

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

Reserved on: 13.07.2022
Pronounced on: 18.07.2022

CRMC No.107/2017

GHULAM MOHAMMAD NAIKOO ... PETITIONER(S)

Through: - Mr. M. M. Dar, Advocate.

Vs.

ABDUL QAYOOM WANI ...RESPONDENT(S)

Through: - None.

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

JUDGMENT

1) The petitioner has challenged order dated 11.05.2017 passed by Judicial Magistrate, 1st Class, Kulgam, whereby criminal complaint filed by the petitioner against the respondent has been dismissed without issuing process against the respondent.

2) It appears that the petitioner had filed a criminal complaint against the respondent alleging commission of offences under Section 420 and 506 RPC. In the complaint, it was alleged that in April, 2015, the respondent/accused approached the petitioner/complainant and offered to purchase bus bearing No.JK03-1349, owned by the petitioner. It is averred that the sale consideration of the bus was fixed as Rs.5.00 lacs and the respondent paid an amount of Rs.5000/ in cash to the petitioner. It is further averred that the respondent issued two cheques, one amounting to Rs.1.00 lac and another amounting to Rs.1.50 lacs in

favour of the petitioner and promised to liquidate the balance consideration amount of Rs.2.45 lacs within a period of two months. Accordingly, the petitioner delivered possession of the vehicle to the respondent. It is further averred that the cheque for an amount of Rs.1.00 lac was encashed by the petitioner, but the other cheque for an amount of Rs.1.50 lacs was returned unpaid. The petitioner is stated to have approached the respondent to liquidate the balance amount of sale consideration but the respondent kept on making false promises and did not liquidate the balance amount and instead extended threats to the petitioner. It is alleged in the complaint that the respondent, with a dishonest intention, has cheated the petitioner and has deprived him of the vehicle in question, without paying the balance amount of sale consideration. Thus, it is alleged that the respondent has committed the offence of cheating.

3) The learned trial Magistrate recorded the preliminary statement of the petitioner and his witness in which the allegations made in the complaint were reiterated by them. Thereafter vide order dated 16.03.2017, the learned trial Magistrate, after taking cognizance of the case, deferred the issuance of process against the respondent and directed SHO, P/S, Kulgam, to conduct investigation under Section 202 of the Cr. P. C. It seems that this order came to be challenged by the respondents by filing a petition under Section 561-A of J&K Cr. P. C bearing No.50/2017 before this Court. The said petition was disposed of by this Court with a direction to the learned Magistrate to consider the application, if any, filed by the petitioner (respondent herein) for

dropping of the proceedings and to pass appropriate orders on the strength of the claim made in the application with supportive material.

4) Pursuant to the aforesaid order passed by this Court, it seems that the respondent moved an application for dropping of proceedings and dismissal of complaint before the trial Magistrate, who, after hearing the parties, passed the impugned order dated 11.05.2017, whereby he has refused to issue process against the respondent and dismissed the complaint by holding that there is no sufficient material on record to proceed against the respondent/accused.

5) Notice of this petition was given to the respondent and he put in appearance before this Court through counsel, Mr. Zahoor Ahmad Shah, Advocate, but for the last couple of hearings nobody has been appearing on behalf of the respondent and, as such, the matter has been taken up for consideration in the absence of respondent.

6) I have heard learned counsel for the petitioner and perused the material on record, including the record of the trial court.

7) It has been contended by learned counsel for the petitioner that the impugned order has been passed by the learned trial Magistrate without applying his mind and that the said order is against the mandate of law. It has been further contended that the observation of the learned trial Magistrate that dispute between the petitioner and respondent is purely of civil nature, is not well-founded as the material on record clearly discloses commission of criminal offences. It is further contended that despite the petitioner being the registered owner of the vehicle, he has

been deprived of the said vehicle without being paid its sale consideration. It is also contended that the learned trial Magistrate has ignored the fact that by allowing the respondent to take possession of the vehicle in question without paying the balance amount of sale consideration, wrongful gain has been caused to the respondent at the cost of the petitioner. Thus, according to the petitioner, offence of cheating is clearly discernible from the material on record.

8) Learned counsel for the petitioner has, while relying upon the ratio laid down by the Supreme Court in the case of **Tulsi Ram and others vs. State of Uttar Pradesh**, AIR 1963 SC 666, and the ratio laid down by this Court in the case of **Gh. Hassan Bhat vs. Gh. Hassan Gors**, 2010(2) JKJ 564[HC] and **Refex Refrigerants Ltd. vs. Kolane Refrigerants**, 2010(2) JKJ 578[HC], contended that a particular set of facts may give rise to both criminal and civil liability and merely because a person has a civil remedy does not mean that criminal proceedings initiated by the said person should be quashed.

9) If we have look at the impugned order, the learned trial Magistrate has observed that to constitute an offence of cheating, it has to be shown that the accused had dishonest intention at the time of making the promise. The learned trial Magistrate has further observed that such intention cannot be inferred merely from the fact that the accused could not subsequently fulfill the promise. According to learned trial Magistrate, there is no such assertion in the complaint or the material on

record. It has also been observed that the dispute between petitioner and the respondent is purely of civil nature and remedy for the petitioner lies in filing a civil suit.

10) As is clear from the contents of the complaint and the documents on record of the trial court, there appears to be a dispute between the parties as regards the sale/purchase of bus. The petitioner claims that whole of the sale consideration has not been paid by the respondent to him and, as such, he has been cheated by the respondent, whereas the case of the respondent is that he has paid entire sale consideration to the petitioner and that the petitioner has executed a General Power of Attorney in his favour whereby he has been authorized to ply the bus and to do all acts in respect of the bus in question.

11) 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 law into motion at the instance of one party to the dispute against the other.

12) The respondent is alleged to have committed offences under Section 420 and 506 of RPC. 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.

13) “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. 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. 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.

14) 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.

15) 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.

16) The Supreme Court in the case of **M/S Indian Oil Corporation vs. M/S NEPC India Ltd. & Ors** (2006) 6 SCC 736, has laid down the principles which guide the Courts in ascertaining as to whether allegations regarding a commercial dispute would give rise to a criminal action apart from the civil remedy. These principles are reproduced 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 malafides/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 so 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 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.

17) From the foregoing enunciation of law on the subject, it is clear that the mere fact that complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available, is not by itself a ground to quash the criminal proceedings. It is only if it is shown that the complaint, even if taken at its face value does not disclose commission of any offence or if it is found that criminal proceedings have been initiated with malafides/malice for wreaking vengeance that the same can be quashed.

18) In the light of the aforesaid legal position, let us now analyze the contents of the impugned complaint and the material on record of the trial court. The grouse of the complainant is that he had entered into a sale agreement with respondent whereby respondent had agreed to purchase the bus owned by the petitioner for a sale consideration of Rs.5.00 lacs. His further case is that he received an amount of Rs.5000/ in cash and an amount of Rs.1.00 lac through cheque from the respondent but the balance amount of sale consideration has not been paid to him by the respondent.

19) As already noticed, in order to commit an act of deception of fraud, which is gist of the offence under Section 420 of the RPC, the complainant must have been dishonestly inducted to deliver the property. To deceive is to induce a man to believe that a thing is true, which is false and which the person practicing the deceit knows or

believes to be false. This intention of deception or fraud must be existent at the time of commission of the offence. The impugned complaint does not anywhere state that the respondent had a dishonest intention from the very inception. Even according to the complainant, the respondent paid an amount of Rs.5000/ in cash initially and later on paid a further amount of Rs.1.00 lac through cheque, whereafter he defaulted in payment of the balance amount. This clearly shows that the respondent at the very inception was having the intention of honouring his commitment to the petitioner. If a person fails to liquidate his liability, it does not necessarily mean that he has committed the offence of cheating. I am supported in my aforesaid view by the judgment of the Supreme Court in **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 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.”

20) 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 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 that substance of complaint is to be seen. Mere use of the expression “cheating” in the complaint is of no consequence.

21) From the foregoing enunciation of law on the subject, it is clear that dishonest or fraudulent intention, which is gist of the offence of cheating, has to be from the inception of the transaction, which, in the instant case, is missing.

22) In the instant case, as already noted, the transaction between petitioner and the respondent was purely of civil nature whereby the petitioner had agreed to sell and the respondent had agreed to purchase the bus in question. The respondent had paid part of the sale consideration but failed to liquidate the balance amount. The petitioner had also executed a Power of Attorney in favour of the respondent authorizing the respondent to do all acts in respect of the bus in question. It is not the case of the petitioner that he has revoked the said Power of Attorney. Therefore, respondent's possession over the bus cannot be termed as illegal or wrongful. It is, thus, a clear case of breach of terms of contract having no criminal texture to it.

23) So far as the offence under Section 506 of RPC i.e. offence of criminal intimidation, is concerned, the same is also not made out from the contents of the complaint because there are no specific details as regards the threats alleged to have been extended by the respondent to the petitioner. Mere omnibus allegations in this regard do not constitute an offence of criminal intimidation.

24) The judgments relied upon by learned counsel for the petitioner, in support of his contentions, are not applicable to the facts of the instant case. In **Tulsi Ram's** case(supra), there were allegations of forgery against the accused besides the allegation of cheating. The act of forgery is purely of criminal nature and it does not have any civil texture to it. Therefore, it was in those circumstances that the Supreme Court held that the accused was guilty of offence under Section 420 IPC. In the case

of **Gh. Hassan Bhat** (supra), the accused had taken away the vehicle from the possession of the petitioner, which obviously amounted to an offence of theft punishable under Section 379 RPC and it is in those circumstances that the Court held that even if there was a civil dispute going on between the parties but the act of the accused amounted to a criminal offence. In the case of **Refex Refrigerants Ltd.**(supra), it was held that the accused were not having the facility for manufacturing of ton tanks nor they had placed any order for onward supply to the complainant and it was specifically pleaded that intention of the accused was fraudulent from the very beginning of the transaction, which induced the complainant to part with Rs.22.00 lacs. It was in those circumstances that the Court held that criminal offence is disclosed against the accused. Thus, the ratio laid down in aforesaid cases relied upon by the petitioner is not applicable to the facts of the instant case.

25) For the foregoing reasons, I do not find any infirmity or illegality in the impugned order passed by the learned trial Magistrate. The petition lacks merit and is dismissed accordingly.

(SANJAY DHAR)
JUDGE

Srinagar,
18.07.2022
"Bhat Altaf, PS"

Whether the order is speaking:	Yes/No
Whether the order is reportable:	Yes/No