(2019) 08 CAL CK 0307

In the Calcutta High Court

Case No : CRAN No. 3778 Of 2018 In Criminal Revision (CRR) No. 1564 Of 2015

M/s. MM Carbon Products (Pvt.) Ltd. & Ors APPELLANT

Vs

State Of West Bengal & Anr RESPONDENT

Date of Decision : 30-08-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 200, 202, 483
Indian Penal Code, 1860 — Section 34, 120B, 406, 420, 465, 467, 468, 471

Citation : (2019) 08 CAL CK 0307

Hon'ble Judges : Tirthankar Ghosh, J

Bench : Single Bench

Advocate : Sourav Chatterjee, Asit Kumar Hazra, Mrinal Kanti Maity, Subhasree Patel, Abhishek Halder

Final Decision : Allowed/Disposed Of

Judgement

Tirthankar Ghosh, J

The revisional application has been preferred at the instance of the petitioners challenging the proceeding being Case No. C/422382 of 2014 under Sections 420/406/120B of the Indian Penal Code (IPC) pending before the Ld.

Chief Metropolitan Magistrate, Kolkata and the issuance of non-bailable warrant of arrest in connection with the said case. The case of the complainant as made out in the petition of complaint is reflected in Paragraphs 6 to 9, which are as follows:-

"6. That complainant company in good faith, from time to time, continued to provide to the accused person, different amounts of money which were duly received and acknowledged by accused person to the tune of a sum of Rs. 3, 35, 00, 000/- (Rupees Three Crores Thirty Five lakhs Only), as an advance for the purpose of procurement of the requisite proportion of the ordered material i.e. Calcined Petroleum Coke from Numaligarh Refineries and then supply to complainant company in between 18.12.2009 to 30.04.2010.

7. That thereafter on 02.11.2011 the accused person have been supplied Calcined Petroleum Coke for a value of Rs. 2, 35, 88, 241/- (Rupees Two Crores Thirty Five Lakhs Eighty Eight Thousand Two Hundred And Forty One Only) to the complainant company and also refunded a sum of Rs. 88, 50, 000/- (Rupees Eighty Eight Lakhs Fifty Thousand Only), then thereafter a sum of Rs. 10, 61, 759/- (Rupees Ten Lakhs Sixty One Thousand Seven Hundred And Fifty Nine) only, remained due.

8. That thereafter complainant company sent repeated emails, reminder letters, letter dated 11.11.2011 and also made numerous verbal requests to the accused person and but in spite of all those efforts they did not pay any hid to repay those due of Rs. 10,61,759/- to the complainant company. Instead of returning the said amount of money, held in trust by the accused persons, by or about the month of June in the year 2012, the accused persons again requested to the complainant company to give further financial support, with a promise, that they would definitely return back the entire amount of money, as soon as possible.

9. That finding no other alternative the complainant company sent a notice dated 08.12.2014 to the accused persons through Advocate drawing upon the personal attention of the accused no. 1 to 5, narrating all the facts and circumstances and therein demanding immediate payment of Rs. 10. 61, 759/- (Rupees Ten Lakhs Sixty One Thousand Seven Hundred And Fifty Nine Only) within not more than 7 days from the date of receipt of the said demand notice or else the complainant company shall be constrained to take appropriate legal actions. The said notices were sent through Speed Post with A/D on 08.12.2014 and were delivered at the correct and proper address to the accused persons. Even after due receipt of the said notice the accused persons inspite of received of the said demand notice accused person did not pay any amount to the complainant company."

Mr. Sourav Chatterjee, Ld. Advocate appearing for the petitioners submit that it is an admitted position from the petition of complaint that there were continuous transactions between the complainant company and the accused company. It is also an admitted position that out of Rs. 3, 35, 00, 000/- (Rupees three crores thirty five lakhs only), only Rs. 10, 61, 759/- (Rupees ten lakhs sixty one thousand seven hundred and fifty nine only) were due for payment.

According to him, if the allegations made in the petition of complaint are accepted to be true in its entirety, the same fails to make out any case under the provisions of Sections 420, 406 and 120B of the IPC. The Ld. Magistrate without applying his mind to the allegations made in the complaint erroneously took cognizance of the offence and subsequently issued process against the petitioners who have been arraigned as accused in this case. It was his further argument that as the petitioners were of Guahati, Assam, the Ld. Magistrate ought to have abided by the provisions of Section 202 of the CrPC. In support of his contention he relied upon the following judgments:-

? 2005 (10) SCC 228 : Anil Mahajan vs. Bhor Industries Ltd. & Anr.

? 2005 (101) SCC 261 : Hotline Teletubes and Components Ltd & Ors. vs. State of Bihar & Anr.

? 2005 (10) SCC 336 : Uma Shankar Gopalika vs. State of Bihar & Anr.

? 2005 (13) SCC 699 : Murari Lal Gupta vs. Gopi Singh

? 2007 (7) SCC 373 : Veer Prakash Sharma vs. Anil Kumar Agarwal & Anr.

? 2009 (3) SCC 78 : V.Y. Jose & Anr. vs. State of Gujarat & Anr.

? 2009 (14) SCC 696 : Dalip Kaur & Ors. vs. Jagnar Singh& Anr.

? 2018 (13) SCC 374 : Medmeme, LLC & Ors. vs. Ihorse Bpo Solutions Pvt. Ltd.

? 2018 SCC OnLIne 1741 : S.S. Binu vs. State of West Bengal & Anr.

? AIR 1968 SC 700 : State of Gujarat vs. Jaswantlal Nathalal.

Mrs. Subhasree Patel, Ld. Advocate appearing on behalf of the complainant/ opposite party No.2 opposes the contentions of the petitioners and submits that once Ld. Magistrate was satisfied with the allegations made in the petition of complaint as also the initial deposition under Section 200 of the CrPC, then only the Ld. Magistrate decided to issue process against the accused persons. She also submitted that as there were disputes raised regarding the transactions taking place between the complainant and the accused/petitioners, there was no scope for conducting further enquiry under the provisions of Section 202 of the CrPC, in support of her case, she relied upon the following judgments:-

? (2000) 3 SCC 269 : Medchl Chemicals & Pharma (P) Ltd. Vs. Biological E. Ltd. & Anr.

? 2019 SCC OnLine SC 182 : Sau. Kamal Shivaji Pokarnekar vs. State of Maharashtra & Ors.

I have perused the allegations advanced by the complainant/opposite party No.2 in the petition of complaint, wherefrom it is evident that the complainant company from time to time advanced money to the accused company for procurement of calcined petroleum coke (hereinafter referred to as coke) from Numaligarh Refineries and the accused company supplied the same to the complainant company. It is further contended that out of the total sum advanced a major portion of the amount was adjusted towards the coke supplied.

A substantial sum was refunded to the complainant company by the accused persons and a sum of Rs. 10, 61, 759/- remained due. The grievance as reflected from the petition of complaint is with respect to the non- refund of this amount which inspite of being demanded was not paid by the accused/petitioners.

In Anil Mahajan vs. Bhor Industries Ltd. reported in 2005 (10) SCC 228, it has been held as follows:-

"..... The allegations are that after making this payment, the accused did not make further payment despite repeated demands and started giving reasons such as cash -flow problems, non-receipt of right type of colour assortment and sales tax problems, etc., besides raising disputes in respect of the material purchased six years back being defective. After making the aforesaid averments in the complaint, it is concluded that the MOU was signed with mala fide and criminal intention of grabbing money and goods from the complainant's Company.

The substance of the complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence. Except mention of the words "deceive" and "cheat" in the complaint filed before the Magistrate and "cheating" in the complaint filed before the police, there is no averment about the deceit, cheating of fraudulent intention of the accused at the time of entering into MOU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay. According to the complainant, a sum of Rs. 3,05,39,086 out of the total amount of Rs. 3,38,62,860 was paid leaving balance of Rs. 33,23,774. We need not go into the question of the difference of the amounts mentioned in the complaint which is much more than what is mentioned in the notice and also the defence of the accused and the stand taken in reply to notice because the complainant's own case is that over rupees three cores was paid and for balance, the accused was giving reasons as above-noticed. The additional reason for not going into these aspects is that a civil suit is pending inter se the parties for the amounts in question."

In Hotline Teletubes and Components Ltd. vs. State of Bihar reported in 2005 (10) SCC 261, it has been held as follows:-

"This appeal by special leave has been filed by the appellants against the order passed by the Patna High Court, refusing to quash their prosecution under Sections 406 and 420 of the Indian Penal Code (for short "IPC"). In the complaint petition, it has been alleged that the complainant supplied goods to the accused persons, but they failed to pay the price therefor. There is no whisper in the complaint that at the very inception of the contract between the parties, there was any intention to cheat. It appears from a bare perusal of the complaint that it is a case of purely civil liability and no criminal offence is disclosed, much less offences either under Section 406 or 420 IPC. So far as the High Court is concerned, it has not considered this aspect of the matter, but has refused to quash the prosecution observing that it was a fit case where parties should take steps for settlement. In our view, allowing such prosecution to continue would amount to an abuse of the process of court and to prevent the same, it would be just and expedient to quash the same."

In Uma Shankar Gopalika vs. State of Bihar reported in 2005 (10) SCC 336, it has been held as follows:-

"...... It is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating."

In Murari Lal Gupta vs. Gopi Singh reported in 2005 (13) SCC 699, it has been observed as follows:-

"..... Even if all the averments made in the complaint are taken to be correct, yet the case for prosecution under Section 420 or Section 406 of the Penal Code is not made out. The complaint does not make any averment so as to infer any fraudulent or dishonest inducement having been made by the petitioner pursuant to which the respondent parted with the money. It is not the case of the respondent that the petitioner does not have the property or that the petitioner was not competent to enter into an agreement to sell or could not have transferred titled in the property to the respondent. Merely because an agreement to sell was entered into which agreement the petitioner failed to honour, it cannot be said that the petitioner has cheated the respondent. No case for prosecution under Section 420 or Section 406 IPC is made out even prima facie."

In Vir Prakash Sharma vs. Anil Kumar Agarwal reported in 2007 (7) SCC 373, it has been held as follows:-

"...... Non-payment or underpayment of the price of the goods by itself does not amount to commission of an offence of cheating or criminal breach of trust."

In V.Y. Jose vs. State of Gujarat reported in 2009 (3) SCC 78, it has been held as follows:-

"...... For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Penal Code can be said to have been made out.

A matter which essentially involves disputes of a civil nature should not be allowed to be the subject-matter of a criminal offence, the latter being not a short cut of executing a decree which is non-existent. The superior courts, with a view to maintain purity in the administration of justice, should not allow abuse of the process of court. It has a duty in terms of Section 483 of the Code of Criminal Procedure to supervise the functionings of the trial courts."

In Medchl Chemicals & Pharma (P) Ltd. vs. Biological E. Ltd. & Anr. reported in 2000 (3) SCC 269, it has been held as follows:-

"The ingredients of the offences under Sections 415, 418 and 420 cannot be said to be totally absent on the basis of the allegations in the complaint. We, however, hasten to add that whether or not the allegations in the complaint are otherwise correct has to be decided on the basis of the evidence to be led at the trial in the complaint case but simply because of the fact that there is a remedy provided for breach of contract, that does not by itself clothe the Court to come to a conclusion that civil remedy is the only remedy available to the appellant herein. Both criminal law and civil law remedy can be pursued in diverse situations. As a matter of fact they

"are not mutually exclusive but clearly co-extensive and essentially differ in their content and consequence. The object of criminal law is to punish an offender who commits an offence against a person, property or the State for which the accused, on proof of the offence, is deprived of his liberty and in some cases even his life. This does not, however, affect civil remedies at all for suing the wrongdoer in cases like arson, accidents etc. It is anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred. The two types of actions are quite different in content, scope and import."

In Sau. Kamal Shivaji Pokarnekar vs. State of Maharashtra & Ors. reported in 2019 SCC OnLine SC 182, it has been held as follows:-

"The only point that arises for our consideration in this case is whether the High Court was right in setting aside the order by which process was issued. It is settled law that the Magistrate, at the stage of taking cognizance and summoning, is required to apply his judicial mind only with a view to taking cognizance of the offence, or in other words, to find out whether a prima facie case has been made out for summoning the accused persons. The learned Magistrate is not required to evaluate the merits of the material or evidence in support of the complaint, because the Magistrate must not undertake the exercise to find out whether the materials would lead to a conviction or not.

Quashing the criminal proceedings is called for only in a case where the complaint does not disclose any offence, or is frivolous, vexatious, or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same. It is not necessary that a meticulous analysis of the case should be done before the Trial to find out whether the case would end in conviction or acquittal. If it appears on a reading of the complaint and consideration of the allegations therein, in the light of the statement made on oath that the ingredients of the offence are disclosed, there would be no justification for the High Court to interfere."

On an analysis of the judgments referred to above, it would be transparent that in order to make out a prima facie case, the ingredients of the offence must be spelt out in the complaint. In the case at hand, the complainant in the complaint stated that the transactions have been taking place continuously for a considerable period of time, a major sum of the money advanced, was either adjusted by way of supplying of coke or by being refunded, the grievance of the complainant is in respect of very small quantum of money being not refunded.

As has been settled by the Hon'ble Apex Court that mere non-payment would not give rise to an offence of cheating or criminal breach of trust and in this case, it is seen that there was no occasion for the complainant to be allured by any mis-representation or by conduct, it can be said by any stretch of imagination that the accused from the very inception did have any intention to either supply the goods or refund the amount, which was in excess. The complainant has also failed to distinguish between mere breach of contract and offence of cheating or criminal breach of trust. The judgments, relied upon by the Ld. Advocate for the opposite party No.2, do not support her case, as in Medchl Chemicals & Pharma (P) Ltd. (supra), the Hon'ble Apex Court was dealing with a case where there were false representations made by the accused which resulted in financial losses and thereby wrongful loss incurred to the complainant.

In Sau. Kamal Shivaji Pokarnekar (supra) relied upon by the Ld. Advocate for the respondent, the Hon'ble Apex Court was dealing with a case where the accused were said to have forged and prepared false documents, on the basis of which a development agreement came into existance and as such there were allegations under Sections 420/465/467/468/471 and Section 34 of the IPC. The said two cases are distinguishable in facts and while deciding those cases the Hon'ble Apex Court has categorically held that if a complaint do not disclose any offence or it is frivolous, vexatious oppressive and the allegations set out in the complaint do not construe an offence of which the Magistrate has taken cognizance it is open for the High Court to quash the same.

Having taken into account, the allegations made in the petition of complaint and the settled principles of law as referred to above in the series of judgments of the Hon'ble Apex Court, I hold:

(a) that the complainant/opposite party has failed to make out a case for the accused persons from the very inception and had any fraudulent or dishonest intention to deceive;

(b) that there were any mis-representations which allured the complainant to part with its money;

(c) mere non-payment cannot give rise to a criminal offence until and unless the complainant prima facie makes out a case that the accused from the very inception did not have any intention to repay;

(d) the mere use of the words 'deceive', 'mala fide intention', 'wrongful gain', 'wrongful loss', 'wrongfully mis-appropriated' would not convert a predominantly civil dispute into a criminal case;

(e) if the allegations made in the complaint is taken as a whole and accepted in its entirety, the same reveals that the complainant has essentially given a civil dispute the cloak of a criminal offence.

On a cumulative appreciation of the averments made in the petition of complaint and the settled position of law, I have no other alternative but to hold that the complaint case being Case No. C/422382 of 2014 has been initiated without any foundation of facts so far as the offences under Sections 420/406/120B of the IPC are concerned and as such the continuance of the same is an abuse of the process of the Court and as such is liable to be quashed.

As the complaint itself has failed to make out any offence so far as the petitioners are concerned, I have not gone into the issue of applicability of Section 202 of the CrPC.

Accordingly, CRR 1564 of 2015 is allowed and the connected application being CRAN 3778 of 2018 also disposed of.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.