

**IN THE HIGH COURT OF DELHI AT NEW DELHI**

**SUBJECT : INDIAN PENAL CODE**

**CRL.REV.618/2005 & CRL.REV.P.619/2005**

Reserved on February 26,2007

Delivered on March 13, 2007

1. CRL.REV.618/2005

CHARANJEET VERMA/AERO CLUB ..... Petitioner

Through: Mr. Harjinder Singh, Sr. Advocate with  
Mr. Harsh Jaidka, Ms. Seema Juneja,  
Ms.Shikha Tyagi, Advocates

versus

STATE & ORS. .... Respondents

Through none

2. CRL.REV.P.619/2005

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Mr.Justice S.Ravindra Bhat

1. These revision petitions impugn a summoning order of the learned magistrate, Delhi, dated 11-5-2005, in so far as it did not include Sections 409, 420 IPC, and Section 138, Negotiable Instruments Act, 1881.

2. The brief facts are that the petitioner filed complaints under Section 409/420 IPC and Section 138 of Negotiable Instrument Act. The petitioner is a manufacturer of leather goods, shoes and accessories having trade mark of "Woodland". It appoints various distributors amongst it Mrs. Varsha Gandhi, sole Proprietor of M/s. Parth Associates applied for distributorship; that facility was granted and M/s. Parth Associates, was appointed by the petitioner, as distributor on 18.02.98.

3. It is alleged that the accused Ms. Varsha Gandhi gave to the petitioner firm six cheques in April and May 1998, total amounting to Rs.17,76,294.32/-; the cheques, on presentation to the Bank were dishonored on the ground of insufficient funds. It is further alleged that the said second respondent thereafter issued 18 cheques for Rs. 5 lakhs each, aggregating to Rs.90 lakhs, in discharge of outstanding liabilities, i.e of Rs.92,93,131.32 with assurance that they would be honoured by the banker on presentation. It was alleged that the petitioner presented the first cheque bearing No.303519 dated 24.10.98 of Rs.5 lakh drawn on Punjab National Bank, through his Banker, Dena Bank. It was dishonoured and returned with the remark "account closed" by the Bank. The other cheques were not presented.

4. The petitioner filed complaints alleging commission of offences under Sections 409/420 IPC, in addition to that under Section 138 of the Negotiable Instrument Act (hereafter "the Act"). It was alleged that closure of account by respondent showed an intention to cheat, prima facie, by fraudulently or dishonestly issuing a cheque and making a false representation, inducing the petitioner to accept the cheques so that it may not be honoured. It was also alleged that the offence under Section 409 IPC was made out as accused had represented the respondent No.1, as its sole proprietor and was entrusted with the goods for sale, and had to hand over the sale proceeds to the petitioner. The accused respondents were acting as agents, and factor of the petitioner and the goods were entrusted to them, which they had to sell and remit the proceeds, to the petitioner. They dishonestly misappropriated goods and did not remit the sale proceeds of the complainant and thus committed an offence punishable under Section 409 IPC. Also offence under Section 420/120 B IPC are alleged to have been committed.

5. It was further alleged that the offence under section 138 of the Negotiable Instruments Act was made out. The petitioner had sent a notice, under Section 138, by registered post and thereafter also by substituted service, which was duly notarized and the report of Notary Public dated 29.04.99 was exhibited. The trial court, by its order however only summoned the accused, under Section 406 IPC. Aggrieved by the order the petitioner has approached this Court for issuance of the

process under Sections 409, 420 IPC and Section 138 of the Negotiable Instruments Act.

6. It was urged by Mr. Harjinder Singh, learned senior counsel that the accused were specifically entrusted with the goods in the capacity as distributor of the complainant and were supposed to hand over the sale proceeds to the complainant. Therefore, they were liable to be prosecuted under section 409 of IPC. It was also submitted that the accused sold the goods and to discharge the liability issued cheques from an account which was closed. Therefore, the accused committed the offence of cheating the complainant, and were liable to be prosecuted for Section 420 IPC. Counsel also urged that after getting intimation of bouncing of the cheque, by memo dated 27.10.1998, the complainant sent a legal notice dated 09.11.1998, which was served on 29.04.1999 at the premises of accused last known by complainant.

7. Counsel placed reliance upon the decision of this court in *Tuncay Alankus Vs. Union of India & ors.* (2000 CrL. L.J. 3280) to say that as the accused, being entrusted with property or with dominion over property dishonestly appropriated and converted the goods to their own use, such property, and has dishonestly used or disposed off that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, they committed the offence of criminal breach of trust.

8. The complaint describes that sometime in 1998, the accused allegedly approached the petitioner to act as distributors. An agreement was entered into; the petitioners used to send the goods. Apparently on past occasions, some cheques had been dishonoured. Therefore, when the cheques for the sum of Rs.17,76,294.32 were not honoured, the accused allegedly held out that the amounts would be paid. The complainant/ petitioner alleged that the premises of the accused were closed, and they left Karnal; later, they allegedly approached the petitioners in November, 1998, and issued 18 cheques for Rs. 5 lakhs each; one of them was presented, but not honoured. The notice could not be served in respect of that cheque, as the petitioner alleged that the second respondent was "absconding".

9. The above facts would indicate that the parties had a business relationship, whereby the petitioner used to send the goods, which were sold by the respondent accused. The trial court proceeded to summon the accused under Section 406. The question is whether the ingredients of the other offences, i.e Sections 409, 420 IPC and 138 Negotiable Instruments Act, are made out.

10. The essential ingredients of the offence under Section 409 are entrustment of any person with property, or with any dominion over property; the person entrusted either dishonestly misappropriating or converting to his own use that property, or inter alia, dishonestly using or disposing of the property in violation of any legal contract made touching the discharge of trust. The position was explained in the judgment of the Supreme Court reported as Anwar Chand Sab Nandikar -vs- State of Karnataka 2003 (10) SCC 521:

“Section 409, IPC deals with criminal breach of trust by public servant, or by banker, merchant or agent. In order to bring in application of said provision, entrustment has to be proved. In order to sustain conviction under Section 409, two ingredients are to be proved. They are :

(1) the accused, a public servant, or banker or agent was entrusted with property of which he is duty bound to account for; and

(2) the accused has committed criminal breach of trust.

What amounts to criminal breach of trust is provided in Section 405, IPC. Section 409 is in essence criminal breach of trust by a category of persons. The ingredients of the offence of criminal breach of trust are :-

(1) Entrusting any person with property, or with any dominion over property.

(2) The person entrusted (a) dishonestly misappropriating or converting to his own use that property, or (b) dishonestly, using or disposing of that property or wilfully suffering any other person so as to do in violation -

(i) of any direction of law prescribing the mode in which such trust is to be discharged; or

(ii) of any legal contract made touching the discharge of trust.

The basic requirement to bring home the accusations under Section 405 are the requirements to prove con-jointly (1) entrustment and (2) whether the accused was actuated by the dishonest intention or not misappropriated it or converted it to his own use to the detriment of the persons who entrusted it.”

11. In this case, the trial court itself prima facie felt there to be some material to issue a summoning order in respect of the offence under Section 406, i.e criminal breach of trust. Therefore, prima facie, materials pointing to entrustment of property or dominion over property, existed. The petitioner's case that the respondent accused dishonestly disposed off, or wilfully suffered some other person to dispose off the property, contrary to any legal contract as to discharge of the trust, however has not been even adverted to. The allegation that the accused used the property, and appropriated the proceeds, without accounting for it, as per the contract, in my considered opinion, are sufficient to justify a summoning order in respect of that offence.

12. As regards the offence of cheating, the Supreme Court, in a large number of decisions, has held that the intention to cheat, i.e deception or fraudulent inducement to deliver property, should exist from the inception. In *Shankar Gopalika v. State of Bihar*, (2005) 10 SCC 336, the Supreme Court held that:

“It is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In the present case it has nowhere been stated 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.”

13. In this case, the complaints itself discloses that the accused used to account for the property entrusted, by paying amounts periodically; sometimes their cheques were dishonoured, but the amounts used to be paid later. Therefore, the element of fraudulent intention inducing the petitioner to part with goods, at the beginning of, or in proximate point of time, when the contract was entered into, was lacking.

14. As regards the offence under Section 138, though the petitioners issued notice, yet as per their own showing, notice could not be served on the drawer. Even otherwise, notice in respect of the cheque for Rs. 5 lakh, presented in October, 1998, was issued in April, 1999; the complaint was filed in June, 1999. The court, under Sections 138/141 can take cognizance only if the prescribed time frames are followed. In any other situation, the bar of Section 142, from taking cognizance would operate. Therefore, I find no infirmity with the order of the trial court as far as it did not issue the summoning order in respect of Section 138.

15. The upshot of the above discussion is that the impugned order, as far as it pertains to Section 409 is set aside; the trial court is directed to issue a fresh notice, after modifying the order, by appropriately including Section 409, IPC. As regards the non inclusion of Section 420 IPC, and Section 138, Negotiable Instruments Act, the petitions have to fail. The petitions are therefore, partly allowed to the extent indicated above.

Sd/-  
(S.RAVINDRA BHAT)  
JUDGE