

(2003) 11 DEL CK 0144

In the Delhi High Court

Case No : Criminal M (M) 2194 of 2003

Mr. Lambert Kroger and Others

APPELLANT

Vs

NCT of Delhi and Another

RESPONDENT

Date of Decision : 03-11-2003

Acts Referred:

Penal Code, 1860 (IPC) — Section 409, 420

Prize Chits and Money Circulation Schemes Banning Act, 1978 — Section 2, 3

Citation : (2003) 8 AD 328 : (2004) CriLJ 992 : (2003) 108 DLT 150 : (2004) 72 DRJ 103 : (2003) 3 JCC 1852

Hon'ble Judges : Jiwan Dass Kapoor, J

Bench : Single Bench

Advocate : V.K. Malik, Kapil Sibbal, Hauzefa Ahmedi, Ejaz Maqbool, Minakshi Nag and Nakul Dewan, for the Appellant; Rajiv Bansal, for the Respondent

Final Decision : Allowed

Judgement

J.D. Kapoor, J.—It is an unfortunate case. Petitioners who are German National came to this country to do business but instead landed themselves in jail for having flouted the Indian Law against "Money Circulation Scheme" and Prize Chits? for attracting innocent people into pumping money with them in a Scheme floated by them showing greed of a Canadian Golden Coin known as "Maple Leaf"

2. Short question involved for determination in this petition is whether terms of the agreement for contract of sale fall within the mischief of "Money Circulation Scheme" as contemplated by Section 2(c) of the Price Chits and Money Circulation Scheme (Banning) Act, 1978 or falls within the ambit of "Price Chit" as envisaged in clause (e) of Section 2 of the Act.

3. According to the petitioner, he was engaged in the business of sale and distribution of Canadian Gold Coins which are referred as "Maple Leaves". This agreement was thrown open to the persons who were desirous of entering into agreement for sale of gold coins in accordance with the terms of marketing plan of the seller. The relevant terms of the agreement for contract of sale are as

under:-

"And whereas the Seller and the Purchaser have agreed to enter into this Agreement for a minimum of four (4) contracts of sale of gold coins amounting to Rs. 49, 300/- each.

Now it is agreed by and between the parties hereto as follows :-

1. Parties conclude -----(minimum 4) contracts of sale whereby the purchaser each time purchases gold coins amounting to Rs. 49,300/- each.

2. The purchaser makes a down payment of Rs. 15, 000/- towards each contract of sale amounting to a total of Rs. ----- . The balance of the purchase price is deemed to have been paid by the purchaser the moment 14(fourteen) contracts of sale have linked up with the contract of sale in question, as fully described in detail in the "Marketing Plan" of the seller, Phase 1, Which is Schedule 1 to this Agreement.

3. The seller grants the purchaser a right of option to convert, after the purchase price of a contract of sale referred to in article 1 has been fully paid, the relevant contract of sale, in conformity with the provisions set forth in the "Marketing Plan" into Phase II and Phase III of the "Marketing Plan." This option is subject to the following terms which are detailed in the Marketing Plan. A part of the gold to be paid out in Phase I, will be deducted and laid down as a down payment on the purchase price of gold in Phase II and respectively Phase III, in Phase II, the down payment amount to Rs. 37, 500/- on a purchase price of Rs. 1, 04, 500/- and in Phase III, the down payment amounts to Rs. 75, 000/- on a purchase price of Rs. 2, 35, 000/-. Exercising the right of option will be effected via an unilateral declaration from the purchaser to the seller. The balance remaining of the purchase price in Phase II and Phase III will be deemed to have been paid the moment (6) contracts of sale have been linked up with the relevant contract of sale, this is described in more detail in the "Marketing Plan" of the seller.

4. The Purchaser declares that he will not, will make the use of the option as referred to in article 3, to also continue his contract in Phase II and III of the Marketing Plan.

5. The Purchaser declares that he has read and understood the terms and conditions which are above and on the reverse of this Agreement. In WITNESS WHEREOF the parties have put their hands the day and year first hereinabove written.

Applied for in (Town) ----- (date)----- Purchaser Signature of purchaser
Signed, accepted, delivered and drawn up in triplicate (Town) ---- (date) -----
Seller Maple Leaf Trading International Pvt. Ltd.

The Agreement has a transitional period whereby the Purchaser can cancel this Agreement within eight days of the Agreement being accepted by Maple Leaf Trading International Pvt. Ltd. Cancellation shall be effected by the way of a

registered letter. It is best for the Purchaser to dispatch the signed letter within six days to the above mentioned address so that it arrives within the appointed time.

Dear Sir/Madam,

I herewith use the transitional period for cancellation and dissolution of the aforementioned Agreement.

(Town)----- (date)----- signature-----

4. According to the prosecution, the aforesaid terms of contract had the following nuances for the purpose of offence under the Price Chits and Money Circulation Scheme (Banning) Act, 1978 as well as of the offence u/s 409, that is criminal misappropriation and 420 that is cheating of Indian Penal Code.

(i) That the petitioners made personal gain out of the investments raised from the general public by virtue of marketing plan of phase 1, phase 2 and phase 3.

(ii) The schemes floated by the accused persons amount to circulating the existing wealth as the investment made by the investors is shared by the originators of the scheme in the form of coalition.

(iii) Every rupee that an investor gains by such a scheme is for a rupee some other investor has lost. Money is made by the company by expanding enrolments who will continue to operate only if it is liable to enroll new replacements of the users who are cycled out.

(iv) That the sole purpose of the scheme is attempting and roping in innocent persons in the scheme by publishing, inducing advertisements. The malafides and motives of the accused persons are borne from the fact that there is no security to the investments made by the innocent public and unless the replacements are made and further members are made, the circulation as proposed would get stalled and the money so accumulated would have already got circulated amongst the promoters and the persons in-charge of the company/directors.

5. It is contended by the learned APP Mr. V.K.Malik that besides provisions of "Prize Chit? and "Money Circulation Scheme", the offences of cheating and criminal misappropriation are also made out as innocent public has been duped and and an amount running into crores of rupees have been seized and that cannot be allowed to be released or defreeze as the said amount belongs to the innocent public and is required to be refunded to them.

6. On the contrary, Mr. Kapil Sibal, learned Senior counsel appearing for the petitioners has refuted these contentions by advancing the plea that terms of the contract do not fall within the definition of "Money Circulation Scheme? as envisaged by Section 2(c) of the Act as "Money Circulation Scheme" involves the promise to pay money on the event of contingency related to the enrolments of members into the scheme. It is contended that since the nature of contract is a

contract entered into between the individual members, rights accrue to only those members who have entered into the contract and not to others. Further, the agreement for contract for sale does not postulate any scheme of membership nor does it postulate any contingency for demand of money based upon membership.

7. In support of his contention, Mr. Sibal has placed reliance upon *State of West Bengal and Others Vs. Swapan Kumar Guha and Others*, wherein concept of "Money Circulation Scheme" was dealt with as under:-

"Two conditions must, Therefore, be satisfied before person can be held guilty of an offence u/s 4 read with Sections 3 and 2(c) of the Act. In the first place, it must be proved that he is promoting or conducting a scheme for the making of quick or easy money and secondly, the chance or opportunity of making quick or easy money must be shown to depend upon an event or contingency relative or applicable to scheme. The legislative draftsman could have thoughtfully foreseen and avoided all reasonable controversy over the meaning of the expression "money circulation scheme" by shaping its definition in this form.

8. In Sanchaita's case the following FIR was lodged.

"To,

The Deputy Superintendent of Police,

Bureau of Investigation,

10, Madan Street,

Calcutta-72

Sir,

On a secret information that "Sanchaita Investments" of 5-6 Fancy Lane, Calcutta, is carrying on business of promoting and/or conducting prize chit and/or money circulation scheme enrolling members of such chit and/or scheme, participating in those, and/or receiving and remitting monies in pursuance of such chits and/or scheme in violation of the provisions of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978, inquiry was held secretly to verify correctness or otherwise of the aforesaid secret information. Enquiry reveals that the said Sanchaita Investments" is a partnership firm, partners being Shri Bihari Prasad Murarka, Shri Sambhu Mukherjee and Shri Swapan Kumar Guha and that it was floated in or around 1975. Enquiry further reveals that the said firm had been offering fabulous interest @ 48% per annum to its members until very recently. The rate of interest has of late been reduced to 36% per annum. Such high rates of interest were and are being paid even though the loan certificate receipts show the rate of interest to be 12% only. Thus, the amount in excess of 12% so paid clearly shows that the "Money Circulation Scheme" is being promoted and conducted for the making of quick and/or easy money. Prizes and/or gifts in cash were and are also awarded to

agents, promoters and members too.

In view of the above, Sarvashri Bihari Prasad Murarka, Sambhu Mukherjee and Swapan Kumar Guha appear to have been carrying on business in the trade name of "Sanchaita Investments" in prize chits and money circulation scheme in violation of Section 3 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 and are Therefore, punishable u/s 4 of the said Act. Necessary action may Therefore, be kindly taken against the aforesaid offenders along with other accomplices as provided in the law.

Yours faithfully,

sd/-

Commercial Tax Officers,
Bureau of Investigation."

9. The question for determination was whether the FIR lodged by the Income Tax Officer against the firm and its partners discloses an offence u/s 53 of the Price Chits and Money Circulation Schemes Act or not. The following answer was provided by the Supreme Court:-

"Therefore, a transaction under which, one party deposits with the other or lends to that other a sum of money on promise of being paid interest at a rate higher than the agreed rate of interest cannot, without money, be a "money circulation scheme" within the meaning of Section 2(c) of the Act, howsoever high the promised rate of interest may be in comparison with the agreed rate. What that section requires is that such reciprocal promises, express or implied, must depend for their performance on the happening of an event or contingency relative or applicable to the enrolment of members into the scheme.

In the first place, the FIR does not allege, directly or indirectly, that the firm was promoting or conducting a scheme for the making of quick or easy money, dependent on any event or contingency relative or applicable to the enrolment of members into the scheme. Secondly, the FIR does not contain any allegation whatsoever that persons who advanced or deposited their monies with the firm were participants of a scheme for the making of quick or easy money, dependent upon any such event or contingency."

10. According to Mr. Sibal none of the aforesaid requirements exist in the instant contract namely neither there is a draw of lots nor is there any prize or gift in cash or kind or any liability of the recipient of the gift to make further payment into the scheme and there are several safeguards built into the business itself and guaranteed by the written agreement. Some of these are:-

"SAFEGUARD NO. 1

Prospective customers are invited by existing customers to a business presentation where the complete business is explained in great detail. At this

time, customers have the option to express their intention to purchase gold coins from the Company. However, no Agreement is concluded, nor advance payment accepted by the Company on that date. The earliest that a prospective customer can decide to conclude the Agreement is 2 days after his expression of intent, when he attends a Business Training, where once again, all aspects of the business are explained to him. Many customers have decided to conclude their Agreements several weeks after they attended the presentation.

SAFEGUARD NO. 2

After entering into the Agreement, the customer is given 8 days time to reconsider his decision, if he so desires, by consulting with others, getting questions answered etc., and in case he decides to discontinue, he can withdraw from the business and get a full refund. More than 170 customers have withdrawn within the time period and received full refunds of the advances paid by them which amount to more than Rs. 1.00 crore. A list of such prior customers, along with representative examples is attached as Annexure-1.

As and when the customer is able to earn commissions of the value of the balance 70% of the agreed amount, which by necessity, involves a lot of time and labour, his contract is fulfilled and gold coins of the contracted amount are then delivered to him. The company has delivered gold coins of the value of more than Rs. 6.00 crores against fulfilled contracts. Details of gold coin deliveries are attached as Annexure 2. The Company has deposited the resultant sales tax with the sale tax department. Proof of sales tax deposited is attached as Annexure 3.

SAFEGUARD NO. 3

In case any customer is not interested in continuing with the business for any reason whatsoever, the Company helps these customers in selling/transferring their contract to any other person. There are almost a hundred documented cases where this has been done. A comprehensive list, along with representative examples is attached as Annexure 4.

SAFEGUARD NO. 4

Finally in case a customer is not successful in his efforts to sell gold coins for the company, and consequently, is not able to earn commissions to fulfill his contract, he has the last option to pay the balance amount by cheque or bank draft, and take delivery of his gold coins, as per clause 15 of the Agreement.

Hence under no circumstances does the customer stand to lose his advance. The Agreements do not have any provision for the forfeiture of the advance payment, and nor is there any provision for return of the advance amount. Finally, there is no dependence on any contingency or chance, and there is no offer of any gift or prize.

The advance payments are just that --- advances for the purchase of products.

They are not an investment. The Company does not have any "members" and has not undertaken any responsibility for generating returns on advances received by it. There is no element of any speculation or risk, and customers' earnings depend only on their sales performance."

11. On the contrary learned APP has relied upon the following two judgments to bring the agreement for contact of sale within the mischief of money circulation scheme---

(i) Sirhind Traders(Registered) Head Office Sirhind v. State of Punjab 1984(1) RCR 64. In this case the brief facts according to the first information were as under:-

"that one Hari Singh, after reading an advertisement about Janta Scheme, went to the office of the Firm. There Bhagat Singh and his employee Sarwan Singh were present and were selling tickets of Rs. 40/each. Hari Singh purchased a ticket from Sarwan Singh bearing No. 3367. Sarwan Singh said at that time that after expiry of 90 days articles worth Rs. 120/- would be given to him. Hari Singh further expressed his apprehension that the aforesaid two persons were giving false hopes by inviting persons and he Along with others would be deceived and those persons would run away."

12. The High Court took the following view:-

"Though the First Information Report is cryptic and appears to have been drawn up in a hurry but I am of the opinion that the conditions laid down by their Lordships of the Supreme Court are satisfied in the present case. For making quick or easy money, the Firm is enrolling members and for the receipt of money received from the members it is offering more money or valuable thing as the consideration on the happening of an event i.e. the expiry of the fixed period. Thus borrowing the words of their Lordships of the Supreme Court used in the above case it is clear that the Firm is carefully arranging a systematic programme of action between two or more persons under which the subscriber agrees to advance or lend money on promise of being paid more money on the happening of an event (i.e. the expiry of 3 months) applicable to the enrollment of the members into the programme and reciprocally the Firm which is conducting the programme, promise on receipt of an advance or loan to pay more money on the happening of the above event."

(ii) Srinivasa Enterprises, Represented by the Managing Partner, Peddi Venkateswarlu and Others Vs. Union of India (UOI), Represented by Ministry of Law, Justice and Company Affairs and Others, wherein the allegations were that prize chits are used for wasteful spending and hoarding commodities and that these schemes enable certain persons to convert tax-evaded income into accounted money. The persons concerned pay a premium to the promoters in return for the facility. It was also stated that there are a number of agents who go about contacting persons who are likely to face the problem of moving their income from the tax authorities. The prize chit pass books issued to them under

different names become their passports for traveling from black money territory to the white money area, the easiest and surest way of using ill gotten wealth. Besides, by their misleading names and companies the "Prize Chit Companies" divert private savings into their personal drains, thus disrupting the national economy.

13. This was a case of prize chits. High Court took the following view:-

"It cannot be said that Prize Chits and Money Circulating Schemes (Banning) Act is in pith and sub stance one against Lotteries. It deals with a special species of contracts with sinister features, although one such feature is the award of prizes to subscribers. While motives cannot validate or invalidate a legislation the core of the subject-matter must govern competency. So viewed it can be accepted that Parliament wanted to restrict and prohibit certain types of contracts because of the noxious element of gambling and lottery implicit therein and apt to entice the credulous and uncautious. The incidental impact on the lotteries does not affect the virus of the Act."

14. As is apparent from the cases cited by the learned APP difference of facts sticks out for miles. The terms of the agreement for contract of sale do not fall either under the "money circulation" scheme or "prize chits" as none of the essential ingredients of the money circulation scheme as envisaged in the Act are available in respect of any of the terms culled out above.

15. To bring the mischief in the ambit of Sections 3 & 4 of the Act i.e. "Money Circulation Scheme? it must be proved that the accused is promoting or conducting a scheme for the making of quick or easy money;

16. To bring scheme or an act within the meaning of "Prize Chits" the following conditions as contemplated u/s 2(c) are required to be fulfilled:-

(i) there must be a draw of lot

(ii) periodic watching of prizes to a specified number of subscribers by draw of lot or any other manner

(iii) these prizes should be either in gift, in cash or in kind

(iv) that the recipient of the gift is in the liability for further payment in respect of the scheme.

17. Dispute does not postulate circulation of any money nor does it involve any element of money nor such an allegation is made in the charge sheet. The agreement does not involve the element of chance or speculation as the members are fixed in the contract itself. So is the commission fixed and dependent upon the marketing plan. The exact terms of the contract are known to the parties at the time of entering into agreement and question of duping or inducing anybody into the scheme for the purpose of making quick or easy money or receipt of any money as the consideration for promise to pay money on any event of contingency relative or applicable to the enrolment of the

members of the scheme does not arise.

18. It is matter of record that as per scheme the coins worth Rs. 6 crore were given to the purchasers who entered into the agreement for sale with the petitioners though the allegation of the prosecution is that the petitioners had collected Rs. 26 crores or so. Be that as it may a scheme floated by the petitioners was such which did not fall within the mischief of "money circulation scheme" or the prize chits.

19. Safeguards built in the business as referred above further fortify the fact that the scheme does not fall within either "money circulation scheme" or "prize chits".

20. So far as the offences u/s 409/420 IPC are concerned the ingredients of both the offences are utterly wanting as Section 409 contemplates the entrustment of the property with any dominion over property and dishonest misappropriation and conversion of the property to one's own use or disposing the said property in violation of any provision of law. Section 420 also involves an act of deceiving any person fraudulently or dishonestly so as to induce him to deliver any property to any person or to make, alter or destroy the whole or any part of a valuable security or anything which is signed or sealed and which is capable of being converted into a valuable security shall be punished with imprisonment of either description for a term which may extend to seven years.

21. However the obligation on the part of the petitioners in not refunding the amount within eight days is required to be discharged by the petitioner. To project the bonafide and the absence of oblique motives in floating the scheme the petitioners have given the undertaking that they would even refund the money to those who are not able to either perform phase-I of the marketing plan or phase-II or phase-III of the marketing plan, if any of them so desires and formally writes to the company.

22. In order to be fair to the petitioners as well as investors a letter of this intention shall be sent to all such subscribers besides being published at least in five Daily National Newspapers. The payment of the money to the said purchasers who entered into the agreement for sale shall be made through the frozen account as the amount which was frozen was towards the bank account in which the money received from the purchasers was deposited. However at the first instance the petitioners shall make written request for making the refunds from the frozen account. The modus operandi of such payment will be as under:-

" Whosoever responds to the letters sent through registered post/AD and to the advertisement to be published in at least five national dailies information of such person shall be given to the Government Agency and cuts and cheques in the amount shall be given by the company and handed over to the subscriber and the money shall be released pursuant to the cheques to the customers".

23. In the result the petition is allowed. The impugned order framing the charges for the aforesaid offences is set aside with aforesaid directions.