

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on : 26.09.2022
Pronounced on: 30.09.2022

CRMC No.265/2017

Bahu Builders and Traders Jammu Pvt. Ltd. ...Petitioner(s)

Through:-Mr. Gagan Basotra, Sr. Advocate
With Ms. Navdeep Kour, Advocate

V/s

J&K Dharmarth Trust and others ...Respondent(s)

Through:- Mr. Ashwani Thakur, Advocate for
R-1 & 3 to 5
Mr. Satinder Gupta, Advocate for R-6

Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1. The petitioner has challenged order dated 11th March, 2017 passed by the Additional Sessions Judge, Jammu (hereinafter referred to as 'the Revisional Court'), whereby the revision petition filed against order dated 20th July, 2015 passed by the learned Municipal Magistrate, Jammu (hereinafter referred to as "the trial Magistrate") has been dismissed. It is pertinent to note here that vide order dated 20th July, 2015 passed by the learned trial Magistrate, the criminal complaint filed by the petitioner against the respondents was dismissed by exercising his powers under Section 203 of the Code of Criminal Procedure.

2. It appears that the petitioner had filed a criminal complaint against the respondents before the trial Magistrate alleging commission of offence under Sections 406/409/481/420/467/468/120-B RPC. It was alleged in the complaint that on 5th April, 1995, an agreement was executed between respondent No.1 and petitioner, whereby a building was proposed to be constructed as per the specifications, drawings and plans prepared by respondent No.1. A supplementary agreement was executed between the petitioner and respondent No.1 on 3rd September, 1996. It was alleged in the complaint that in terms of Clause (1) of the agreement dated 5th April, 1995, respondent No.1 had promised to give tenancy rights of 76 garages in the basement, 129 shops in the ground floor, 96 shops in the first floor and 4 commercial halls in the 2nd floor to the petitioner/complainant or its nominee in lieu of consideration of construction of the building by the petitioner from its own resources and costs. It was further averred in the complaint that as per Clause (15) of the agreement, respondent No.1 was not authorized to let out or lease the open spaces, corners, parking etc in the built up area without written NOC from the petitioner.

3. It was alleged in the complaint that the respondents hatched a conspiracy and dishonestly shifted the tenancy rights with respect to the property in question without the knowledge of the complainant. Accordingly, three different lease deeds came to be executed on 18th February, 2012, 26th March, 2012 and 26th March, 2012 in respect of D-Block, 2nd Floor, Shop No.13, Basement Floor and Shop No.14,

Basement Floor respectively. It was alleged that by doing so, the respondents have caused wrongful loss to the petitioner, as valuable lease rights in the property in question valuing approximately Rs.3 Crores had been fraudulently transferred to respondent No.6.

4. Learned trial Magistrate, after recording preliminary evidence of the petitioner/complainant, passed order dated 20th July, 2015, whereby the complaint of the petitioner was dismissed presumably in exercise of powers under Section 203 of the Code of Criminal Procedure. In the said order it is recorded that in terms of the agreement dated 5th April, 1995, the disputes between the parties are arbitrable through the mechanism of sole arbitration of Dr. Karan Singh. It is further observed in the said order that in case the respondents-accused have committed any breach of the agreement, they have a remedy to file suit for damages and, as such, offences alleged in the complaint are not made out against the respondents.

5. The aforesaid order came to be challenged by the petitioner by way of a revision petition before the Revisional Court, who vide impugned order dated 11th March, 2017 has upheld the order of the trial Magistrate and dismissed the revision petition. While doing so, the Revisional Court has observed that dispute between the petitioner and respondents is in the realm of civil dispute for which remedy is available in the agreement executed between the parties and as such, criminal proceedings cannot lie against the respondents.

6. The petitioner has challenged the impugned order passed by the Revisional Court as well as the order passed by the trial Magistrate on the ground that the contents of the complaint clearly disclose commission of criminal offence against the respondents, inasmuch as the offence of criminal breach of trust and forgery are disclosed against them. It has been further submitted that the Courts below have failed to appreciate this vital aspect of the matter and they have committed grave illegality in passing the impugned orders. It has also been contended that provision of alternative mechanism for redressal of any dispute does not ipso-facto absolve a person from criminal liability and that mere presence of civil element in a criminal offence does not mean that no offence is made out. Learned counsel for the petitioner has placed reliance upon the judgments of the Supreme Court rendered in the cases of **Arun Bhandari v. State of Uttar Pradesh and others, (2013) 2 SCC 801, M. Krishnan v. Vijay Singh and another, AIR 2001 SC 3014, Trisuns Chemical Industry v. Rajesh Ahharwal and others, (1999) 8 SCC 686, Rajesh Bajaj v. State of NCT of Delhi and others, (1999) 3 SCC 259 and Kamlesh Kumari and others v. State of U.P. and another, 2015(6) Scale 77.**

7. I have heard learned counsel for the parties and perused the record of the case including record of the trial Magistrate.

8. Learned Senior Counsel appearing for the petitioner has submitted that as per the terms of the agreement, the lease hold rights in respect of the building in question could have been granted only in favour of the petitioner or its nominee and in no case in favour of any other person.

Learned Senior counsel has submitted that the fact that the respondents have executed lease deeds in violation of the aforesaid stipulation of the agreement shows their dishonest intention and it amounts to criminal breach of trust on their part. He has further submitted that the lease deeds in violation of the terms of the agreement dated 5th April, 1995 could not have been executed, as such, the same fall within the definition of forged documents.

9. It is not in dispute that the petitioner and respondent No.1 have executed an agreement dated 5th April, 1995 followed by supplementary agreement dated 3rd September, 1996. The grievance of the petitioner/complainant is that the commitments made as per the covenants of the aforesaid agreement have not been honoured by the respondents. It is the case of the petitioner that by doing so, the respondents have committed offences of cheating and criminal breach of trust.

10. The question that falls for determination is whether in the face of aforesaid nature of dispute between the parties, it would be open to a Criminal Court to set the criminal law into motion at the instance of one party to the agreement against the other.

11. There can be no dispute to the fact that merely because a particular act of a person gives rise to civil liability against another person does not mean that no criminal proceedings can be initiated against such person. The judgments relied upon by the learned counsel appearing for the petitioner primarily support the aforesaid position of law to which there

can be no dispute. In order to understand as to in which cases criminal prosecution can be allowed to proceed where remedy in civil law is also available, it would be apt to refer to the judgment of the Supreme Court in the case of **M/s Indian Oil Corporation v. M/s NEPC India Ltd. and others (2006) 6 SCC 736**. In the said case the Supreme Court has, after noticing its earlier judgments on the issue relating to maintainability of a criminal prosecution in a case which involves breach of a commercial contract, observed as under:-

“13. (i) to (iv) xxxxxxxxxxxxxxxx

(v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a CRM(M) No.284/2019 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 proceedings 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, 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.

14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under [section 250 Cr.P.C.](#), more frequently, where

they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may."

12. From the aforequoted principle of law, it is clear that before deciding as to whether proceedings in a criminal complaint are to be dropped, the Court has to be satisfied that the subject matter involved in the complaint is a purely civil wrong and that it has no criminal texture to it. Further it is not necessary that in every case where remedy against a person lies by way of a civil proceeding, the criminal prosecution is out of bounds. Each case has to be decided in the light of the facts and circumstances peculiar to that particular case.

13. In light of the aforesaid legal position, let us now analyze the allegations leveled in the impugned complaint. As already noted, the respondents are alleged to have committed offences under Sections 406, 409, 420, 467, 481 and 468 RPC. So far as offence of forgery is concerned, the same is not made out from the contents of the complaint. What the petitioner is alleging in the complaint is that respondent No.1 has executed lease deeds in violation of the terms of the agreement. It is not the case of the petitioner that the person, who executed the lease deeds on behalf of respondent No.1 was either not authorized by the said respondent to do so or that someone else forged the signatures of the authorized person on the lease deeds. The grouse of the petitioner is that respondent No.1 could not have executed these lease deeds as it violated the terms of the agreement between the petitioner and the said respondent. Thus, it is not a case of making of false documents,

consequently there cannot be a case of forging of the documents. Thus, offences under Sections 467 and 468 RPC are ruled out in this case. Similar is the fate of offence under Section 481 RPC, as it is nobody's case that the respondents have used a false property mark. Offence under Section 409 is also ruled out because the said offence can only be committed by a public servant, banker, merchant or agent. It is not the case of the petitioner that any of the respondents is either a public servant or a banker, or a merchant or an agent.

14. The other offences alleged to have been committed by the respondents are offences under Section 406 and 420 RPC. In order to attract the ingredients of Section 420, there has to be a fraudulent or dishonest inducement on the part of a person and thereby the other party must have parted with his property. To establish an offence under Section 420 RPC, it must be shown that there was a fraudulent and dishonest intention at the time of commission of the offence and that the person practising deceit had obtained the property by fraudulent inducement and willful representation. Mere breach of contract cannot give rise to a criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the transaction i.e., at the time when the offence is alleged to have been committed.

15. "Dishonestly" has been defined in Section 24 of RPC to mean deliberate intention to cause wrongful gain or wrongful loss and when, with such intention, deception is practised and delivery of property is

induced, then the offence under Section 420 RPC can be said to have been committed.

16. So far as offence under Section 406 RPC is concerned, it provides punishment for criminal breach of trust. Criminal breach of trust has been defined in Section 405 of RPC, which reads as under:

"405. Criminal breach of trust.--Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

17. From a perusal of the aforesaid provision, it is clear that it entails misappropriation or conversion of another's property for one's own use with a dishonest intention. Cheating, as defined under Section 415 of the RPC, also involves the ingredient of having dishonest and fraudulent intention which is aimed at inducing the other party to deliver a property to a specific person. Thus, both the Sections postulate "dishonest intention" is a pre-condition for even prima facie establishing the commission of said offences. It is only if ingredients postulated in Sections 405 and 415 of the RPC are made out from the contents of the impugned complaint that offences under Section 420 and 406 RPC can be said to have been disclosed.

18. The Supreme Court in the case of **Hridaya Ranjan Prasad Verma v. State of Bihar, (2000) 4 SCC 168**, has observed that it is the intention which is the gist of the offence and in order 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.

19. Again, in **Alpic Finance Ltd vs P. Sadasivan And Anr, (2001) 3 SCC 513**, the Supreme Court held that “an honest man entering into a contract is deemed to represent that he has the present intention of carrying it out but if, having accepted the pecuniary advantage involved in the transaction, he fails to pay his debt, he does not necessarily evade the debt by deception”. Thus, it is necessary to show that a person had fraudulent or dishonest intention at the time of making of promise, to say that he committed an act of cheating.

20. In light of the aforesaid legal position, let us now analyze the contents of the impugned complaint. The grievance of the petitioner/complainant is that he had entered into an agreement with respondent No.1 and as per the terms of the agreement in consideration of construction of the complex, respondent No.1 had to transfer lease hold rights in respect of the building in favour of the petitioner or its nominee but the said respondent failed to do so inasmuch as at least three instances, lease hold rights were transferred in favour of persons other than the petitioner or its nominee. Regarding transfer of lease hold rights in respect of majority of shops/spaces available in the complex, the petitioner has not raised any grievance, which means that even as per the

case of the petitioner, substantial compliance was made by respondent No.1 to the terms of the agreement. Thus, it cannot be stated that respondent No.1 had dishonest intention of not honouring the commitments made in the agreement right from its inception. If a person fails to honour his commitment under an agreement relating to a commercial transaction, it does not necessarily mean that he has committed offence of cheating or criminal breach of trust. In the above context, it would be apt to refer to the observations of the Supreme Court made in the case of **Alpic Finance Ltd** (Supra). Para 10 of the aforesaid judgment is relevant to the context and the same is reproduced as under:-

“10. The facts in the present case have to be appreciated in the light of the various decisions of this Court. When somebody suffers injury to his person, property or reputation, he may have remedies both under civil and criminal law. The injury alleged may form the basis of civil claim and may also constitute the ingredients of some crime punishable under criminal law. When there is dispute between the parties arising out of a CRM(M) No.284/2019 transaction involving passing of valuable properties between them, the aggrieved person may have a right to sue for damages or compensation and at the same time, law permits the victim to proceed against the wrongdoer for having committed an offence of criminal breach of trust or cheating. Here the main offence alleged by the appellant is that the respondents committed the offence under [Section 420 IPC](#) and the case of the appellant is that the respondents have cheated him and thereby dishonestly induced him to deliver property. To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence. There is no allegation that the respondents made any willful

misrepresentation. Even according to the appellant, the parties entered into a valid lease agreement and the grievance of the appellant is that the respondents failed to discharge their contractual obligations. In the complaint, there is no allegation that there was fraud or dishonest inducement on the part of the respondents and thereby the respondents parted with the property. It is trite law and common sense that an honest man entering into a contract is deemed to represent that he has the present intention of carrying it out but if, having accepted the pecuniary advantage involved in the transaction, he fails to pay his debt, he does not necessarily evade the debt by deception."

21. Relying upon the ratio laid down in **Alpic Finance Ltd** (supra), the Supreme Court in the case of **Anil Mahajan vs. Bhor Industries Ltd. and another, (2005) 10 SCC 228**, has held that from a mere denial of a person to keep up promise subsequently, a culpable intention right at the beginning, that is, when he made the promises cannot be presumed. The Court went on to observe that a distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of the inducement. The subsequent conduct is not the sole test. The Supreme Court further observed that mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent/dishonest intention is shown at the beginning of the transaction and the substance of complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence.

22. From the foregoing enunciation of law on the subject, it is clear that the dispute between the petitioner and respondent No.1 is purely of

commercial nature having no element of criminality to it. Even as per the case of the petitioner, there has been no element of fraudulent intention on the part of respondent No.1 at the time of entering into the agreement, which is subject matter of the complaint. Thus, the basic ingredients of the offence of cheating are missing in the instant case. Similarly, even as per the contents of the impugned complaint, there has been no entrustment of property by the petitioner to respondent No.1. The property in fact admittedly belongs to respondent No.1 and the petitioner at best was entitled to its lease hold rights. Thus, an important ingredient of offence of criminal breach of trust is missing in the instant case. Hence, it cannot be stated that any offence is made out against respondent No.1.

23. There is yet another aspect of the matter, which is required to be noticed. In the agreement, which is subject matter of the complaint, there is an arbitration clause which provides that in case of any dispute or difference arising touching the rights and liabilities of the parties in terms of the said agreement, the same has to be settled by reference of those disputes to Dr. Karan Singh, who has agreed to be the arbitrator between the parties and that his decision is to be final and binding on the parties. Admittedly, the disputes which are subject matter of complaint in question have arisen in respect of the rights and obligations of the parties under the agreement dated 5th April, 1995. Therefore, it was open to the petitioner to avail the remedy of arbitration but it appears that instead of doing so or in addition to doing so, the petitioner has chosen to initiate

criminal proceedings against the respondents in order to pressurize them to settle purely civil disputes. The Supreme Court has, in the case of **M/s Indian Oil Corporation** (supra), while deprecating the tendency of business circles to convert civil disputes in criminal cases, observed as under:

"(13) While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if CRM(M) No.284/2019 a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged (14) While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law."

24. In view of the foregoing discussion and the analysis of the allegations leveled in the impugned complaint, it is clear that the transaction between the petitioner and respondent No.1 is purely of civil nature and it has been given a criminal colour by the petitioner/complainant, which is impermissible in law. Learned trial Magistrate was, therefore, justified in dismissing the complaint by

exercising his powers under Section 203 Cr.P.C. and thus, no fault can be found with the impugned order passed by the Revisional Court, whereby the order of the trial Magistrate has been upheld.

25. For foregoing reasons, the petition lacks merit and, as such, the same is dismissed.

(Sanjay Dhar)
Judge

JAMMU.
30 .09.2022
Vinod.

Whether the order is speaking : Yes
Whether the order is reportable: Yes