
(2004) 10 AP CK 0079

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 1878 of 2004

Vishal Paper Tech India Ltd. and Others

APPELLANT

Vs

State of A.P. and Another

RESPONDENT

Date of Decision : 29-10-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 482
Penal Code, 1860 (IPC) — Section 120B, 34, 406, 415, 417

Citation : (2005) 2 ALD(Cri) 210 : (2005) CriLJ 1838

Hon'ble Judges : C.Y. Somayajulu, J

Bench : Single Bench

Advocate : Rupendra Mahendera, for the Appellant; Public Prosecutor and Y. Rama Rao, for the Respondent

Judgement

C.Y. Somayajulu, J.—Second respondent filed a private complaint against the petitioners and others alleging that the accused who entered into an agreement on 20-1-1995 to purchase a Multi-layer coated boards manufacturing, machine for Rs. 380.00 lakhs on ex-works basis, took bank guarantees and post-dated cheques as security for due performance of the contract, and that as per the terms agreed between them those bank guarantees and post-dated cheques have to be returned on pro-rata basis on the basis of the supplies made and even after it supplied the machinery worth Rs. 380.00 lakhs, the accused who paid the price of Rs. 380 lakhs, as agreed, had, with a view to defraud it, presented some of the cheques, which have to be returned to it as per the understanding, for payment and when those cheques were dishonoured, accused not. only launched criminal prosecution against it but had also, fraudulently, invoked the bank guarantees without returning them, and hence are liable for punishment u/s 120-B, 406, 417, 418 and 420 read with 34, IPC. The said complaint was referred to police for investigation u/s 156(3), Cr.P.C. by the learned Magistrate. The police, after investigation, referred the case as of civil in nature. Thereupon, on a protest petition filed by the second respondent, the

learned Magistrate, after recording the sworn statement of the authorized representative of the second respondent, took cognizance of the case u/s 420, IPC only against the petitioners and others as C.C. No. 1089 of 2002. This petition is filed to quash the proceedings in that C.C. against the petitioners who are A-1 (company), A-3 and A-4, who are some of its directors.

2. The main contention of the learned counsel for the petitioners is that the allegations in the complaint and the sworn statement of the authorized representative of the second respondent, even if taken to be true, disclose only a civil liability but not any offence, much less an offence u/s 420, IPC, because there is nothing in the complaint or the sworn statement to show that petitioners had mens rea to cheat even at the time of entering into the transactions, which is the sine qua non for an offence u/s 420, IPC. It is his contention that second respondent filed O.S. No. 1562 of 1996 and sought an interim injunction under Rule 1 of Order 39, CPC restraining the first petitioner from invoking the bank guarantees furnished by it to the first petitioner and obtained an injunction from the trial Court, and that first petitioner preferred an appeal against that order and that the appellate Court, after elaborately discussing all the contentions raised, reversed the order of the trial Court and vacated the injunction, and the said order of the appellate Court was confirmed by this Court in C.R.P. Nos. 2445 to 2450 of 1998 by giving a specific finding that first petitioner has a right to invoke the bank guarantees. It is his contention that after the disposal of the said C.R.Ps., when the trial Court gave a direction to the second respondent to pay the court-fee on the value of the bank guarantees sought to be invoked by the first petitioner, second respondent had withdrawn the suit and so, it is clear that the second respondent who failed to obtain the relief in a Civil Court, invoked the jurisdiction of the Criminal Court only with a mala fide intention to harass the petitioners with a view to extract money from the petitioners by using arm twisting methods and to coerce them to a compromise, and that is so is evident from the fact that the complaint was given several months after the dismissal of CRP No. 2445 and 2450 of 1998 by this Court, and so the proceedings against the petitioners are liable to be quashed, more so because first petitioner, being a juristic person, cannot have mens rea to commit an offence. He relied on *Alpic Finance Ltd. Vs. P. Sadasivan and Another*, ; *S.W. Palanitkar and others Vs. State of Bihar and another*, ; *Ajay Mitra Vs. State of M.P. and Others*, ; *Hira Lal Hari Lal Bhagwati Vs. C.B.I., New Delhi*, ; *A.K. Khosla and Others Vs. T.S. Venkatesan and Others*, and *State of Maharashtra Vs. Syndicate Transport Co. (P) Ltd. and Others*, in support of the contentions raised by him. It is his contention that petitioners, after coming to know that second respondent obtained an ex-parte award by invoking the arbitration clause in the agreement between the parties, filed a petition questioning the award, and so 2nd respondent who already invoked the arbitration clause cannot invoke the jurisdiction of Criminal Court on the same cause of action, and for that reason also the proceedings against the petitioners are liable to be quashed. Finally he contended that since there can be no vicarious liability in criminal proceedings, proceedings against the director of

the company, who have not made any representation to the 2nd respondent, are liable to be quashed.

3. The contention of the learned counsel for the second respondent is that as per the terms of the agreement between the second respondent and the accused, the accused have to return the post-dated cheques and the bank guarantees furnished by the second respondent for the due performance of the contract in a phased manner, and that 2nd respondent who performed its part of the contract by supplying the machinery as per the agreement was paid the entire amount due and payable by the accused to it and so the accused who have to return the post-dated cheques and the bank guarantees furnished by it had, with a mala fide intention and to cheat the second respondent, not only presented the post-dated cheques for payment but had also invoked the bank guarantees and so there is prima-facie case of cheating against the accused. It is his contention that second respondent filing a suit for an injunction restraining the petitioners and others from invoking the bank guarantees, and invoking the arbitration clause, are not and cannot be a ground for quashing the complaint, because an act done by a person can give rise to both civil and criminal liability, and the fact that civil remedy is pursued is not and cannot be a bar for invoking the criminal jurisdiction and relied on *Lalmuni Devi (Smt.) v. State of Bihar* 2001 (1) A LT (Cri) 219 : AIR 2001 SCW 2504 and *M/s. Medchl Chemicals and Pharma P. Ltd. Vs. M/s. Biological E. Ltd. and Others*, in support of his contentions.

4. Before going into the merits and contentions raised by the learned counsel for the parties it is appropriate to refer to the decisions relied on by them. *Alpic Finance Ltd. Vs. P. Sadasivan and Another*, (supra) relates to purchase of 100 hydraulically operated dental chairs by an educational Trust for use in the Dental College being run by it. Alleging that on physical verification by it some chairs financed by it were found missing from the premises of the Trust, the financier lodged a private complaint against the trustees of the Education Trust which entered into the hire purchase agreement with it, under Sections 420, 406 and 423 read with Section 120-B, IPC. When the accused moved the High Court u/s 482, Cr.P.C. to quash the proceedings initiated against them, that petition was allowed and that order of the High Court, quashing the proceedings, was confirmed by the Apex Court, since it is not the case of the financier that the hydraulically operated dental chairs were obtained by any fraudulent inducement or through willful misrepresentation, and since most of the amount borrowed by the Trust was repaid to it, belie the element of deception on the part of the borrowers.

In *S.W. Palanitkar and others Vs. State of Bihar and another*, (supra) it is held that for a person to be held guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. It also held that when the act of a party to an agreement is an offence, arbitration clause therein is not a bar for initiation of criminal proceedings against the offender.

In *Ajay Mitra Vs. State of M.P. and Others*, (supra), the Apex Court quashed the

proceedings u/s 420, IPC against the appellant before it, on the ground that the allegations in the complaint, when taken to be true did not make out any offence, much less an offence u/s 420, IPC.

In *Hira Lal Hari Lal Bhagwati Vs. C.B.I., New Delhi*, (supra) the Apex Court stated the requirements to be proved by the complainant for bringing out the offence of cheating as defined in Section 415 of I.P.C.

In *A.K. Khosla and Others Vs. T.S. Venkatesan and Others*, (supra) it is held that a company, which is a juristic person, cannot be convicted for an offence u/s 420, IPC, since mens rea is one of the essential ingredients of the said offence.

In *State of Maharashtra Vs. Syndicate Transport Co. (P) Ltd. and Others*, (supra) a learned single Judge of Bombay High Court considered the question whether a company can be prosecuted for an offence involving mens rea, when that offence was committed by its servant.

In *Lalmuni Devi case AIR 2001 SCW 2504* (supra) and *M/s. Medchl Chemicals and Pharma P. Ltd. Vs. M/s. Biological E. Ltd. and Others*, (supra) the Apex Court held that when the complaint discloses the ingredients for the offence alleged, the fact that civil remedy is available to the complainant is not a ground for quashing the criminal proceedings.

Principles laid down in the above decisions would be kept in view while deciding this case.

5. That 2nd respondent supplied the machinery ordered by the second accused for and on behalf of the first petitioner company, and that payment for that machinery was made by the first petitioner is not denied or disputed. It is the specific case of 2nd respondent that the bank guarantees and post-dated cheques were issued to the accused as security for the due performance of the contract, and that after it performed its part of the contract as per the terms of the agreement to the satisfaction of the accused, the accused without returning the bank guarantees and post-dated cheques as per the terms of the agreement, had mischievously presented the post-dated cheques for payment and invoked the bank guarantees and thus have committed an offence u/s 420, IPC. It is no doubt true as per the decisions relied on by the learned counsel for petitioners, for bringing home the guilt of the accused u/s 420, IPC, complainant should establish that the accused had an intention to cheat even at the time of entering into transaction. In my considered opinion the question whether the accused had, in fact, an intention to cheat even at the time of inception can be decided only on the basis of the evidence adduced, and for taking cognizance of a complaint u/s 420, IPC it is enough if the allegations in the complaint prima facie disclose that the complainant was cheated by the accused, because the Apex Court in *Rajesh Bajaj Vs. State NCT of Delhi and Others*, held that for the Court to take cognizance of an offence u/s 420, IPC 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, and that it also is not necessary that he

(the complainant) should state in so many words that the intention of the accused was dishonest or fraudulent and if factual foundation for the offence has been laid in the complaint, the Court should not hasten to quash the complaint. In my considered opinion if the intention to cheat is apparent on the face of the accused, or if he proclaims that he has an intention to cheat even at the time of entering into the transaction, there can be no scope for the complainant to enter into the transaction because no ordinary prudent man would enter into the transaction with another person fully knowing that the person with whom he is entering into the transaction has an intention to cheat him. So the question whether there was intention on the part of the accused to cheat the complainant, even at the time of inception, will have to be decided by the trial Court, depending on the evidence adduced and the facts and circumstances of the case. For that purpose the conduct of the accused would be relevant.

6. It is well known that while deciding a petition u/s 482, CrPC to quash a complaint, the allegations in the complaint have to be assumed as true. The allegations in the complaint in this case show that as per the agreement between the parties the bank guarantees and post-dated cheques have to be returned by the accused to the 2nd respondent and that it (2nd respondent) had supplied the machinery worth Rs. 360 lakhs to the accused as per the terms of the agreement and received payment therefore as per the terms of the agreement. If a purchaser, who takes bank guarantee from the vendor for the due performance of the contract, makes full payment for the goods as per the terms of the agreement to the vendor and invokes the bank guarantee also, prima facie intention to cheat on the part of the purchaser can be drawn. In the facts and circumstances of the case, it can prima facie be said that the accused were having an intention to cheat the second respondent. As stated earlier question whether there was intention to cheat even at the time of entering into contract or not can, in the facts and circumstances of the case, be decided only on the basis of the evidence adduced during the course of trial. Therefore, I see no grounds to quash the complaint on the ground that the 2nd respondent failed to specifically allege in the complaint that there was intention to cheat on the part of petitioners even at the time of entering into the contract.

7. The fact that 2nd respondent filed a suit for an injunction restraining the first petitioner from invoking the bank guarantee is not and cannot be a ground for quashing the proceedings in the C. C., because the cause of action for filing a suit for an injunction restraining invocation of bank guarantees arose before invoking the bank guarantee. That cause of action is different from the cause of action for filing this complaint u/s 420 IPC, for which the cause of action is invocation of the bank guarantees.

8. Apart from the above in view of the ratio in *State of Madhya Pradesh Vs. Awadh Kishore Gupta and Others*, defence of, and the documents relied on by, the accused cannot be taken into consideration for deciding a quash petition u/s 482, CrPC So the documents relied on by the petitioners cannot be taken into

consideration for deciding this petition. Even otherwise since the orders in the C.R.Ps. relied on by the learned counsel for the petitioners were passed in the interlocutory applications filed in a suit by the 2nd respondent against the first petitioner, and since it is well known that the life of interlocutory orders is limited to the pendency of the suit, those orders do not operate as *res judicata* either in the proceedings of the suit or in other proceedings. So those orders are of no help to decide this petition.

9. The fact that the suit filed by the 2nd respondent was dismissed for non-payment of court-fees as directed by the Court also has no relevance for deciding this petition for the very same reason of its being based on a different cause of action, and also because a transaction may give rise to both civil and criminal liability, and the fact that a party lost the civil suit, or failed to get relief in the civil suit, is not and cannot be a ground for quashing the criminal proceedings based on a different cause of action, in view of the ratio in *Lalmuni Devi's case* AIR 2001 SCW 2504 (*supra*) and *M/s. Medchl Chemicals and Pharma P. Ltd. Vs. M/s. Biological E. Ltd. and Others*, *supra*).

10. For the above reasons and in view of the ratio in *S.W. Palanitkar and others Vs. State of Bihar and another*, *supra*) the fact that 2nd respondent invoked the arbitration clause in the agreement per se is not and cannot be a ground for quashing the proceedings in the C.C.

11. I find force in the contention of the learned counsel for the petitioners that unless the statute creates vicarious liability question of making the other Directors of a company, who did not participate in the negotiations, for the offence, if any, committed by one of the Directors does not arise. Since first petitioner is being represented by A.2, and since the allegations in the complaint do not disclose that the other directors of the first petitioner apart from A.2 had any role to play in the transaction, proceedings against the other Directors of the company, for the offence allegedly committed by A.2 for on behalf of the first petitioner-(A. 1) are liable to be quashed. In view thereof the proceedings in the C.C. against petitioners 2 and 3 and A.4 to A.10, though A.4 to A. 10 have not joined as petitioners in the petition, are liable to be and hence, are quashed.

12. No doubt *mens rea* is essential for an offence u/s 420, IPC. No doubt first petitioner-(A. 1) being a juristic person it may not have *mens rea*. But since in *ANZ Grindlays Bank Ltd. and Others Vs. Directorate of Enforcement and Others*, , question of liability of a company for criminal offences was referred to a Constitution Bench, first petitioner-(A. 1) who is being represented by A.2, its Managing Director, who is not a party to this petition, neither A.2 nor the first petitioner would be inconvenienced by my not quashing the proceedings against the first petitioner. The proceedings against the first petitioner can be decided by the trial Court as per the decision(s) of the Apex Court. So I am not quashing the proceedings against the first petitioner.

13. Before parting with the case, I wish to place on record a few thoughts of

mine. It is well known that Legislature enacts laws to arrest unsocial or undesirable activities, which cause harm to the society at large, and prescribes deterrent punishments to prevent such activities taking place. Judicial notice can be taken of the fact that there is a sea-change in the human values and that human values etc. of 21st century are different from those prevailing in the 19th century. History tells us the people in this country, generally, were honest and law abiding during 1860 i.e. 19th century when IPC came into force on 6-10-1860, when with one rupee a person could purchase more than one bag of rice and some gold also. Now a bag of rice costs more than Rs. 1,000/-. Salaries of many Government servants and officers at that time were in two figures. Now even a class four employee earns four figure salary. Obviously keeping in view the said fact recent enactment like Narcotic Drugs and Psychotropic Substances Act, 1985 and Information Technology Act, 2000 prescribe fine in lakhs of rupees for the offences committed under those enactments. But the fine prescribed in IPC way back in 1860, which at the time could be a deterrent, remained unchanged even till now i.e. more than 140 years after IPC was enacted. In the present day situation the meager fine prescribed in several sections of I.P.C. can, by no stretch of imagination, be said to be a deterrent to prevent such offences. Since greed to become rich overnight by any means, has become the order of the day, and taking notice of the fact that several individuals and bogus institutions, by promising rich returns, are luring innocent people into investing their hard earned money with them and are vanishing overnight, Legislature, in an attempt to prevent such operations, made some laws, obviously because such acts may not fall under "cheating" as defined in Section 415, I.P.C. "Cheating" as understood by a common man is different from "cheating" as defined by Section 415, IPC, because for "cheating" to be an offence under IPC, intention to cheat even at the time of entering into the transaction has to be established. In the present day situation when honesty became a very rare commodity, and since nobody would make apparent his intention to cheat even at the time of inception, and since persons resort to cheating only after creating confidence about his being honest in the mind of the man he intends to cheat, in my considered opinion it may be in the fitness of things, and to suit the present day need, to cast the burden to establish that he had no intention to cheat on the accused, by making suitable amendment to Section 415, IPC. It is for the concerned authorities to take a decision.

14. In the result, the petition is partly allowed and the proceedings against the petitioners 2 and 3 and A.4 to A. 10, are quashed. Petition of first petitioner, is dismissed.