

Ramakant Khanderia and ors. Vs. Aspi Market, Director of Eastern Stores and Trading Co. Pvt. Ltd. and ors.

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Court : Mumbai

Decided On : Oct-05-1998

Reported in : (1999)101BOMLR627

Judge : T.K. Chandrashekhara Das, J.

Appeal No. : Cri. Writ Petition No. 1204 of 1991

Appellant : Ramakant Khanderia and ors.

Respondent : Aspi Market, Director of Eastern Stores and Trading Co. Pvt. Ltd. and ors.

Disposition : Petition allowed

Judgement :

T.K. Chandrashekhara Das, J.

1. This writ petition arises out of a complaint made by the 1st respondent alleging that the offence under Section 420 read with Section 114 of IPC was committed by the petitioners.

2. I have gone through the complaint filed by the 1st respondent before the Addl. Chief Metropolitan Magistrate, 37th Court, Esplanade, Bombay in C.C. No. 2251/8

of 1990. On examination of the complaint, I do not find that any offence under Section 420 is disclosed. What has been disclosed is that a breach of promise made by the petitioners.

3. The petitioners placed orders on 1st respondent for supply of certain goods and after supplying the goods, the petitioners did not make the payment. On close reading of the complaint, it is revealed that there is clear breach of promise, but all breaches of promise will not amount to offence of cheating. The dividing line between the breach of promise and cheating is very thin. Unless it is disclosed from the averments of the complaint that before committing the breach of promise, there was any design to defraud the complainant, in the initial stage of the transaction, the offence of cheating cannot be said to have been disclosed. In this context, it is worthwhile to note the recent decision of the Supreme Court on the subject. In *Nageshwaru Prasad Singh Alias Sinha v. Narayan Singh and Anr.* 1998 (6) SCC 694 : 1998 SCC (Cri.) 1978, it has been stated that in order to sustain a complaint under Section 420 of I.P.C. it has to be shown at the initial stage of the transaction itself that the accused had an evil design for cheating the complainant. Unless such circumstances are disclosed or inferable from the pleadings or the materials provided along with the complaint, breach of a promise at a later stage of transaction will not amount to an offence under Section 420 of I.P.C. It would amount only a breach of promise of a contract for which remedy is elsewhere.

4. In para 3 of the aforesaid decision, it is observed that:

The latter part thereof illustrates that at the time when agreement for sale was executed, it could have in no event been termed dishonest so as to hold that the complainants were cheated of the earnest money, which they passed to the appellant as part-consideration, when possession of the total land involved in the bargain was passed over to the complainant-respondents, and which remains in their possession. Now, it is left to imagine who would be interested in delaying the matter in completing the bargain when admittedly the complainants have not performed their part in making full payment. The matter is therefore; before the Civil Court in this respect. The liability, if any, arising by the breach thereof is civil in nature and not criminal.

5. In this case, there is no record to show that evil design of the petitioners were having at the time of business transactions entered into between the parties. In the absence of such pleadings, the learned Magistrate was in error in issuing summons on the basis of the averments contained in the complaint. In view of this, writ petition is only to be allowed.

6. In the result, writ petition is allowed. Rule made absolute in terms of Prayer Clause (a).

Interim stay stands vacated.

Prayer Clause (a):

that the Hon'ble Court be pleased to call for the records and proceedings in Case No. 2251/S-90 of 1990 from the Additional Chief Metropolitan Magistrate, 37th Court, Esplanade at Bombay and after examining the legality, validity and propriety thereof, this Hon'ble Court be pleased to quash and/or set aside the proceedings in the said Complaint.

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