

CASE NO.:
Appeal (crl.) 941 of 2001

PETITIONER:
M/S INDSEAM SERVICES LTD.

Vs.

RESPONDENT:
BIMAL KUMAR KEJRIWAL (HUF)

DATE OF JUDGMENT: 14/09/2001

BENCH:
D.P.MOHAPATRA & K.G.BALAKRISHNAN

JUDGMENT:

D.P. Mohapatra, J.

Leave granted.

M/s Indseam Services Limited, an accused in complaint case No.C.1628/96 pending before the Metropolitan Magistrate, 12th Court, Calcutta, has filed this appeal assailing the order dated 10.07.2000 of the Calcutta High Court dismissing the Revision Petition filed by it for quashing the order of the magistrate taking cognizance of the offence under Section 420, Indian Penal Code, and issuing process to the accused.

The complaint case was registered on receipt of the complaint filed by one Krishan Kumar Kejriwal, authorised representative of Bimal Kumar Kejriwal, who is the respondent herein, alleging, inter alia, that three cheques drawn by the officers of the appellant-company in favour of the respondent were returned by the bank on instructions received from the drawer not to encash them. The complainant contended that on the facts averred in the complaint petition the accused have committed the offences under Section 138/141 of the Negotiable Instruments Act and Section 420 read with Section 120B of the IPC.

The learned Magistrate on perusal of the complaint petition and statement of the complainant and other materials produced by him, dismissed the complaint petition under Section 203 of the Criminal Procedure Code holding that there was no sufficient ground for proceeding against the accused, vide the order dated 1.10.1996. Therein the learned Magistrate observed that the dispute between the parties cropped up due to breach of contract between them and that the dispute is of a civil nature. The complainant challenged the said order by filing a Review Petition before the High Court. The High Court disposed of the case by the order dated 21.3.1997 holding that the learned Magistrate was right in not taking cognizance of the offence under Section 138/141 of the

Negotiable Instruments Act and his order in that regard cannot be interfered with; that the learned Magistrate should have taken cognizance of the offence under Section 420 IPC. The High Court issued a direction to the learned Magistrate to hold further enquiry into the complaint and pass appropriate order. On receipt of the order of the High Court the learned Magistrate by the order dated 9.12.1997 took cognizance under Section 420/120B IPC and issued process to all the accused persons. The order passed by the Magistrate is quoted hereunder:

"I have also gone through the order of Hon'ble High Court. On careful scrutiny of the materials on record, I find that there is sufficient ground to proceed against the accused persons u/s 120B/420 IPC.

Issue Summons against all the accused persons u/s 120B/420 IPC requisites are to be put in at once."

The appellant filed a revision petition in the High Court assailing the said order. The learned Judge declined to interfere with the cognizance order passed by the learned Magistrate for the reason that when there was a specific direction from the High Court to take cognizance of the offence under Section 420 IPC and the Magistrate passed the order in view of such direction it will not be proper for the High Court to hold otherwise. The relevant portion of the order reads as follows:

"It appears that the learned Magistrate took cognizance of the offence under Section 420/120B of the Indian Penal Code and issued process against the accused persons in view of the direction given by this Court. In my considered opinion when there is a specific direction from this Court directing the learned Magistrate to take cognizance of the offence under Section 420 IPC, it will not be proper for this Court to hold otherwise.

In view of the discussions made above I think it will not be proper for this Court to pass any further order or to go into the merit of the case in view of the judgment delivered by Justice Tiwari. This court cannot sit on appeal over the judgment and order passed by a co-ordinate bench of this Court. The revisional application is accordingly dismissed. However, liberty is granted to the petitioner to agitate all the points, which he has taken before this court in this revisional application, before the trial court at the appropriate stage of the proceedings."

Shri Rakesh Dwivedi, learned senior counsel appearing for the appellant raised the contentions that on reading the complaint petition and accepting the averments made therein as correct, no prima facie case for the offence of cheating punishable under Section 420 IPC is made out; that the averments made in the complaint petition do not show that the element of deceit on the part of the accused persons was present when the parties entered into the contract; that the transactions between the parties and liability of the appellant thereunder, if any, are of civil nature and criminal prosecution in such a case is a means of harassing the accused persons and gives rise to abuse of the process of court. Shri Dwivedi also contended that the learned magistrate passed the cognizance order without holding any enquiry despite the specific direction of the High Court.

Per contra, Shri D.A.Dave, learned senior counsel appearing for the respondent contended that the ingredients of the offence of cheating punishable under Section 420 IPC are made out on the averments in the complaint petition and therefore the learned Magistrate was right in passing the order taking cognizance of the offence under Section 420 IPC and the High Court rightly dismissed the Revision Petition filed by the appellant. Shri Dave further contended that the complainant had entered into the contract with the accused persons and parted with substantial sum of money (rupees eighty lakhs) on the basis of the three cheques issued by the latter in his favour which were returned by the Bank on the instructions issued by the accused persons. Referring to illustration (f) of Section 415 IPC Sri Dave submitted that on the averments made in the complaint petition the ingredients of the offence are satisfied. On perusal of the order under challenge it is clear that the learned single Judge disposed of the revision petition filed by the appellant for setting aside the cognizance order and for quashing the criminal proceeding without entering into the merits of the case. The learned single Judge did not consider the nature of the contract between the parties, the arrangement for payment of dues by the accused persons to the complainant, nor did he record a finding that the ingredients of the offence of cheating defined under Section 415 IPC were prima facie made out from the averments in the complaint petition and the statement on oath by the complainant before the learned Magistrate. The learned single Judge felt bound by the observations made in the order passed on 21st March, 1997 in which another single Judge (Justice S.K.Tiwari) while accepting the position that the Magistrate rightly did not take cognizance of the offence under Section 138/141 Negotiable Instruments Act had observed that the learned Magistrate should have taken cognizance of the offence punishable under Section 420 IPC. From the order under challenge it is manifest that the learned single Judge did not pay due attention to the part of the order in which the learned Magistrate was directed to hold further enquiry into the complaint. While judging the question whether the cognizance order passed by the learned Magistrate was sustainable in law it was incumbent for the learned single Judge to go into the question whether the complainant has been able to make out a prima facie case for the offence of cheating on the averments in the complaint petition and his

statement on oath. The matter should have been examined in the light of the contentions raised by the accused applicant in the revision petition and finding recorded. The learned single Judge also did not consider whether the learned Magistrate held any further enquiry before passing the cognizance order; whether the dispute raised in the case is of civil nature and continuing the criminal proceeding will give rise to abuse of the process of court.

We are constrained to observe that there has been an avoidance of the function of judicial determination of the question of acceptability or otherwise of the plea raised by the accused persons for setting aside the cognizance order and for quashing the criminal proceedings merely on the ground that on the previous occasion the single Judge had made an observation that cognizance should have been taken under Section 420 IPC, ignoring the further direction given in that order to the Magistrate to hold enquiry into the complaint.

For the reasons discussed in the foregoing paragraphs, the order under challenge being unsustainable has to be set aside and the matter is remitted to the High Court for fresh consideration. Since we are remitting the matter to the High Court for fresh consideration we do not deem it proper to make any observation on the merits of the case.

Accordingly, the appeal is allowed. The order passed on 10.7.2000 in Criminal Revision No. 1230/98 is set aside and the matter is remitted to the High Court for fresh disposal in accordance with law.

.....J.
(D.P.MOHAPATRA)

.....J.
(K.G.BALAKRISHNAN)

September 14, 2001

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