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Court : Mumbai Goa

Decided On : Sep-16-2015

Judge : F.M. Reis &Amp; K.L. Wadane

Appeal No. : Criminal Writ Petition No. 90 of 2014

Appellant : Keith Gracias

Respondent : State of Goa and Others

Judgement :

K.L. Wadane, J.

1. Heard Mr. P.P. Singh, learned Advocate appearing for the petitioner, Mr. D.Lawande, learned Additional Public Prosecutor appearing for the respondent nos.1 and 2 and Mr. S. Redkar, Advocate appearing for the respondent no.3.

2. Rule. Rule returnable forthwith. By consent, heard forth. The learned Advocates appearing for the parties waive notice on behalf of the respondent.

3. This petition is filed by the petitioner-accused to quash and set aside the First Information Report No.31/2013 registered against him for the offence punishable under Section 420 of the Indian Penal Code.

4. The brief facts of the case may be summarized as under:-

The complainant-respondent no.3 herein lodged a complaint to the Police Station, Panaji on 26th December, 2012 stating that she purchased Idea Mobile handset from M/s. Arte Digital World having its shop at Panaji.

5. The said mobile handset stopped working and had network problem initially though there was no problem with sim-card but found that there was no problem with sim-card as the said BSNL sim-card giving network when it was used and tried to other handset. Thus, it was confirmed that there was fault in the handset.

6. The respondent no.3 along with her husband went to the shop and met salesman " Mr. Aman, who said the handset has to be sent to the Service Centre.. However, he was reluctant to give receipt of handset, but ultimately one of them gave the receipt of handset to the complainant.

7. After eight days, when the complainant's husband went to collect the handset, at that time, Mr. Aman told that there was major fault in the handset and it was sent to the company for repairs and further told him to collect handset after 15 days.

8. After 15 days when the complainant and her husband went to collect the new handset, then Mr. Aman told them to come after two days. After two days, again he told him to wait for another two days. When the complainant threatened to file a complaint of cheating against him then he handed over the old mobile handset to the complainant. Then the husband of the complainant told Mr. Aman that he had agreed to give new handset mobile as replacement. Mr. Aman went again his own words and started behaving rudely and then told them the Company will repair the old handset and he refused to give new mobile handset. Thereafter Mr. Aman and the present petitioner told the complainant that they will send handset to the company and will give them a replacement. So the complainant handed over handset to the petitioner on 14.12.2012 and the petitioner assured to give new handset as a replacement within eight days. Thereafter, they contacted the petitioner and inquired about handset. At that time, the petitioner told them that he had received new handset from the Company and told them to collect the handset on 24.12.2012. On 24.12.2012 the petitioner told the complainant to come on 26.12.2012. The complainant lost faith upon the petitioner and went to the Police

Station and narrated the grievance. The Police Officer on duty called the petitioner and inquired about the handset. At that time, the petitioner said that handset is with Aman. Aman called at the police station and he came with handset. According to the complainant, the petitioner was supposed to give new handset but he failed to do so. Therefore, the complaint for the offence punishable under Section 420 of the Indian Penal Code is lodged and registered.

9. We have heard the arguments of the learned counsel appearing for the respective parties. We have also gone through the written submissions made by the respondent no.3 and perused the record.

10. Basically, looking to the contents of the F.I.R., it reveals that when the complainant raised the grievances of faulty handset for the first time Mr. Aman was in the shop. At that time, the mobile handset was sent for repairs. Thereafter the complainant went to the said shop for about 2-3 days. At that time, the petitioner was not present in shop. From the allegations in the First Information Report, it is seen that the name of the petitioner came in the picture at the last event when Mr. Aman contacted the petitioner. Therefore, one thing is very much clear that when the handset was handed over to Mr. Aman for its repairs at that time the petitioner had no role to play nor he was present at the shop. Therefore, it is difficult to infer that the present petitioner had accepted handset with intent to cheat the complainant. It further reveals from the record that lastly when the complainant approached to the police of Panaji Police Station at that time the petitioner as well as Mr. Aman was called in the police station. The police enquired with the petitioner and Aman. At that time, the petitioner has given acknowledgment of the handset on invoice.

11. The petitioner is Assistant Manager working in M/s. Idea Cellular Limited and nowhere it is mentioned in the complaint that at the time of purchase of mobile handset this petitioner was present in the shop and he sold the handset to the complainant. Further more, there is no allegation in the First Information Report that when the complainant initially approached to Mr. Aman for repairs or replacement of the handset at that time also, the petitioner was not present there, therefore, the question of promise does not arise.

12. Basically there are no averments/allegations in the First Information Report that the present petitioner has deceived and cheated the complainant with fraudulent or dishonest intention at the time of making promise or representation. There is no averment in the First Information Report regarding basic ingredients of the offence of cheating. There is no averment in the First Information Report that the present petitioner is promised anything and subsequently he has cheated the complainant. Even assuming that the present petitioner had given a promise then failure to keep one's promise does not amount to cheat. It is well settled law that to establish the offence of cheating the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation from its inception. Here, in the present case, there is no material to show that the petitioner had given promise to the complainant to replace the handset.

13. From the record, it is seen that the complainant has availed efficacious remedy by filing a complaint against the petitioner under the provisions of Consumer Protection Act, 1986 and the Forum directed the petitioner to pay cost of the handset of Rs. 5600/- with 12% interest and compensation of Rs. 25,000/- and costs of the litigation to the extent of Rs. 5000/- against which the present petitioner preferred an appeal to the State Commissioner for which there was delay. However, it was not condoned and the application for condonation of delay is rejected, against which, the present petitioner has approached the National Commission by way of filing the revision and the National Commission has stayed the order of the Consumer Forum. Therefore, even assuming, for the time being, that there was contract between the petitioner and the respondent no.3 and the petitioner had committed breach of contract or promise even though appropriate remedy is available and availed by the respondent no.3 and such dispute is pending before the appropriate forum.

14. Mr. Singh, the learned Advocate has, therefore, rightly relied upon the observations in the case of Vesa Holdings P. Ltd.and Anr. Vs. State of Kerala and Ors, reported in 2015 (2)Crimes 114 (SC) wherein it is observed as follows:-

9. It is true that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may be available to the complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint disclose the criminal offence of cheating or not. In the present case there is nothing to show that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 IPC. In our view the complaint does not disclose any criminal offence at all. Criminal proceedings should not be encouraged when it is found to be malafide or otherwise an abuse of the process of the court. Superior courts while exercising this power should also strive to serve the ends of justice. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of court and the High Court committed an error in refusing to exercise the power under Section 482 Criminal Procedure Code to quash the proceedings.?

15. Further, the Division Bench of this Court in a case Sayed Mohammed Masood Vs. State of Maharashtra, reported in 2008 (1) Bom CR (Criminal) 670 has observed thus:

It is to be seen if a matter, which is essentially of civil nature, has been a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law?

Further, it is observed that when the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute an offence or make out a case against the accused. The guilty intention is an essential ingredient of the offence of cheating. In other words 'mens rea' on the part of the accused must be established.

16. Looking to the observations of the above cited authorities, we think that the dispute between the petitioner and the respondent no.3 appears to be of civil nature and even the contents of the First Information Report are accepted as it is, even then, such contentions are not sufficient to constitute the offence punishable under Section 420 of the Indian Penal Code, even prima facie. In view of the

observations of the Apex Court in the case State of Hariyana Vs. Bhajanlal, reported in 1990 SCR Supl. (3) 259 we are of the opinion that the First Information Report No.31/2013 is liable to be quashed and set aside, as the continuation of criminal proceeding will be abuse of process.

17. Hence, writ petition is allowed. The First Information Report No.31/2013 lodged with Panaji Police Station on 18.1.2013 is hereby quashed and set aside. Rule is made absolute in above terms.

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