

## THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on:17.04.2007

+ **CRL. REV. P. 276/2006**

**COGENT SILVER FIBER PTE LTD.**

... Petitioner

- versus -

**STATE**

... Respondent

### Advocates who appeared in this case:

For the Petitioner : Mr K.K. Sud, Sr Advocate with Mr Vijay Aggarwal

For the Respondent/State : Mr V.K. Malik

### **CORAM:-**

**HON'BLE MR JUSTICE BADAR DURREZ AHMED**

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|----|--|-----|
| 1. | Whether Reporters of local papers may be allowed to see the judgment ? | Yes |
| 2. | To be referred to the Reporter or not ?                                | Yes |
| 3. | Whether the judgment should be reported in Digest ?                    | Yes |

### **BADAR DURREZ AHMED, J**

1. The petitioner is aggrieved by the order dated 05.04.2006 passed by the learned Metropolitan Magistrate. By the impugned order, the petitioner's application for a direction/ order for investigation under Section 156(3) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "Code") was dismissed in the following words:-

“In my considered opinion, the dispute between the parties is purely of civil nature and it does not disclose commission of any offence under the Penal Code for which either directions under Section 156(3) Cr. P. C. can be passed or cognizance u/s 190 (1) (a) Cr. P.C. can be taken to proceed with the complaint under Section 200 Cr. P. C. Further proceeding in the matter would only lead to wastage of

valuable judicial time. The petition as well as complaint are dismissed. File be consigned to Record Room.”

2. The petitioner had made the application under Section 156(3) of the Code because the complaint filed by the petitioner before the Police Station Malviya Nagar, was not being registered as an FIR and the police was not investigating into the purported offences under Section 406/420/467/468/471/506/120 B IPC. A copy of the said complaint has been placed on record and the essential features of the complain are as follows:-

- “(a) It is alleged that a Memorandum of Understanding (MOU) was entered into between the petitioner (Cogent Silver Fiber Pte. Ltd.) and Noble Fiber Technologies Inc. (hereinafter referred to as “Noble Fiber Technologies”), which is a company incorporated in U. S. A. The said purported MOU was signed allegedly by one Mr. N. S. Prasad, who is alleged to be the country manager in India of Noble Fiber Technologies.
- (b) It is alleged that under the MOU, the petitioner was to be appointed as the sole and exclusive agent/ dealer for India in respect of the products of Noble Fiber Technologies marketed under the brand name “X-Static”.
- (c) It is also alleged in the complaint that the petitioner, pursuant to the signing of the said MOU, set up the entire infrastructure and did whatever was required of it under the said MOU. In this connection, it is alleged that the petitioner spent a sum of Rs.2.9 crores.
- (d) It is alleged in the complaint that Noble Fiber Technologies resiled from / disowned the MOU on the ground that the same was not signed by an authorized signatory.

- (e) In this background, the petitioner contends that Noble Fiber Technologies, its President, Vice President and other executives including the said Mr N. S. Prasad were guilty of cheating, breach of trust, forgery, criminal intimidation etc. apart from breach of contractual obligations.”

3. Mr K. K. Sud, the learned senior counsel, who appeared on behalf of the petitioner submitted that the accused persons need not be made parties and no notice would be necessary because the case is still at the pre-cognizance stage. On merits, Mr Sud contended that the learned Metropolitan Magistrate has erred in holding that the matter was purely of a civil nature. He placed reliance on two Supreme Court decisions in the case of *M/s Medchl Chemicals & Pharma Pvt. Ltd. v. M/s Biological E. Ltd. & Ors.*: 2000 CrL. L.J 1487 and *Rajesh Bajaj v. NCT of Delhi*: 1999 CrL. L.J. 1833. He also submitted that at the stage of taking cognizance, the Magistrate is not required to sift the evidence and the material on record in great detail and that the Magistrate is only required to see whether the facts, as stated in the complaint, disclose an offence or not. If an offence is disclosed, then the Magistrate ought to issue the direction under Section 156 (3) of the Code.

4. The learned counsel for the State was also heard. He supported the impugned order and submitted that the case is entirely of a civil nature and for which civil proceedings are admittedly underway between the parties, as indicated in paragraph 18 of the complaint itself. He further submitted that the

complaint does not disclose the commission of any offence even if the statements made therein are taken at face value.

5. It is clear that disputes between parties may be either purely civil disputes or purely criminal in nature. There may also be disputes which are of a mixed or hybrid kind involving both civil disputes and criminal offences. In this connection, the Supreme Court in **Indian Oil Corporation v. NEPC India Ltd.:** (2006) 6 SCC 736 observed as under:-

“(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 proceeding are different from a criminal proceeding, the mere fact that a 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 allegation in the complaint discloses a criminal offence or not.”

Thus, it is clear that even a commercial transaction or a contractual dispute may involve a criminal offence. Merely because a complaint relates to a commercial transaction or a breach of contract, it cannot be pushed aside by a criminal court and the test that is to be employed is whether the allegations in the complaint disclose a criminal offence or not. In the impugned order, I find that the learned Metropolitan Magistrate has come to the opinion that the dispute between the parties is purely of a civil nature and it does not disclose the

commission of any offence under the Indian Penal Code. It is not as if the learned Metropolitan Magistrate had merely, on the basis that a commercial transaction or a contractual dispute was involved, dismissed the application of the petitioner. He also came to the conclusion that the complaint did not disclose the commission of any offence under the Indian Penal Code. It is, of course, another matter that the learned Metropolitan Magistrate has not gone into detail or give elaborate reasons for arriving at this conclusion. The present petition would, perhaps, have been obviated had the learned Metropolitan Magistrate give his reasons, even briefly.

6. The offence alleged to have been committed in the present case could be grouped into four categories. First is the offence of cheating punishable under Section 420 IPC. The second being of criminal breach of trust, for which Section 406 IPC has been invoked. The third relates to offences of forgery etc., for which the petitioner has referred to Sections 467, 468 and 471 IPC. The fourth group relates to Section 506 IPC for criminal intimidation and 120 B for conspiracy.

7. Insofar as the offence punishable under Section 420 IPC is concerned, it involves the offence of cheating and dishonestly inducing delivery of property. Section 420 IPC reads as under:-

**“420. Cheating and dishonestly inducing delivery of property**

Whoever cheats and thereby dishonestly induces the person deceived any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

Section 420 requires not only cheating but also delivery of property or the making, alteration or destruction of a valuable security or anything which is signed or sealed and which is capable of being converted into a valuable security. Therefore, before an offence under Section 420 IPC is made out it must also be an offence under Section 415 IPC. In **G. V. Rao v. L. H. V.**

**Prasad: (2000) 3 SCC 693**, the Supreme Court held :-

“This part speaks of intentional deception which must be intended not only to induce the person deceived to do or omit to do something but also to cause damage or harm to that person in body, mind, reputation or property. The intentional deception presupposes the existence of a dominant motive of the person making the inducement. Such inducement should have led the person deceived or induced to do or omit to do anything which he would not have done or omitted to do if he were not deceived. The further requirement is that such act or omission should have caused damage or harm to body, mind, reputation or property.”

It has to be determined as to whether the alleged breach of contract or breach of an obligation resembling a contract would amount to cheating in the context of the present case. The Supreme Court in **Hridaya Ranjan Prasad Verma v.**

**State of Bihar: (2000) 4 SCC 168** held:-

“In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. 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. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.”

8. It must be noted that in *M/s Medchl Chemicals (supra)* (a decision cited by Mr Sud) it is stated that it is anathema to suppose that when a civil remedy is available a criminal prosecution is completely barred. There is no dispute with this proposition and it has already been mentioned above with reference to the Supreme Court decision in *Indian Oil Corporation (supra)* that a civil dispute may also have elements of a criminal offence. But that has to be examined on the basis of the allegations made in the complaint. In *M/s Medchl Chemicals (supra)* itself, the Supreme Court observed with regard to the offences, *inter alia*, under Section 420 IPC as under:-

“In order to attract the provisions of Sections 418 and 420 the guilty intent, at the time of making the promise is a requirement and an essential ingredient thereto and subsequent failure to fulfill the promise by itself would not attract the provisions of Section 418 or Section 420. Mens rea is one of the essential ingredients of the offence of cheating under Section 420. As a matter of fact Illustration (g) to Section 415 makes the position clear enough to indicate that mere failure

to deliver in breach of an agreement would not amount to cheating but is liable only to a civil action for breach of contract.”

The observations of the Supreme Court in ***Rajesh Bajaj (supra)***, another case relied upon by Mr Sud, does not detract from the position indicated above. In that case, the Court held:-

“The crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or not. The complainant has stated in the body of the complaint that he was induced to believe that the respondent would honour payment on receipt of invoices, and that the complainant realised later that the intentions of the respondent were not clear. He also mentioned that the respondent after receiving the goods had sold them to others and still he did not pay the money. Such averments would prima facie make out a case for investigation by the authorities.”

9. The decisions cited by Mr Sud do not detract from the position that for an offence under Section 420 IPC, there must not only be an intention to cheat from the inception but there must also be delivery of property. This has to be discerned from the substance of the complaint and merely because the petitioner / complainant uses expressions which include words such as “deceive” and “cheating” in the complaint would not entail that the commission of such an offence was made out. In this connection, the Supreme Court in ***Anil Mahajan v. Bhore Industries Ltd. : (2005) 10 SCC 228*** observed as under:

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



Except mention of the words “deceive” and “cheat” in the complaint filed before the Magistrate and “cheating” in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MOU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay.”

Considering the substance of the complaint, in the light of the Supreme Court decisions referred to above, I find that the offence punishable under Section 420 IPC is not made out. The initial intentment of cheating is not discernible. Moreover, there is no delivery of property alleged.

10. With regard to the allegation qua criminal breach of trust, it is pertinent to note that the offence punishable under Section 406 IPC has to involve a criminal breach of trust which is defined in Section 405 IPC. In ***Indian Oil Corporation (supra)***, the Supreme Court held as under:-

“22. A careful reading of the section shows that a criminal breach of trust involves the following ingredients: (a) a person should have been entrusted with property, or entrusted with dominion over property; (b) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or wilfully suffer any other person to do so; (c) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust. The following are examples (which include the illustrations under Section 405) where there is “entrustment”:

- (i) An “executor” of a will, with reference to the estate of the deceased bequeathed to legatees.

- (ii) A “guardian” with reference to a property of a minor or person of unsound mind.
- (iii) A “trustee” holding a property in trust, with reference to the beneficiary.
- (iv) A “warehouse keeper” with reference to the goods stored by a depositor.
- (v) A carrier with reference to goods entrusted for transport belonging to the consignor/ consignee.
- (vi) A servant or agent with reference to the property of the master or principal.
- (vii) A pledgee with reference to the goods pledged by the owner / borrower.
- (viii) A debtor, with reference to a property held in trust on behalf of the creditor in whose favour he has executed a deed of pledge-cum-trust. (Under such a deed, the owner pledges his movable property, generally vehicle/ machinery to the creditor, thereby delivering possession of the movable property to the creditor and the creditor in turn delivers back the pledged movable property to the debtor, to be held in trust and operated by the debtor.)”

Thus, it is clear that unless there is entrustment with property or entrustment with dominion over property, there can be no criminal breach of trust. The complaint does not disclose any such entrustment of property or entrustment with dominion over property. Therefore, offence punishable under Section 406 IPC is also not made out.

11. With regard to the third genre of offences falling under Sections 467, 468 and 471 IPC also, I find that the complaint does not disclose any such offence. There is no element of forgery. The only averment made in the complaint is that the said Mr N. S. Prasad had allegedly signed the purported MOU on behalf of Noble Fiber Technologies, when he was not authorized to do so. This, to my mind, does not constitute offences categorized under Sections 467, 468 and 471 IPC. With regard to criminal intimidation and conspiracy, there are no averments setting out the ingredients of these offences.

12. In view of the foregoing discussion, the conclusion arrived at by the learned Metropolitan Magistrate that the dispute between the parties is purely of civil nature and the complaint does not disclose the commission of any offence under the Indian Penal Code, does not warrant any interference.

The revision petition is dismissed.

**BADAR DURREZ AHMED**  
**( JUDGE )**

**April 17, 2007**  
**SR**