

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on: 18.08.2022

Pronounced on: 24.08.2022

CRMC No.54/2016

BHARTI AIRTEL LIMITED COMPANY & ORS. ... PETITIONER(S)

Through: - Ms. Arshie Zuhar, Advocate.

Vs.

MALIK MUSHTAQ

...RESPONDENT(S)

Through: - None.

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

JUDGMENT

- 1) The petitioners have challenged order dated 10.09.2015 passed by learned Additional Sessions Judge, Pulwama, whereby learned Sessions Judge has set aside order dated 17.08.2015 passed by learned Judicial Magistrate, 1st Class, Pampore.
- 2) It appears that the respondent herein had filed a complaint against the petitioners alleging commission of offences under Sections 406, 418, 420, 109 and 120-B RPC. The aforesaid complaint came to be dismissed by the learned trial Magistrate vide his order dated 17.08.2015 on the ground that there is no sufficient ground for

proceeding against the accused/petitioners. The aforesaid order came to be challenged by the respondent/complainant by way of a revision petition before the Court of Additional Sessions Judge, Pulwama. Vide the impugned order dated 10.09.2015, the learned Sessions Judge set aside the order of the learned trial Magistrate and remanded the case back to the learned trial Magistrate with a direction to proceed afresh and pass order in accordance with the provisions of law. It is this order, which is under challenge before this Court by way of instant petition.

3) It has been contended that the impugned order dated 10.09.2015 passed by learned Sessions Judge is illegal and bad in the eyes of law, inasmuch as the transaction between the respondent/complainant and the petitioners is purely of civil nature and if at all the respondent had any grievance, he could have approached a Civil Court or a Consumer Redressal Forum. It has been further contended that the allegations made in the complaint do not disclose commission of offence under Section 420 of RPC or any other offence against the petitioners and, as such, it was not open to the learned Revisioanl Court to

set the criminal law into motion against the petitioners by quashing the order of the learned trial Magistrate.

4) I have heard learned counsel for the petitioners and perused the material on record including the record of the trial court.

5) The respondent after appearing on a few dates stopped appearing in the case and, as such, the case has been heard in his absence.

6) In the complaint that has been filed by the respondent against the petitioners, it has been alleged that complainant/respondent had applied to the petitioners for providing a Sim Card so that he could avail and utilize telecom services provided by the petitioners. It is further averred in the complaint that pursuant to his application, the petitioners herein allotted cell No.9797042100 to the respondent/complainant and he circulated this number amongst all his family, friends and clients. It was alleged that the aforesaid cell number was not activated by the petitioners despite repeated requests and ultimately, he was orally informed that the aforesaid cell number cannot be activated and instead another cell number i.e., 9906684827 would be allotted and activated in his favour.

Upon this, the respondent/complainant is stated to have served a legal notice upon the petitioners. It was claimed by the respondent/complainant that in response to an RTI query, he was informed by Telecom Enforcement and Resources Monitoring, J&K, that both SIM Cards bearing cell Nos.9906684827 and 9797042100 belong to some third person(s). On this ground, it was urged that the respondent/complainant has been cheated and deceived by the petitioners and he has been put to loss, injury and inconvenience. According to respondent/ complainant, he has been allotted a number that was already in use of some other person and that he was entitled to obtain a fresh unused mobile number.

7) A perusal of the contents of the aforesaid complaint reveals that the grievance of the respondent/complainant is that he has been provided a cell number that was in use of some other person on an earlier occasion and this, according to the respondent/complainant, constitutes an act of cheating on the part of petitioners. The question that falls for determination is whether the aforesaid alleged act of the petitioners would come within the definition of 'cheating'.

8) In order to attract the ingredients of Section 420, there has to be an element of cheating on the part of the accused. Cheating has been defined in Section 415 RPC. To constitute offence under Section 420, there must 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.

9) “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.

10) Now coming to the facts of the instant case as have been narrated hereinbefore, as per respondent’s own case, he had applied to the petitioners for issuance of a Sim Card. He was provided the SIM Card but instead of

providing him a fresh and unused mobile number, he has been allotted a mobile number that was previously in use of some other person that had been disconnected later on. What the petitioners/service providers had, after receiving the payment from the respondent/complainant, offered to him is the Sim Card and not a particular cell phone number. There can never be a representation on behalf of a service provider to a consumer to allot a particular mobile number to him unless the consumer has applied for a vanity number by making additional payment in this regard. It is not the case of the respondent/complainant that he had paid any extra charges for getting a particular mobile number. Therefore, the facts alleged by the respondent/complainant do not at all disclose any element of fraud or cheating on the part of the petitioners.

11) The respondent/complainant may have some grouse about non-activation of his Sim Card within a reasonable time but for that the petitioners cannot be held criminally liable. If at all allegation of the respondent in this regard is factually correct, he has the remedy of approaching the Consumer Redressal Commission as his grouse in this regard would come within the definition of “deficiency of service” as contained in Consumer Protection Act but by

no stretch of imagination, the allegations made in the complaint constitute any criminal offence against the petitioners.

12) The learned trial Magistrate has rightly, on the basis of the material on record, concluded that there is no ground for proceeding against the petitioners and dismissed the complaint but unfortunately, the learned Additional Sessions Judge, while exercising his revisional jurisdiction, has failed to appreciate this aspect of the matter. It is not that in every criminal complaint filed by a complainant against an accused, the trial Magistrate has to issue process against the accused without applying his mind to the material available before him. The observations of the learned Additional Sessions Judge that the learned trial Magistrate should not have given an opinion that the complainant has remedy available under Civil Law and that he has not spelt out as to what ingredients are missing, are not in accordance with law. A look at the order passed by the learned trial Magistrate would show that he has dealt with the matter threadbare and he has clearly indicated that the ingredients of the offence of cheating are not made out against the petitioners and in this regard, he has placed reliance upon

a host of case law on the subject. Similarly, the learned trial Magistrate was well within his jurisdiction to take overall view of the matter and record his satisfaction that the dispute projected in the complaint is essentially of a civil nature arising out of a contractual obligation.

13) Summoning of an accused in a criminal matter is a serious business. Once the criminal law is set into motion, the accused is exposed to the possibility of arrest and he has to rush to the court to seek bail. Therefore, the order of summoning an accused in a criminal complaint should not be a mechanical exercise but such an order should reflect that the Magistrate has applied his mind to the facts of the case and the applicable law, whereafter the Magistrate has to record his satisfaction as to whether any offence is made out and if so, which of the offences is made out from the contents of the complaint and the material available before him. It is only thereafter that the Magistrate has to decide as to whether or not the process has to be issued against an accused. In the instant case, the learned trial Magistrate has taken all these precautions before passing the order and holding that there is no ground for proceeding against the petitioners/accused.

14) There can be no dispute to the legal proposition that pursuing of civil remedy will not bar criminal proceedings and that the criminal proceedings cannot be quashed merely because civil remedy is also available to a complainant but then when a dispute arising in a case is purely of a civil nature and it has been given a criminal colour just to wreak vengeance upon the accused and to coerce him to settle a purely civil dispute, the court has to scuttle any such attempt on the part of the complainant.

15) The Supreme Court has, in the case of **M/S Indian Oil Corporation vs. M/S NEPC India Ltd. & Ors (2006) 6 SCC 736**, deprecated the tendency of converting civil disputes in criminal cases. Paras 13 and 14 of the said judgment are relevant to the context and the same are reproduced 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 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 though 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."

16) Recently, the Supreme Court in the case of **Mitesh Kumar J. Shah vs. The State of Karnataka & Ors. 2021 SCC Online SC 976**, has expressed its disapproval for imparting criminal colour to a civil dispute merely to take advantage of a relatively quick relief granted in a criminal case in contrast to a civil dispute. The Court further went on to observe that such an exercise is nothing but an abuse of the process of law which must be discouraged in its entirety.

17) Having regard to the aforesaid legal position and after analyzing the material on record in the light of the said legal position, it is clear that that the dispute between the petitioners and the respondent/complainant is purely of civil nature and even otherwise, the allegations made in the impugned complaint against the petitioners do not constitute any criminal offence. Thus, this is a fit case

where this Court should exercise its powers under Section 482 of Cr. P. C to prevent the abuse of process of law and to secure the ends of justice by quashing the order passed by the learned Additional Sessions Judge, Pulwama.

18) For the foregoing reasons, the petition is allowed and the impugned order dated 10.09.2015 is set aside and order dated 17.08.2015 passed by the learned trial Magistrate is maintained.

19) The trial court record along with copy of this judgment be sent back.

(SANJAY DHAR)
JUDGE

Srinagar,
24.08.2022
"Bhat Altaf, PS"

Whether the order is speaking: Yes/No

Whether the order is reportable: Yes/No

