

(2012) 04 DEL CK 0100

In the Delhi High Court

Case No : Criminal M.C. No. 4144 of 2009 and Criminal M.A. 14102 of 2010

Sanjay Aggarwal

APPELLANT

Vs

G.S. Tayal and Others

RESPONDENT

Date of Decision : 11-04-2012

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 200, 300, 300(1), 482
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 406, 415, 420, 468, 471

Citation : (2012) 04 DEL CK 0100

Hon'ble Judges : M.L. Mehta, J

Bench : Single Bench

Advocate : Sanjay Gupta, for the Appellant; G.S. Tayal in person for himself as well as for other respondents, for the Respondent

Final Decision : Dismissed

Judgement

M.L. Mehta, J.—This petition is filed u/s 482 Cr.P.C. seeking quashing of criminal complaint No. 80/1 of 2005 u/s 406/420 IPC and also summoning order dated 18th April 2009 of the ACMM, Rohini District Courts, Delhi. Facts in brief necessary for the disposal of this petition are these:

Four complaints u/s 138 Negotiable Instruments Act (for short "the Act") read with section 415 and 420 IPC were filed by G.S. Tayal, his wife Munni Tayal and his sons Kapil Kumar Tayal and Devendra Kumar Tayal against the petitioners Sanjay Aggarwal, his brother Ajay Aggarwal and their firm M/s. Sanjay Steel Tube Company. These complaints were filed in the year 2005. The summoning orders were passed against the aforesaid accused persons u/s 138 of the Act. The complainants filed applications for dropping allegations of sections 415 and 420 IPC stating that they have filed separate complaints against the accused persons u/s 420 IPC. Vide order dated 3rd June 2011, the learned Magistrate recorded that since the cognizance was taken in the complaints u/s 138 of the Act only, there was no necessity of filing such applications and so he disposed of

those applications as having become infructuous.

2. These are the four complaints which were filed by the complainants u/s 200 Cr.P.C. for seeking registration of FIRs against the accused persons u/s 406, 420 IPC which have given rise to the present petition. In these four complaints, the Magistrate vide the impugned order dated 18th April 2009 has taken cognizance and issued summons to the accused persons including the petitioner u/s 420 IPC. In addition, summons have also been issued to the petitioner u/s 468 and 471 of IPC. In addition to the aforesaid two brothers and their firm, one Bhagwan Dass has also been added as an accused. The original complaints were filed on the allegations of the accused persons having given cheques in discharge of their liability towards loans taken by them from the complainants and the cheques getting dishonoured on presentation on the ground of "insufficient funds" and their not making payments of the amounts despite service of legal notice. It was also alleged that the accused persons were knowing fully well that they did not have sufficient funds in their bank account and had deliberately and willfully, with no intention to repay the loan, induced the complainants and thus committed offences u/s 415 and 420 IPC. As is noted above, cognizance was taken u/s 138 of the Act only and thereafter the allegations of sections 415 and 420 IPC were sought to be deleted by the complainants.

3. In the present complaints the allegations with regard to dishonor of the cheques and non-payment of the amounts despite the legal notices are the same as were in the previous complaints. In addition, it is alleged that the accused persons mischievously issued the aforesaid cheques with the ulterior motives and designs knowing fully well that the said cheques would be dishonoured on account of insufficient funds in their account. It was alleged that they made false representations to the complainants and issued bogus cheques duly signed by accused No. 2 and 3 namely Sanjay Aggarwal and Ajay Aggarwal with deliberate and willful intention not to repay the loan amounts to the complainants and falsely induced them to accept the said cheques with the representation that the same shall be honoured on presentation. It was alleged that all the accused were involved in criminal conspiracy and deliberately caused wrongful loss to the complainants and they committed offences u/s 405, 406 and 420 IPC. It was on these allegations that the MM took cognizance of the offence u/s 420 IPC against all the accused persons including the petitioner and in addition also summoned the petitioner for the offence u/s 468 IPC.

4. The petitioner is the only accused who has assailed the impugned order and sought quashing of the complaints. Other accused have not challenged the impugned orders.

5. The contentions of the petitioner are that he is a partner of M/s. Sanjay Steel Tube Company with effect from 1st May 2003 vide partnership deed of this date. It was submitted that the dispute was of civil nature and that the complainants had filed civil suits under Order 37 CPC against the petitioner, his brother and their firm. In the said suits their applications seeking leave to defend were

declined and consequently the said suits of the complainants were decreed vide separate judgments dated 5th April 2006 by the ADJ. They challenged the judgments and decrees of the ADJ by filing four Regular First Appeals (RFAs) wherein in pursuance of the orders dated 17th July 2006 and 18th September 2006 of this Court, they have deposited Rs. 16,48,250/- inclusive of interest @ 10% per annum. It was next submitted that the complaints filed against them by the complainants in 2005 u/s 138 of the Act are pending and that allegations in those complaints and in the subsequent complaints u/s 406 and 420 IPC are the same and thus, in view of the pendency of the previous complaints no legal action was called for in these subsequent complaints.

6. It was next submitted that there were no ingredients of sections 420, 468 and 471 IPC alleged or pleaded by the complainants in these complaints against the petitioner. In this regard it was submitted that the transactions entered into by the petitioner with the complainants/ respondents were totally legal and it was due to financial difficulty that the petitioner could not repay the loans. It was submitted that the cheques and receipts were executed by the petitioner as security of loans and that the documents were executed by him in his personal capacity or in his capacity as partner of the firm in which he was inducted later on at the relevant time when he executed the documents.

7. On these grounds the petitioner has sought quashing of the complaint and also the impugned summoning orders directed against him.

8. Reliance is placed on the judgments of (i) Pepsi Foods Ltd. and another v. Special judicial Magistrate and others, (1998) SCC 749; (ii) Hridaya Ranjan Pd. Verma and Others Vs. State of Bihar and Another, (iii) Indian Oil Corporation Vs. NEPC India Ltd. and Others, and (iv) Kolla Veera Raghav Rao Vs. Gorantla Venkateswara Rao & Anr. Criminal Appeal No. 1160/2006 decided on 01.02.2011 by the Supreme Court.

9. The respondents/complainants filed counter reply to the present petition reiterating the allegations as set out by them in the complaints against the petitioner, his brother and their company. It was submitted that M/s. Sanjay Steel Tube Company was a partnership firm constituted on 28th June 1996. As per the said partnership deed which was submitted with the bank - State Bank of Bikaner and Jaipur, the partners are Shri Ram Swarup, Smt. Antu Aggarwal and Shri Ajay Aggarwal. The petitioner Sanjay Aggarwal was not the partner in the said firm. It is alleged that the partnership deed allegedly created on 1st May 2003 with Sanjay Aggarwal and Ajay Aggarwal as the partners of the firm was a sham document which was never acted upon till date since the firm as per the bank record continued with the same partners having same account No. 12450. It is alleged that when the loan amounts were advanced to the firm in January, 2002, the receipts as also the cheques were signed by Ajay Aggarwal and also the petitioner as partners of the said firm. The contention was that at the time of taking loans in January 2002 and November 2004 petitioner Sanjay Aggarwal was neither a partner of the firm nor authorized signatory, but he dishonestly

and fraudulently misrepresented himself to be a partner of the firm and executed the receipts and the cheques from the account of the firm and that he has also manufactured false partnership deed of 1st May 2003 with dishonest intention and thereby committed offences u/s 420 and 468 IPC. It was submitted that if at all Sanjay Aggarwal could be said to have become partner of the firm it was only with effect from 1st May 2003 and not prior to that i.e. not at the time of execution of receipts dated 16th January 2002 and 31st January 2002 and also issue of Post Dated Cheques (PDCs) against the said loan amounts.

10. I have heard learned counsel for the petitioner and complainant, G.S. Tayal in person and perused the records.

11. There is no doubt that earlier complaints were filed by the complainants in January 2005 against the petitioner, his brother Ajay Aggarwal and their firm M/s. Sanjay Steel Tube Co. u/s 138 of the Act read with sections 415 and 420 and that in the said complaints summons were issued against the accused persons including the petitioner u/s 138 of the Act only. Though the complainant subsequently filed applications for deletion of the allegations under sections 415 and 420 IPC, but since summons were issued against all the accused persons u/s 138 of the Act only, those applications were disposed of as infructuous. In the mean while the complainants had filed four complaints against the accused persons including the present petitioner and one Bhagwan Dass. It is in these complaints that the learned MM after recording the statement of the complainant and the bank official, DD Pandit ordered issue of summons to all the accused persons u/s 420 IPC and in addition to petitioner u/s 468 IPC.

12. There is no dispute with regard to the law relating to exercise of jurisdiction of this Court u/s 482 Cr.P.C. for the purpose of quashing of complaints in criminal proceedings. In Pepsi Foods" case (supra), the Hon"ble Supreme Court held that:-

28. No doubt the Magistrate can 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 him when the complaint does not make out any case against him and still he must undergo the agony of a criminal trial.

In the case of Indian Oil Corpn. Ltd. (supra) the principles regarding exercise of jurisdiction u/s 482 Cr.P.C. have been reiterated by the Supreme Court as under:

(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a

meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed of, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

13. Relying upon the aforesaid principles, the learned counsel for the petitioner submitted that the allegations in the previous complaints u/s 138 of the Act and in the present complaints are same and even if the allegations are taken on their face value and accepted in the entirety, do not prima facie, constitute any offence under sections 420 and 468 IPC against the petitioner.

14. It was also submitted that the transaction between the parties was purely of civil nature and the present complaints are clear abuse of process of the Court. It was submitted that as per above principles (i), (ii) and (v), the present complaints are liable to be quashed.

15. Before proceeding to see as to whether the allegations set out in the complaints, prima facie, make any case, it may be noted that as per the above principles the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations of the complaint is warranted while examining prayer for quashing of a complaint. Further, the complainant is not required to verbatim reproduce the

legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings cannot be quashed. The quashing of the complaint is warranted only where the complaint is bereft of the basic facts which are absolutely necessary for making out the offence. Further, the power cannot be used to stifle or scuttle a legitimate prosecution and has to be used sparingly and with abundant caution. Still further, the nature and scope of the civil proceedings are different from a criminal proceedings and the mere fact that the complaint relates to civil transaction or breach of promise of contract for which a civil remedy is available or has been availed of, is not a ground for quashing of a criminal complaint.

16. In the case of Indian Oil Corporation Ltd. (supra), the Supreme Court while dealing with the applicability of the ingredients of cheating held as under:

32. The essential ingredients of the offence of "cheating" are: (i) deception of a person either by making a false or misleading representation or by other action or omission, (ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person 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.

33. The High Court has held that mere breach of contractual terms would not amount to cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction and in the absence of an allegation that the accused had a fraudulent or dishonest intention while making a promise, there is no "cheating". The High Court has relied on several decisions of this Court wherein this Court has held that dishonest intent at the time of making the promise/ inducement is necessary, in addition to the subsequent failure to fulfill the promise. Illustration (f) and (g) to Section 415 make this position clear:

(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.

(g) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery, A cheats; but if A, at the time of obtaining the money intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

34. In *Rajesh Bajaj Vs. State NCT of Delhi and Others*,

9. It is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor is it

necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent.

11. The crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or not. The complainant has stated in the body of the complaint that he was induced to believe that the respondent would honour payment on receipt of invoices, and that the complainant realized later that the intentions of the respondent were not clear. He also mentioned that the respondent after receiving the goods had sold them to others and still he did not pay the money. Such averments would prima facie make out a case for investigation by the authorities.

35. In *Hridaya Ranjan Pd. Verma and Others Vs. State of Bihar and Another*, this Court held:

14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is, the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.

17. It has been noted above that though there are no verbatim ingredients of Sections 415 and 468 IPC in the complaint, but reading the complaint as a whole it would be seen that the complainants have alleged the fraudulent acts of the petitioner in making false representations and having willful and deliberate intention not to pay the loan amount and to cheat the complainants. Based on the allegations in the complaint, as also the statement of complainant G.S. Tayal and the bank official Mr. D.D. Pandit, the MM ordered for issuance of summons to the accused persons. Mr. D.D. Pandit was examined as complainant's witness on 18th July 2008. He produced a copy of the partnership deed dated 28.06.1996,

partnership letter dated 17.07.1998 and the extract from the cheque refer register. As per the documents, the partners of the said firm were Ram Sarup, Antu Aggarwal and Ajay Aggarwal till the date of his examination on 18.07.1998. Account opening form also showed the names of these three persons only as partners. The said form is seen to have been signed by the petitioner as introducer. The partnership deed of 28.06.1996 is also seen to have been signed by the petitioner as a witness. From the extract of the cheque refer register it is seen that the cheques of loan amounts were issued by M/s. Sanjay Steel Tube Co. in the names of the complainants and the same were returned. From the two receipts dated 16.01.2002 and one dated 31.01.2002, it is seen that these have been signed both by Ajay Aggarwal and the petitioner, Sanjay Aggarwal on behalf of the firm. The PDCs of the loan amounts are also seen to have been signed by both of them as partners. These cheques were issued from the current account of the firm bearing No. 12450. From all these it appears that petitioner Sanjay Aggarwal was not the partner of the firm when he executed these receipts as also the cheques as partner of the said firm in January 2002. The partnership deed of 1st May 2003 seems to have been created for some ulterior purposes inasmuch as according to bank the said account continued to be operated in the name of the firm of which Sanjay Aggarwal was not the partner. If this firm has been created on 01.05.2003 vide this partnership deed then the same would have found mentioned in the bank record. If at all it is assumed that Sanjay Aggarwal became a partner of the said firm on 1st May 2003, but he was not a partner of the firm when the aforesaid receipts and cheques were issued. These are all triable issues and could only be decided by way of evidence. Prima facie it appears that he was not a partner at the relevant time of execution of receipts and issue of cheques from the account of the firm as partner.

18. Though the complainants had filed suits of recovery under Order 37 of CPC and have received some amount by the orders of this Court, but those proceedings are independent of the allegations as set out in the complaints against the petitioners. These are prima facie established from the testimony of the complainant and bank official. For the purpose of summoning, the allegations in the complaint as also the testimonies, if any, led in support thereof are essentially to be considered.

19. The contention that since the proceedings u/s 138 of the Act were subjudice and the allegations in the present complaint are same, no legal action was called for, is untenable. From the testimony of the complainant G.S. Tayal and that of the bank official it is prima facie seen that though the petitioner was not the partner of the said firm, but he had so represented and executed the receipts and also the cheques from the account of the partnership firm. As per Rajesh Bajaj (supra) there was no necessity for the complainant to have verbatim reproduced in the body of the complaint all the ingredients of the complaint. Though it was also not necessary for him to state in so many words that intention of the accused was dishonest and fraudulent, but it is seen from the body of the complaint as a whole that such allegations/averments are specifically

stated by the complainant. It has been noted above that the allegations in the previous complaints were confined to section 138 of the Act, whereas in the present complaints there are specific allegations of dishonest and fraudulent acts of the petitioner and his having cheated the complainants.

20. The reliance placed on the case of Kolla Veera Raghav Rao (supra) is highly misplaced. As per the said judgment what was prohibited u/s 300 (1) Cr.P.C. was that no one can be tried and convicted for the same offence or even for a different offence but on the same facts, if he was already tried or convicted or acquitted on such facts by some court. In the present case, as noted above, the allegations u/s 138 of the Act and u/s 420/468 IPC against the petitioner are entirely different. There is no bar of both these cases to be tried simultaneously. The bar of section 300 Cr.P.C. was not attracted in the present case since the case against the petitioner u/s 138 of the Act was still pending and he was neither acquitted nor convicted. In the case of Kolla Veera Raghav Rao (supra) the appellant was earlier convicted u/s 138 of the Act and it was in those peculiar circumstances that it was held that he could not be tried on the same facts u/s 420 IPC.

21. The petitioner, no doubt, has stated that he was in financial difficulty and was unable to repay the loan amounts and had no intention to cheat or dishonestly divert the loan amount, but, these are all defences that will have to be put forth and considered during trial. The defences that may be available or facts when established during the trial may lead to acquittal are not the grounds for quashing of the complaint at the threshold. At this stage, the only fact relevant is that whether the averments in the complaint expressly, indirectly or impliedly spell out the ingredients of criminal offence or not. And the pleas which have been raised by the petitioner would be tested at the trial and cannot form the basis of quashing of the complaints.

22. The Supreme Court has repeatedly cautioned that the power of quashing a criminal proceeding at the stage of summoning should be exercised very sparingly and with circumspection and that too in the rarest of rare cases. This has been again impressed by the Supreme Court in the case of State of Haryana and others Vs. Ch. Bhajan Lal and others, From the above discussion, it cannot be said that the allegations made in the complaints, even if they are taken at their face value and accepted in entirety to be correct, do not make out a case against the petitioner u/s 420/468 IPC. In such circumstances, I refrain myself from exercising powers u/s 482 Cr.P.C. to quash the complaints at threshold.

23. Nothing contained hereinabove shall tantamount to expression of opinion on the merits of the case. The petition has no merit and is hereby dismissed.