(2020) 05 CAL CK 0008

In the Calcutta High Court

Case No : Criminal Revision (CRR) No. 155 Of 2016, ?CRAN 1778 Of 2018

Mini Arora & Anr. APPELLANT

Vs

State Of West Bengal RESPONDENT

Date of Decision : 19-05-2020

Acts Referred:
Indian Penal Code, 1860 — Section 34, 406, 420
Code Of Criminal Procedure, 1973 — Section 156(3), 164

Citation : (2020) 05 CAL CK 0008

Hon'ble Judges : Jay Sengupta, J

Bench : Single Bench

Advocate : Danish Haque, Sharequl Haque, Sudip Ghosh, Bitasok Banerjee, Apurba Kr. Datta

Final Decision : Disposed Of

Judgement

Jay Sengupta, J

1. This is an application challenging a proceeding including the charge-sheet filed therein under Sections 406, 420 and 34 of the Penal Code and the order issuing warrant of arrest against the accused/petitioner no 1.

2. Learned Counsel appearing on behalf of the petitioner submitted as follows. The crux of the allegations levelled in the petition of complaint on the basis of which a direction was passed under Section 156 (3) of the Code was that the opposite party no. 2 was the authorised signatory representing a company under the name and style of "Rupa & Company Limited"; the company was in the business of manufacturing and selling hosiery and readymade garments; the petitioner no. 1 was the sole proprietor of "M/s Sainath Enterprise" and her husband the petitioner no. 2 looked after the business of the company; in 2012 the petitioners and the opposite party no. 2 met and the formers convinced the latter to be hired as job contractor for stitching and packaging of hosiery and readymade garments; due to the festive season, there was huge demand in the market between March and September, 2012; the opposite party no. 2 entrusted

the petitioners with 67,264 pieces of materials which were supposed to be stitched and packaged within a stipulated time; after much persuasion the petitioner till 29.07.2013 delivered only 44,839 pieces of materials; despite several reminders till date the petitioners did not return the rest of the goods which was approximately valued as Rs. 45,49,300/-. As would be evident from the allegations, it was a purely civil dispute which was wrongly converted into a criminal proceeding only to wreck vengeance on the petitioners. A failure to keep such promise would, at the worst, amount to a civil breach of contract. Nor was Section 420 attracted in the present case. In fact, rest of the materials were seized and the complainant actually got back those goods. So far as the petitioner no. 2 was concerned, the allegation was that he mainly looked after the business. There was an inordinate delay in lodging the complaint. A substantial quantity of the goods was admittedly returned. No prima facie case was made out as would be evident from a plain reading of First Information Report and the charge-sheet. Any further continuation of the impugned proceeding would be an abuse of the process of Court. On the question of part performance of contract and the consequent insufficiency of criminality, reliance was placed on Anil Mahajan Versus Bhor Industries, (2006) 1 SCC (Cri) 746, M/s Thermax Ltd. Versus K.M. Johny, (2012) 1 C CrLR (SC) 37 and Gouri Shankar Rajgaria Versus the State of West Bengal, (2009) 1 C Cr LR (Cal) 810. On the question of whether a prima facie case was made out or not, reliance was placed on S.W. Palanitkar Versus State of Bihar, 2002 SCC (Cri) 129, Stemcor India Private Limited Versus State of West Bengal, 2010(1) CHN 397, Nanki Bhayna Versus State of West Bengal, 2014 (3) Crimes 586 (Cal). On the question of circumstances necessary for issuing a non-bailable warrant of arrest, reliance was placed on Inder Mohan Goswami Versus State of Uttaranchal, 2008 SCC (Cri) 259.

3. Learned Counsel appearing on behalf of the de facto complainant/opposite party submitted as follows. A prima facie case was indeed made out against the present petitioners. Since negotiations for return of goods or equivalent money were going on till 2013, the information could be lodged in 2014. The statements contained in paragraphs 16 and 18 of the petition of complaint clearly make out a prima facie case. Alternatively, if not Section 420, at least an offence under Section 406 of the Penal Code was clearly made out in this case. On this reliance is placed on the case of Rashmi Kumar Versus Mahesh Kumar Bhada, 1997 SCC (Cri) 415. A further investigation could reveal the true extent of the fraud. It is trite law that most of the cases of cheating or criminal breach of trust arise out of commercial transactions.

4. Learned Counsel appearing on behalf of the State relied on the case diary and submitted as follows. A prima facie case was clearly made out from the First Information Report, the charge-sheet and the accompanying documents. On the question that cases of cheating and criminal breach of trust take place mostly in respect of commercial transactions, reliance was placed on Rajesh Bajaj Versus State (NCT of Delhi), 1999 SCC (Cri) 401. Among other things, the case diary

contained statements of two employees, a production manager of the complainant company who supported the prosecution case. A witness supported the seizure of 2400 pieces of the product in question. Two employees of the complainant company, one being a production manager and the other working in quality department, had their statements recorded under Section 164 of the Code. While the latter did not say anything about selling of the rest of the goods by the accused, the former stated that he had received information over telephone about the selling of the products in question. It was, thus, alleged that instead of returning the goods in question, the accused sold off the rest of the goods in the market. As such, there were sufficient materials to proceed to the next stage. No ground was made out for quashing of the impugned proceeding.

5. I heard the submissions of the learned counsels appearing on behalf of the parties and perused the revision petition and the case diary.

6. It appears that the application for quashing has been filed in respect of a proceeding in which a First Information Report was lodged as far back as in 2014 and a charge-sheet was submitted in 2015. The crux of the prosecution case is that the de facto complainant/opposite party no. 2 hired the petitioners as job contractor for stitching and packaging hosiery and readymade garments in view of the huge demand that existed in the festive season of 2012, the accused were entrusted with 67,264/- pieces of materials on the understanding that the job was to be done within a stipulated period, but after much persuasion the accused/ petitioners delivered only 44,839/- pieces of materials and they did not deliver the rest of the goods valued approximately at Rs. 45,49,300/-. Not only were the goods not returned, but subsequently an employee of the de facto complainant also learnt that such goods were being sold in the market under the brand name of the de facto complainant. Some goods were subsequently seized.

7. It is true that there was a business relation between the accused and the de facto complainant. However, it is also true that most of the cases of cheating and criminal breach of trust emanate from such business relations or commercial transactions. On this, a reference may be made to the ratio laid down by the Hon'ble Apex Court in the case of Rajesh Bajaj (supra).

8. It is trite law that a mere failure to keep a promise may not amount to an offence of cheating. The present facts would have fallen within the ambit of this principle had the accused, after being unable to give the stitched and packaged products in time, at least would have returned the goods given to them for the job work, even beyond time. But, the accused did not do so. On the contrary, some goods could be seized at the instance of the petitioner no. 2 only after the registration of the First Information Report. Therefore, the cases relied on by the petitioner on the question of ongoing business transaction and mere failure to keep up promise would be distinguishable in the present facts.

9. Although the statements of the employees regarding information about sale of some of the rest of the goods in the market would be hearsay in nature, the

subsequent seizure of such goods would have some bearing on this issue. However, it is also true that the Investigating Agency did not do its bit in further exploring the allegations about sale of some of the products by the accused in the market.

10. A retention of goods, even if temporary, in violation of the terms agreed between the parties could amount to criminal breach of trust. In the present case, not only were that goods in question retained by the accused in violation of the terms agreed, they were not even returned to the owner/de facto complainant despite demand. A prima facie case of criminal breach of trust is thus clearly made out in this case.

11. As regards the offence of cheating, it is settled law that the intention to cheat has to exist from the very inception. In the present context, it appears that whether the accused had an intention to cheat at the very inception as regards the rest of the goods is a disputed question of fact, which cannot be decided in an application for quashing of proceeding. Besides, an offence of cheating can be charged in the alternative to a charge for criminal breach of trust, in an appropriate case.

12. In view of the above, I do not find any substantial reason to interfere with the impugned proceeding at this stage. It shall, nevertheless, be open to the petitioners to raise all the points taken up in this revision, before the Learned Trial Court at an appropriate stage.

13. However, it appears that on the very day of submission of charge-sheet, the Learned Trial Court was pleased to issue a warrant of arrest against the present petitioner no. 1. Incidentally, the petitioner no. 1 had not been arrested in connection with the case. No reason has been recorded as to why an issuance of summons could not serve the purpose of securing the attendance of the said accused. Be that as it may, in the facts and circumstances of the present case, I do not think that there was a need to issue warrant of arrest against the petitioner no. 1 on the very first day of submission of charge-sheet.

14. In view of the above discussions, although the prayer for quashing of the impugned proceeding is refused, I set aside the order issuing warrant of arrest against the present petitioner no. 1 and direct her to surrender before the Learned Trial Court within twelve weeks from this date. An extensive period is being allowed for surrender in view of the impending crisis arising out of spread of the deadly Covid-19 (corona virus). In the event the petitioner no. 1 surrenders before the Learned Trial Court within such time and prays for bail, her application for bail shall be considered in accordance with law. With these observations, I dispose of the revisional application and the connected application.

15. Since the learned Advocate of the petitioners did not respond despite attempts to reach him over telephone and did not appear today at the time of delivery of judgment, the learned Registrar General is requested to communicate

a gist of this order to the petitioners at their declared address at the earliest.

16. Urgent photostat certified copies of this judgment may be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.

