

(2009) 06 CAL CK 0028
In the Calcutta High Court
Case No : C.R. R. No. 378 of 2009

Rajat Goswami and Another

APPELLANT

Vs

The State of West Bengal and Another

RESPONDENT

Date of Decision : 29-06-2009

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 401, 482
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 120B, 34, 406, 415, 417

Citation : (2009) 06 CAL CK 0028

Hon'ble Judges : Prasenjit Mandal, J

Bench : Single Bench

Advocate : Tapan Kumar Tewari, Kumar Jyoti Tewari and Debina Mitra, for the Appellant; Sandipan Ganguly and Bhaskar Seth for Opposite Party No. 2, Krishna Ghosh and Debabrata Roy for State, for the Respondent

Judgement

Prasenjit Mandal, J.—This application under Article 227 of the Constitution of India read with Sections 401 and 482 of the Code of Criminal Procedure, 1973 is at the instance of the accused persons and is directed against the complaint case No. C/36 of 2009 filed before the learned Additional Chief Metropolitan Magistrate, Calcutta, which was treated as First Information Report u/s 156(3) of the Cr. P.C., 1973.

2. The fact of the case in short is that the opposite party No. 2 and his wife have money-lending business without any licence. They have no other trade or employment save and except money-lending business without any licence. The petitioner No. 1 is very much known to the opposite party No. 2 and his wife. The petitioner No. 2 took a loan of Rs. 3,00,000/- on 01.09.2007 on condition that the petitioner No. 2 shall have to pay interest at the rate of 3.5% per annum. On conversation it was decided that the loan was given for a period of three months only and for that reason the opposite party No. 2 would get interest to the tune of Rs. 30,000/- for the said period at the rate of Rs. 10,000/- per month of which

the first month interest was taken by the opposite party No. 2 by cash in advance. The petitioner No. 2 could not repay the loan within three months and he was paying interest at the rate of Rs. 10,000/- per month up to December, 2008. Thus, he paid Rs. 1,60,000/- as interest over the loan amount of Rs. 3,00,000/- within 16 months. The petitioner could not pay the principal amount up till now. The petitioner No. 2 issued cheques in favour of the opposite party No. 2 for the said loan and the petitioner No. 1 also executed cheque in favour of the opposite party No. 2 as guarantor for the said transaction. Thereafter, another loan of Rs. 5,00,000/- was given to the petitioner No. 2 on interest by the wife of the opposite party No. 2 and necessary papers for agreement were executed. Interest was determined at the rate of 4% per annum to be paid in cash. The opposite party No. 2 was in the habit of cancelling the agreement and the cheques issued, when full repayment with regard to the loan with interest was made. The opposite party No. 2 deposited the cheques issued by the petitioner No. 2. But the cheques bounced with the remark that the account of the petitioner No. 2 had been closed. Suppressing all the material facts, the opposite party No. 2 filed the complaint case No. C/36 of 2009 before the learned Additional Chief Metropolitan Magistrate, Calcutta under Sections 406/420/120B of the I.P.C. on 15.01.2009. That petition of complaint was forwarded to the Shyampukur P.S. for investigation and accordingly Shyampukur P.S. case No. 23 dated 21.01.2009 u/s 406/420/120B of the I.P.C. was started. Thereafter the accused petitioners have preferred this application for quashing the proceedings.

3. Mr. Tewari, the learned Advocate for the petitioner submits that the opposite party No. 2 is in the habit of granting loan to different persons and for that purpose he takes different documents including agreement for repayment, cheques, etc. to be executed by the loanee and the guarantor. Thereafter upon payment of the full amount along with interest, the opposite party No. 2 returns those papers to the respective parties after making pen through on the papers. The opposite party No. 2 did not file any case u/s 138 of the N.I. Act but he filed the case only to create pressure upon the petitioners so that the money could be realised at early. Even he did not file any civil suit for realisation of the money. The transaction between the petitioners and the opposite party No. 2 is clearly a commercial transaction. There was no element of cheating and breach of trust initially and at the time of execution of the documents. So the accused petitioners could not be charged at all for the offence punishable u/s 406/420/120B of the I.P.C. The proceedings against them should be quashed.

4. On the other hand, Mrs. Krishna Ghosh, learned Advocate for the State submits that the concerned Shyampukur P.S. case number has culminated into the chargesheet and so the case should be tried in accordance with law.

5. Mr. Ganguly appearing for the opposite party No. 2 submits that the Hon'ble High Court should not quash any criminal case under Sections 406/420/120B of the I.P.C. at the threshold but opportunity should be given to the de-facto

complainant to prove his case against the accused petitioners. He also submits that at the stage of investigation, the High Court should not examine the nature of the transaction whether it is commercial transaction or. If an enquiry is held it could be ascertained to see whether the accused petitioners had committed any offence. He has also contended that the documents filed by the accused petitioners may be the documents in support of the defence, but those could not be filed at the initial stage for quashing the proceedings. Those documents may be tendered at the time of trial only. So he submits that the application is liable to be dismissed.

6. Therefore, the main question that arises for decision is whether the criminal case lodged against the accused persons can be quashed at the initial stage of investigation.

7. Having considered the submission of the learned Counsel for the parties and on going through the materials on record, I find that admittedly the accused No. 2 took loan from the opposite party No. 2 upon execution of agreement and issuance of cheques in favour of the opposite party No. 2. The petitioner No. 1 also executed a cheque in favour of the opposite party No. 2 showing he stood as guarantor for the transaction and in case of non-payment by the loanee, the amount could be recovered from the guarantor.

8. Mr. Tewari has refereed to the following decision in support of his contention:

1. Suryalakshmi Cotton Mills Ltd. Vs. Rajvir Industries Ltd. and Others, to show that when Blank cheques were given earlier to the respondents for use for business purposes when the relation between the parties was good but the alleged fraudulent use took place few years thereafter when dispute arose between them Section 420 of the I.P.C. is not attracted as fraudulent inducement must be there at the inception and not at a later investigation.

2. Dalip Kaur and Others Vs. Jagnar Singh and Another, . He has submitted that unless and until it is proved that the fraudulent and dishonest intention existed from the very inception when the promise or representation was made, no offence of cheating or criminal breach of trust was committed. He has also contended that where allegations contained in FIR, even if given face value and taken to be correct, do not disclose commission of offence and disclose only a civil dispute, FIR is liable to be quashed.

3. Vir Prakash Sharma v. Anil Kumar Agarwal and Anr. Reported in (2007) 7 SCC 373. He has submitted that merely because the accused issued cheques which got dishonoured, the same by itself would not mean that he cheated the complainant. Complaint was liable to be quashed.

4. Inder Mohan Goswami and Anr v. State of Uttaranchal and Ors. reported in (2008) 1 SCC (Cri) 259. He has referred to this decision to show when the Hon"ble High Court can quash the proceeding in exercise of inherent power u/s 482 to prevent abuse of the process of Court, and to otherwise secure the ends

of justice.

9. Similarly, he has referred to the decision reported in (2008) 13 SCC 689 to show that post dated cheques presented at a much later date was dishonoured with the remark that the account was closed, yet, when some money was returned in cash in such circumstances, no offence u/s 420 of the I.P.C. was made out.

10. On the other hand, Mr. Ganguly has referred to the following decisions:

1. Mohanan v. Prabha G. Nair and Anr. Reported in 2004 SCC (Cri) 816. He has stated that the Single Judge was not justified in quashing the complaint at the threshold when the complainant had no opportunity to adduce evidence before the Magistrate.

2. T. Vengama Naidu v. T. Dora Swamy Naidu and Anr. Reported in (2008) 2 SCC (Cri) 231. He has submitted that only enquiry that could be undertaken was to see whether the complaint or FIR did not contain allegations of any offence u/s 464/420 read with Section 34 of the I.P.C. FIR is to be taken on its face value for adjudging the same and not on merits.

3. Rajesh Bajaj v. State NCT of Delhi and Ors. reported in 1999 SCC (Cri) 401. He has submitted that in commercial transactions many a cheating is committed. So quashing of criminal proceedings u/s 420/417/415 of the I.P.C. is not justified.

4. State of Orissa and Anr. v. Saroj Kumar Sahoo reported in (2006) 2 SCC (Cri) 272. He has submitted that quashing of proceedings by High Court u/s 482 Cr. P.C. is not proper (a) where investigation was not completed and (b) where chargesheet had been filed; by appreciating the evidence - Held impermissible.

5. State of M.P. v. Awadh Kishore Gupta and Ors. reported in 2004 SCC (Cri) 353 to show that the documents filed by the accused petitioner in his application for quashing the proceeding u/s 482 of the Cr. P.C. could not be looked into by the High Court which could be done only at the time of trial.

6. R.V. Palega and Anr. v. State and Anr. Reported in (2008) 1 C Cr. L.R. (Cal) 502. He has referred this decision to show allegations in FIR constituting offence - defence claim of its being a case of civil dispute cannot be considered.

11. The loan was granted by the opposite party No. 2 to the petitioner No. 2. But on perusal of the petition of complaint, I find that the petitioner No. 2 is not a relation or friend of the opposite party No. 2. But I find that a heavy amount of loan of Rs.3,00,000/- was given by the opposite party No. 2 to the plaintiff for commercial purpose. Similarly, the wife of the opposite party No. 2 gave Rs. 5,00,000/- to the petitioner No. 2. For the purpose of granting loan, the petitioner No. 2 executed several documents including issuance of cheques. The petitioner No. 1 also stood as guarantor by issuing cheques in favour of the opposite party No. 2 and his wife. The opposite party No. 2 has described that loan was on interest free basis and it was given for commercial purpose. The

opposite party No. 2 did not state in his petition of complaint even as to what kind of business the opposite party No. 2 was doing. So the opposite party No. 2 granted loan to the petitioner No. 2 even without knowing fully well the nature of the transaction that the opposite party No. 2 was doing and for what purpose he was taking the loan. In such circumstances, the statement of the opposite party No. 2 that he gave a loan to a stranger on the assurance of the P.W.1 to such heavy amount without any interest, is difficult to believe. Admittedly the petitioner No. 2 could use the said money for commercial purpose. So the contention of the accused petitioners that it was the habit of the opposite party No. 2 to grant loans to different persons and then to claim interest at an exorbitant rate, cannot be disbelieved. Whatever may be the defence that could be available only at the time of trial as per decisions of the Hon"ble Apex Court. In order to decide the fate of the complaint case lodged by the opposite party No. 2, I find that the petitioner No. 2 issued cheques on 01.09.2007. In 2007 then within one year from the date of execution of the cheque by the accused petitioner No. 2 far less to say within six months from the date of issue of the cheques, the opposite party No. 2 did not place the same for encashment before the bank. At the time of issuance of the cheque one signature was obtained just below the place mentioned for date. Subsequently, the date entered thereto was made pen through and another date was inserted showing renewal after one year from the date of execution of the cheque initially. In the meantime, as per complaint case, the account of the petitioner No. 2 was closed and so the cheque was bounced. Therefore, from the conduct of the opposite party No. 2, it is crystal clear that he is not interested to get those money by filing a petition of complaint u/s 138 of the N.I. Act or a civil suit for recovery the money advanced. But he lodged a criminal case after one year from the date of initial issue of the cheques in favour of the opposite party No. 2. Such conduct of the opposite party No. 2 clearly shows that the opposite party No. 2 wanted to create pressure upon the petitioners for realisation of the money by filing a complaint case under Sections 406/420/120B of the I.P.C. So it is crystal clear from the conduct of the parties that at the initial stage, the accused petitioners had no intention to cheat the opposite party No. 2 at all or to commit breach of trust.

12. If I peruse the petition of complaint as a whole, I find that the petition of complaint lays down the facts which give rise cause of action to file a civil suit, if permissible under the law. Offences as alleged in the petition of complaint do not justify for the once u/s 406/420/120B of the I.P.C. at all.

13. The decision of Vir Prakash Sharma (supra) clearly lays down in paragraph 15 which is quoted below:

15. In law, only because he had issued cheques which were dishonoured, the same by itself would not mean that he had cheated the complainant. Assuming that such a statement had been made, the same, in our opinion, does not exhibit that there had been any intention on the part of the appellant herein to commit an offence u/s 417 of the Penal Code.

14. The cheques having not been presented within the statutory period, when it was first issued clearly show that the accused persons had no criminal intention to cheat but according to terms and conditions payment would be made. That is why another signature of the loanee was taken just below the date so that the date could be changed according to the sweet will of the opposite party No. 2. If the face value of the petition of complaint is taken as true, for inaction on the part of the opposite party No. 2 to take initiative u/s 138 of the N.I. Act, clearly shows that initially there was no intention to cheat and so the fact as narrated in the petition of complaint, if taken as true, does not constitute the commission of any offence under Sections 406/420 and other Sections. This has also been reiterated in the decisions of Dalip Kaur and Others Vs. Jagnar Singh and Another, . For convenience, I am quoting the paragraph 12 of the said decision:

12. Yet again, in Hira Lal v. State of U.P. this Court held: (SCC p. 92, para 12)

12. The parameters of interference with a criminal proceeding by this High Court in exercise of its jurisdiction u/s 482 of the Code are well known. One of the grounds on which such interference is permissible is that the allegations contained in the complaint petition even if given face value and taken to be correct in their entirety, commission of an offence is not disclosed. The High Court may also interfere where the action on the part of the complainant is mala fide.

(See also Harmanpreet Singh Ahluwalia v. State of Punjab.)

15. Therefore, according to such decision there is no element of cheating and breach of trust at all.

16. The petitioner No. 2 is within his right to close his bank account when the so-called cheques were not tendered within the time limit and when they were tendered after a lapse of one year from the date of issuance of the cheques after taking signature of the loanee just below the place mentioned as date to suit the case of the opposite party No. 2, I hold, that there is no element of cheating at the initial stage. This has been clearly stated in the case of Subodh Section Salaskar (supra). It may be noted here that during the pendency of the criminal proceeding the petitioner No. 2 paid a sum of Rs. 1,00,000/- to the opposite party No. 2 by way of banker's cheque and this has been proved by the supplementary affidavit filed by the petitioners. So the commercial transaction is still going on and the opposite party No. 2 is receiving money from the petitioner No. 2. In such circumstances, if the investigation for offences under Sections 406/420/120B of the I.P.C. is allowed to proceed, I hold, it will amount to abuse of the process of law. I am also of the view that the opposite party No. 2 filed the petition of complaint u/s 156(3) of the Cr. P.C. with a mala fide intention.

17. During argument it is submitted on behalf of the State that chargesheet has been filed against the accused persons. If the trial is continued it will be nothing but an abuse of the process of the Court and to help a person who is flouting the petitioners on the basis of issuance of cheques by them under compelling

circumstances or otherwise. In the result, I am of the view that the complainant has failed to make out the essential ingredients of the alleged offences in his petition of complaint. For that reason, the petition of complaint and consequently other orders passed on the basis of the petition of complaint are liable to be quashed. The application, therefore, succeeds. It is allowed.

18. The complaint case No. C/36 of 2009 and all the orders passed thereon by the learned Additional Chief Metropolitan Magistrate, Calcutta stand quashed. Consequently, the Shyampukur Police Station Case No. 23 of 2009 at 21.10.2009 arising out of the said complaint case No. C/36 of 2009 also stands quashed.

19. Considering the circumstances, there will be no order as to costs.

20. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.