(2001) 07 SHI CK 0018

In the High Court Of Himachal Pradesh

Case No : Criminal M.M.O. No. 49 of 2000

Mata Shanker Ram Samujh Tiwari APPELLANT

Vs

The State of H.R and Others RESPONDENT

Date of Decision : 31-07-2001

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 34, 344, 366A, 372, 376

Citation : (2001) 3 ShimLC 245

Hon'ble Judges : M.R. Verma, J

Bench : Single Bench

Advocate : Rakesh Mania, for the Appellant; P.M. Negi, Assistant A.G. for Respondent No. 1 and S.S. Chauhan, for the Respondent

Final Decision : Allowed

Judgement

M.R. Verma, J.—The Petitioner has presented this petition u/s 482 of the Code of Criminal Procedure read With Article 227 of the Constitution of India for quashing FIR No. 25 dated 20.3.1999 (wrongly mentioned as ''FIR No. 29 dated 19.3.1999'' in the petition) registered against him at police station, Parwanoo, District Solan under Sections 406, 418 and 420 of the Indian Penal Code along with the subsequent proceedings.

2. The case of the Petitioner as made out in the petition is that he is a resident of Bombay and is dealing in the business of supply of material on commission basis. M/s. Morepen Laboratories Limited (herein-after referred to as Respondent No. 2) supplied certain goods to him for sale to prospective customers who did not make the payment to him. The Company then entered into an agreement dated 8.8.1998 with the Petitioner and obtained post dated cheques as security for payment of money. It was agreed to between the parties that the said cheques would not be presented without prior instructions of the Petitioner about the receipt of payment from the customers to whom the material was supplied.

However, in violation of the terms of the agreement, Pramod Chandra, Senior Manager of the Company, lodged the aforesaid First Information Report against the Petitioner concealing the fact that a complaint u/s 138 of the Negotiable Instrument Act had already been filed by Respondent No. 2 against the Petitioner in view of which the First Information Report could not have been lodged. The reading of the First Information Report does not disclose any offence as the agreement (Annexure P-I) witnesses only a transaction which is purely of civil nature and is an admission of an existing debt and no goods were transferred to the Petitioner in lieu of the post dated cheques. Hence, no criminal liability can be attributed to the Petitioner and continuation of the proceedings on the basis of the said First Information Report is mis-use of the process of the Court. Hence, the present petition.

3.Respondent No.1 in its reply raised a preliminary objection that the Petitioner has not come to the Court with clean hands and that the number and date of First Information Report as mentioned in the petition, are not correct and that the contents of the First Information Report and the evidence disclose the commission of offence under Sections 406, 418 and 420 of the Indian Penal Code by the Petitioner. It is also claimed that the proceedings u/s 138 of the Negotiable Instrument Act being quasi criminal in nature, would not have any effect on the proceedings under Sections 406, 418 and 420 of the Indian Penal Code which are separate and independent offences. It has, thus, been maintained that the commission of the above offences for which the First Information Report has been lodged, is made out against the Petitioner and he does not deserve the relief as claimed.

4. Respondent No. 2 in its reply has also taken mostly the similar stand and has further claimed that efforts of the Petitioner to secure anticipatory bail in the Court of Sessions Judge, Solan and in this Court had failed and he is a habitual offender and had been cheating Respondent No.2 since April 1998. It is also averred that the Petitioner is a big cheat and dishonest person and tells lies. His business is to take material from innocent industries on bill basis while issuing post dated cheques to them knowing it fully well that being based at Bombay, no legal action against him can be prosecuted to some logical end at Bombay by those who carry on their business at far off places from Bombay. To substantiate its averments, Respondent No. 2 has annexed with the reply a copy of the minutes (Annexure-I), copy of undertaking/agreement (Annexure-II) and a copy of noting and protest note (Annexure-III) to show that the Petitioner had evil design to defraud the Company from the very beginning. While denying the other averments in the petition, it has been claimed that Respondent No. 2 has not acted in violation of the terms of the agreement and the First Information Report has been lodged against the Petitioner strictly within the framework of the rules. Respondent No. 2 has further claimed that the Petitioner has already caused heavy loss to the Company situated in a poor State of Himachal Pradesh and if such "Bigwigs fraudy persons continue the cheating" in view of the loop-holes then the industries already facing crisis will close down and it is not only the

management but the workers in particular and the State in general which will suffer, therefore, quashing of criminal proceedings just at the thresh-hold will not at all be appropriate and in the interest of justice.

5. I have heard the learned Counsel for the Petitioner and Respondent No.2 and the learned Assistant Advocate General for Respondent No.l and have also gone through the material placed on record.

6. The sum and substance of the allegations against the Petitioner as in the FIR. (Annexure R-l) is (i) that the Petitioner executed a deed dated 8.8.1998 acknowledging the liability to pay amount due on account of material purchased from Respondent No. 2, (ii) that in the event of his failing to do so by the stipulated time, Respondent No. 2 could institute a criminal proceeding against him, (iii) that he issued eight post dated cheques in support of the said deed, (iv) that the cheques so issued bounced, (v) that the deed and cheques "were otherwise made for forgery" and cheating Respondent No. 2, (vi) that the Petitioner failed to make the payment as agreed and did not honour the terms and conditions of the said deed which amounts to criminal breach of trust, and (vii) that the Petitioner "dis-honestly, fraudulently made false legal document, executed and signed the same with the intention to cause damage" and with a view to cause wrongful loss to it. It is on the basis of these allegations that FIR (Annexure R-l) has been registered against the Petitioner under Sections 406, 420 and 418 of the Indian Penal Code at Police Station, Parwanoo and a complaint u/s 138 of the Negotiable Instruments Act has also admittedly been filed in the concerned Court.

7. Be it stated at the very outset that as per the allegations that eight post dated cheques issued by the Petitioner to Respondent No. 2 had bounced and a complaint in this regard is already filed in the Court of competent jurisdiction, therefore, this aspect of the matter need not be commented upon being not subject matter of the present petition. The question which requires consideration by this Court is as to whether the allegations in the First Information Report constitute the commission of offences punishable under Sections 406, 420 and 418 of the Indian Penal Code which requires investigation etc.?

8. It was argued by the learned Counsel for the Petitioner that the allegations contained in the First Information Report do not constitute offences under Sections 420, 418 and 406 of the Indian Penal Code and in case the cheques issued by the Petitioner had bounced, the appropriate criminal case therefore is already pending before a Court of competent jurisdiction and the investigation by the police for the commission of the aforesaid offences is illegal, unjustified and unwarranted, therefore, the First Information Report is liable to be quashed, more so, when Respondent No. 2 while lodging the First Information Report has concealed filing of the complaint u/s 138 of the Negotiable Instruments Act. To substantiate his contention, the learned Counsel has placed reliance on G. Sagar Suri and Another Vs. State of U.P. and Others,

9. On the other hand, the learned Counsel for Respondent No. 2 had contended that the contents of the First Information Report do disclose the commission of offences under Sections 420, 418 and 406 of the Indian Penal Code and these are distinct offences from the offence u/s 138 of the Negotiable Instruments Act and as such the First Information Report has rightly been registered and investigation and further proceedings thereon are not liable to be quashed. To support his contention, the learned Counsel has relied on V.S. Krishnan and Another Vs. State of U.P. and Another, ; Nagpur Steel and Alloys Pvt. Ltd. v. P. Radhakrishna alias Rajan and Ors. 1997 SCC 1073 and State of Kerala and Others Vs. O.C. Kuttan and Others,

10. To constitute an offence of criminal breach of trust punishable u/s 406 of the Indian Penal Code, the following requisites must be satisfied:

(i) that the accused was entrusted with property or with domain over it;

(ii) that he misappropriated it or converted it to his own use or used it or disposed it of.

Thus, entrustment of property to and misappropriation thereof by the accused are indispensable requirements to constitute an offence u/s 406 of the Indian Penal Code. In the instant case, the First Information Report (Annexure R-l) and the deed (Annexure P-l) do not disclose entrustment of any property what-so-ever by Respondent No. 2 to the Petitioner nor do they reveal mis-appropriation of property by the Petitioner. Thus, the First Information Report read with the deed aforesaid, does not disclose the commission of an offence u/s 406 of the Indian Penal Code.

11. "To cheat" is the common ingredient of offences punishable under Sections 418 and 420 of the Indian Penal Code. Hence in the absence of "cheating" there cannot be an offence u/s 418 or Section 420 of the Indian Penal Code. Cheating has been defined u/s 415 of the Indian Penal Code as follows:

415. Cheating.-Whoever, by deceiving any person, fraudulently or dishonesty 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".

Explanation.-A dishonest concealment of facts is a deception within the meaning of this section.

12. In view of the above definition to constitute "cheating", exist ence of the following requisites has to be shown:

Deception of person(s)

(a) fraudulently or dishonestly inducing that person: (i) to deliver any property to any person; or

(ii) to consent that any person will retain any property; or

(b) intentionally inducing the person deceived to do or omit to do anything which he would not do or omit, if not so deceived and which act or omission causes or is likely to cause damage or harm to the person deceived in body, mind, reputation or property.

13. In the case in hand it is not in dispute that the deed Annexure P-I contains an acknowledgement of past liability and a promise to discharge such liability. Such a deed cannot be said to be a forged document as alleged in the First Information Report for the simple reason that due acknowledgement of past liabilities and promise to discharge them is a normal transaction having no element of dishonesty. There is no allegation that by executing Annexure P-I the Petitioner deceived Respondent No. 2 fraudulently or dishonestly inducing it to deliver any property to any person or to consent for retention of any property by any person. In fact, the terms and conditions of the deed do not constitute any delivery to or retention of property by any person. Further, there is no allegation that any inducement by the Petitioner led Respondent No. 2 to do or omit to do any thing which it would not have done or would not have omitted to do but for such inducement by the Petitioner. Thus, the allegations in the First Information Report Annexure R-I do not disclose commission of offences under Sections 418 and 420 of the Indian Penal Code.

14. The default clause in the deed (Annexure P-I) that in the event of failure of the payment as agreed to by the Petitioner, Respondent No.2 shall be at liberty to institute a criminal case under Sections 406, 418 and 464 of the Indian Penal Code for criminal breach of trust, cheating and forgery against the Petitioner, has no legal consequences. No act, conduct, omission or failure to do something by a person will constitute an offence(s) by virtue of a condition in the agreement to so treat such act, conduct, omission or failure but such act etc. will amount to an offence only when the requisite ingredients to constitute an offence are made out. Therefore, the First Information Report could not have been lodged and registered merely on the basis of said clause. The fact, thus, remains that Annexure P-I does not disclose the commission of offences punishable under Sections 406, 418 and 420 of the Indian Penal Code.

15. In G. Sagar Suri''s case (supra) the accused borrowed a sum of Rs. 50 lacs from the complainant and for repayment issued two cheques which on presentation to the banker were dishonoured. The accused then issued two cheques to satisfy the loan but these cheques were also dishonoured. The complainant therein then lodged First Information Report under Sections 406/420 of the Indian Penal Code and before that, had also instituted a complaint u/s 138 of the Negotiable Instruments Act without complaining about the commission of offences under Sections 406/420 of the Indian Penal Code. The accused filed an application u/s 482 of the Code of Criminal Procedure in the

Allahabad High Court which was dismissed. The accused carried the matter to the Apex Court by way of an appeal. The Hon''ble Supreme Court held that a criminal complaint u/s 138 of the Negotiable Instrument Act was pending against the Appellant and other accused and they would suffer the consequences if the offence u/s 138 of the Act was proved, but there was no occasion for the complainant to prosecute the Appellant/accused under Sections 406/420 of the Indian Penal Code and in his doing so it is clearly an abuse of the process of law and the prosecution of the Appellant/accused under Sections 406/420 of the Indian Penal Code was liable to be quashed.

16. The facts of G. Sagar Suri''s case (supra) are almost akin to the facts of this case wherein the allegations as in Annexure R-l do not disclose the commission of the offences under Sections 420, 418 and 406 of the Indian Penal Code and regarding issue of post dated cheques which were dishonoured, a complaint u/s 138 of the Negotiable Instruments Act is admittedly pending disposal. Therefore, lodging of the First Information Report under Sections 420, 418 and 406 of the Indian Penal Code in this case is a sheer misuse of the process of law.

17. In V.S. Krishna''s case (supra) a Division Bench of Allahabad High Court refused to quash the First Information Report under Sections 420, 467, 468, 471 and 504 of the Indian Penal Code wherein complaints u/s 138 of the Negotiable Instruments Act were also lodged in various Courts. The Division Bench found that the First Information Report therein disclosed the commission of the cognizable offences complained against. Thus, it was not a case wherein the First Information Report did not disclose the commission of the offences, hence the ratio of this case is not applicable to the facts and circumstances of this case.

18. In Nagpur Steels & Alloys'' case (supra) the Hon''ble Apex Court found that the complaint u/s 420 of the Indian Penal Code disclosed the commission of the offence, therefore, it was not liable to be quashed on the ground that the acts complained against were committed during the course of a commercial transaction as was done by the High Court. Thus, the ratio of this case is also not attracted in the facts and circumstances of this case.

19. In O.C. Kuttan''s case (supra) the High Court had quashed the First Information Report under Sections 366A, 372, 376 and 344 read with Section 34 of the Indian Penal Code on the basis of the conclusion that the prosecutrix was more than 16 years of age and exercised her discretion to have sex with those whom she liked or got money and she willingly submitted herself to most of them who came to her for sex. The Apex Court held that in recording such findings the High Court had exceeded its jurisdiction u/s 482 of the Code of Criminal Procedure as also in quashing the First Information Report in view of the statement of the prosecutrix. Evidently, the allegations against the accused as made disclosed the commission of offences, therefore, the order of the High Court was set aside.

20. The position which emerges from the above discussion is that a High Court in

exercise of its powers u/s 482 of the Code of Criminal Procedure will not be justified in quashing a First Information Report the contents whereof disclose the commission of any cognizable offence. However, if the facts as stated in the First Information Report do not disclose the commission of any cognizable offence, the High Court will be fully justified in quashing such First Information Report in exercise of its powers u/s 482 of the Code of Criminal Procedure to prevent the abuse of process of law.

21. It was contended for the Respondent that charge-sheet against the Petitioner has already been submitted and on being summoned, he had put in appearance before the trial Court. Therefore, the Petitioner has a right to address arguments before the trial Court for his discharge. In these circumstances, this Court need not and should not exercise its powers u/s 482 of the Code of Criminal Procedure and the question whether the Petitioner is liable to be charged for the commission of the offences punishable under Sections 420, 418 and 406 of the Indian Penal Code or deserves to be discharged, must be left to be decided by the trial Court.

22. Accepting the contention of the learned Counsel for the Respondents must necessarily mean that when consequent upon a First Information Report sought to be quashed a charge sheet is submitted to the concerned Court, the petition for quashing the First Information Report becomes infructuous or the Court ceases to have the jurisdiction to dispose it of on merits. However, in view of the ambit and scope of the inherent powers of the High Court u/s 482 of the Code of Criminal Procedure, any petition seeking exercise of such powers must be decided on its merits and mere filing of the charge sheet based on a First Information Report which is sought to be quashed, does not debar the High Court from deciding the petition u/s 482 of the Code of Criminal Procedure on its merits. Taking a view as urged for the Respondent may not only often lead to disastrous consequences perpetuating the agony of the aggrieved party but will also be contrary to the letter and spirit of law.

23. In G. Sagar Suri''s case (supra), the Hon''ble Supreme Court while dealing with almost similar contention as raised for the Respondent herein, held as under:

7. It was submitted by Mr. Lalit, learned Counsel for the second Respondent that the Appellants have already filed an application in the Court of Additional Judicial Magistrate for their discharge and that this Court should not interfere in the criminal proceedings which are at the threshold. We do not think that on filing of any application for discharge, the High Court cannot exercise its jurisdiction u/s 482 of the Code. In this connection, reference may be made to two decisions of this Court in Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, and Ashok Chaturvedi and Others Vs. Shitulh Chanchani and Another, wherein it has been specifically held that though the Magistrate trying a case has jurisdiction to discharge the accused at any stage of the trial if he considers the charge to be groundless but that does not mean that the accused cannot approach the High Court u/s 482 of the Code or Article 227 of the Constitution to

have the proceeding quashed against them when no offence has been made out against them and still why must they undergo the agony of a criminal trial.

24. In view of the above legal position, the contention for the Respondents cannot be sustained.

25. For the reasons stated here-in-above, this petition is allowed and the First Information Report No. 25 dated 20.3.1999 under Sections 406, 420 and 418 of the Indian Penal Code, registered against the Petitioner at Police Station, Parwanoo and subsequent proceedings pursuant to such First Information Report are quashed.

