the first instance and Rule was issued thereafter. In response to the service of notice of Rule, Ms.P B Sheth learned APP appeared for the State and Mr.R S Sanjanwala learned advocate appeared for respondent no.2. I have heard the learned advocates for the parties and have perused the papers. In fact, the learned advocates for the parties have taken me through the complaint and through the order of the trial court.

6. The learned advocate for the petitioner has argued that since it is a case of sale and purchase of goods on credit, there would not be a case of entrustment and therefore, the offence u/s.406 IPC cannot be said to have been made out, in absence of entrustment. It is argued that the question of criminal misappropriation would be there, only if there is entrustment. The goods sold

and purchased on credit for some value, cannot be said to have been entrusted to the purchaser by the seller.

7. In order to appreciate the said argument, we can consider the provisions made in Sections 403, 404 and 405 of IPC. On a bare look at the said provisions, it is very clear that before an offence punishable u/s.406 IPC can be said to have been committed, there has to be an entrustment of property. When there is a contract for sale and purchase of a property, it is a matter of sale against consideration and therefore, the property cannot be said to have been entrusted temporarily, for a limited purpose for a limited object. In the present case, we find that the fertilizers were sold on credit. Therefore, it cannot be said that there was entrustment of the said property by the second respondent to the petitioner. When entrustment is not there, then, offence punishable u/s.406 IPC cannot be said to have been made out.

8. Another ground is for the offence punishable u/s.420 IPC. For the purpose of appreciation of fact, we have to consider that the parties were at contract of sale and purchase of fertilizer since long. The petitioner used to purchase fertilizers on credit from the second respondent and the second respondent used to sell it to the petitioner on credit. Payments were made from time to time. However, after initial four to five transactions, the last transaction was such, wherein, the payment of consideration was not made inasmuch as the payment was tendered by cheque, which was dishonored as aforesaid and the said fact is not in dispute before this Court.

9. The question would arise as to whether mere nonpayment of a goods purchased on credit would amount to an act of cheating. It is required to be considered that for the purpose of an offence punishable u/s.420 IPC, one has to appreciate the provision made in S. 415 of IPC, which can be referred for ready reference as follows; Section 415 : "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"."

9.1 On a bare reading of S. 415 of IPC, it is very clear that before an offence of cheating can be said to have been committed, the complainant is required to prove that the accused, the second respondent herein, by deceiving the second respondent fraudulently or dishonestly, induced the second respondent to deliver the property to the complainant. This means that there must be a fact that the petitioner must have fraudulently or dishonestly induced the second respondent to deliver fertilizers. Now, here it was a question of sale and purchase of fertilizers. Agreement was that the consideration would be paid later on and therefore, as a part of consideration, a cheque was also issued which was ultimately dishonored. In the facts and circumstances of this case, it cannot be

said that at the time of initial transaction of sale and purchase of fertilizers, the petitioner had a dishonest intention to cheat the second respondent. In other words, it cannot be said that the second respondent was deceived or cheated by the petitioner fraudulently or dishonestly. In other words, inducement by dishonest or fraudulent means at the inception of the contract is required to be alleged and proved. The question of proof will not arise here, at this stage, as the evidence has not commenced. Therefore, the second respondent was required to make an allegation that an inducement was given to him by the petitioner and that the second respondent was deceived fraudulently and dishonestly by the petitioner and on account of that, he parted with the property in favor of the petitioner. These allegations are not there in the complaint, which has been culminated in the FIR on account of an order of the trial court to refer the matter for investigation u/s.156(3) of the Code. In other words, it is not the case of the second respondent that right from the inception, the petitioner had a dishonest intention to cheat the petitioner. In absence of such an allegation, no offence punishable u/s.420 IPC can be said to have been made out.

10. In support of the said contention, the learned advocate for the second respondent has relied upon a decision of the High Court of Kerala reported in a case of Shadili V/s. Uthaman reported in 1988(3) Crimes 600, wherein, it has been laid down that when post dated cheques were issued, expecting that funds would be made available on due date and if ultimately, the accused person fails to make out funds, it would be treated to be a case of cheating, but, it may result in a civil dispute.

11. In Nemchand Swaroopchand Shaha V/s. M/s.T.H.Raibhagi Firm reported in 2001 CLJ 4301 also, the cheque was issued for price of written articles in a business transaction. There was nothing to show any dishonest or fraudulent intention on the part of the accused. It was, therefore, observed that the ingredients of cheating cannot be said to have been established and the offence would attract the provision made in S. 138 of the Negotiable Instruments Act, 1881. Therefore, it was not appropriate to take cognizance of the offence u/s.190(1)(d) of the said Code, in absence of any Notice to the accused u/s.138 of the aforesaid Act. In the present case, we find that though Notice has been issued, the second respondent has not taken any action of filing complaint u/s.138 of the aforesaid Act within the limitation stipulated by the said Act. The second respondent has found it proper to file a complaint for the offences punishable u/s.406 and 420 IPC only. Anyway, the said offences have not been made out and no complaint has been filed for an offence punishable u/s.138 of the aforesaid Act.

12. In S.N.Palanitkar & Ors. V/s. State of Bihar & Anr. reported in 2001 AIR SCW 4435, it has been laid down that any intention to deceive should be in existence at the time when the inducement was made. Mere failure to keep the promise, subsequently, cannot be assumed as leading to cheating.

13. Almost similar view was adopted in Yadabula Lawrence V/s. State of Andhra

Pradesh reported in 1997 CLJ 4580.

14. A decision of the Madras High Court in the case of Venkatachalam V/s. State reported in 1998 CLJ 3189 has been relied upon. In this case, it has been observed that dishonest intention cannot be inferred from bouncing of cheques issued for existing dues.

15. The above discussion makes it clear that so far the offence punishable u/s.406 IPC is concerned, it cannot be said to have been made out, as there was no case of entrustment of any property. So far the offence punishable u/s.420 IPC is concerned, it also cannot be said to have been made out in absence of a case of inducement at the time when the contract of sale and purchase took place. Mere nonpayment is not sufficient to hold even prima facie that there is a case of cheating. Same way, bouncing of cheque will not be sufficient to infer a case of inducement. In above view of the matter, when these two offences have not been prima facie made out, then there is no reason, as to why the prosecution should proceed ahead against the petitioner. In that view of the matter, when no offence is made out, the petitioner was required to be discharged by the trial court. The trial court has not considered this aspect of the case and therefore, the order of the trial court dismissing the application of the petitioner for his discharge, has to be held to be illegal and consequently, it would be necessary for this Court to interfere with the said order, at this stage, in this revision application.

16. For the foregoing reasons, this revision application is allowed. The impugned order dated 16/12/2000 passed by the learned J.M.F.C., Dakor in Criminal Case No.58/1998 dismissing the application of the petitioner for his discharge from the said case is ordered to be set aside and the petitioner is ordered to be discharged from the offences punishable u/s.406 and 420 of IPC in the said case. Rule is made absolute accordingly.