

GAHC010188452023



IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

Crl.Pet/922/2023

1. Ashimara Housing Private Ltd.
Having registered address at B3/47,
Safdarjung Enclave, New Delhi-110029
2. Manish Mahendra Choksi,
Director-Ashimara Housing Private
Limited
B3/47 Safdarjung Enclave New Delhi-29
3. Ramachandra Kasargod Kamath
Director-Ashimara Housing Private
Limited
B3/47 Safdarjung Enclave New Delhi-29
4. Sanjaya Gupta,
Director-Ashimara Housing Private
Limited
B3/47 Safdarjung Enclave New Delhi-29
5. Shubha Lal
Executive Director-Ashimara Housing
Private Limited
B3/47 Safdarjung Enclave New Delhi-29
6. Nidhi Kumra,
Executive Director- Ashimara Housing

Private Limited
B3/47 Safdarjung Enclave New Delhi-29

Petitioners

-Versus-

1. Neha Saraf D/O- P.L Poddar,
Director, Growth Maximisers Pvt. Ltd,
having its Regd Office at Saraf Building ,
A.T Road, Guwahati 01, Kamrup (M), Assam
2. The State of Assam
Represented through the Public Prosecutor,
Assam

Respondents

For Petitioner(s) : Mr. A.M. Bora, Senior Advocate
Mr. V.A. Chowdhury, Advocate

For Respondent(s) : Mr. D. Saraf, Advocate

Date of judgment : 06.05.2024

**BEFORE
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA
JUDGMENT**

1. Heard Mr. A. M. Bora, learned senior counsel, assisted by Mr. V. A. Chowdhury, learned counsel for the petitioners. Also heard Mr. D. Saraf, learned counsel for the Respondent No.1.
2. This Criminal Petition has been registered on filing of an application under Section 482 of the Code of Criminal Procedure, 1973 by the petitioners, praying for quashing of the criminal proceedings in CR Case No.5875/2022, pending

before the Court of learned Judicial Magistrate 1st Class, Kamrup (M) as well as for setting aside the order dated 28.11.2022, passed by learned Judicial Magistrate 1st Class, Kamrup (M), in CR Case No.5875/2022, whereby summons were issued against the present petitioners.

3. The facts relevant for adjudication of this Criminal Petition, in brief, are as follows:

- i.** That the Petitioner No. 1, namely, Ashimara Housing Private Ltd. is a private limited company incorporated as per the provisions of the Indian Companies Act, 1913. It is operating "Your Space", which is a premier student housing brand, having pan India presence. It caters to nearly 600 plus students. The Petitioner Nos. 2 to 4, are on the Board of Directors of the Petitioner No.1 Company and are not involved in the day-to-day operations of the Company. The Petitioner Nos.5 and 6 are the Executive Directors of the Petitioner No.1 Company.
- ii.** The Respondent No. 1, Smt. Neha Saraf, has filed a complaint under Section 200 of the Code of Criminal Procedure, 1973, before the Court of learned Chief Judicial Magistrate, Kamrup (M), *inter-alia*, alleging that the petitioners have committed the offences under Sections 384/406/420 of the Indian Penal Code.

- iii.** It is stated in complaint filed by the Respondent No.1 that she is the Director of “Growth Maximisers Pvt. Ltd”, which is a private limited company and engaged in the business of providing hiring services to all industries by sourcing candidate to their clientele.
- iv.** It is alleged, in the complaint filed by the Respondent No. 1, that the Petitioner No. 1 Company had requested the respondent’s company to start providing their services for hiring suitable candidates and accordingly, the respondent’s company informed the petitioners’ company about the terms and conditions of the service, which was confirmed by the petitioners’ company through e-mail. However, no written agreement is there between the parties.
- v.** It is also stated in the complaint that the respondent’s company started providing head hunting services to the petitioners’ company on agreed terms and conditions. However, it is alleged in the complaint that the petitioners’ company always used to violate the terms of payment by withholding the payments to the respondent’s company and used to pay the same only after repeated persuasion via e-mail.
- vi.** It is also alleged in the complaint that the respondent’s company sourced two candidates, namely, Shridhar Prabhu Anantharaman and Neetika as per the given

requirement. However, it is alleged that one Mr. Vinayak representing the petitioners' company instructed the respondent's company not to co-ordinate with Shridhar Prabhu Anantharaman as he wanted to deal with the candidate himself.

- vii.** Thereafter, the respondent's company raised invoice dated 17.05.2022 for Rs. 3,24,500/- in respect of charges for hiring of Shridhar Prabhu Anantharaman and invoice dated 18.05.2022 for Rs. 1,06,200/- in respect of charges for hiring Neetika . The total amount in respect of two candidates was of Rs. 4,30,700/-.
- viii.** It is alleged in the complaint that the petitioners' company, after availing the services of the respondent's company in respect of the aforesaid candidates started harassing the respondent company by asking them to reduce the invoice amount and demanded adjustment of the service charge for hiring one Mr. Anish Dhatavkar, which had already been paid by the petitioners' company.
- ix.** The respondent's company also issued a legal notice dated 27.07.2022 to the petitioners' company in this respect regarding the above matter.
- x.** The petitioners' company replied to the said legal notice, *inter-alia*, stating that the said Mr. Anish had failed to attend minimum working hours and claimed adjustment

of the overdue service charge for hiring of Neetika from service charges paid towards hiring of Mr. Anish Dhatavkar.

xi. It is alleged in the complaint by the Respondent No.1 that the accused with fraudulent intention, through their representative Vinayak tried to make out a different story for not paying the service charges relating to hiring of Mr. Shridhar and has illegally retained the payment, which was due to the respondent's company. It is also alleged in the complaint that the accused (present petitioners) had criminal intention from the very beginning of the transaction.

xii. On receipt of the said complaint, the complainant was examined under Section 200 of the Code of Criminal Procedure, 1973, and the cognizance of offence under Section 420 of the Indian Penal Code was taken by the learned Judicial Magistrate 1st Class, Kamrup (M), Guwahati, by order dated 28.10.2022. Thereafter, by order dated 28.11.2022, after examining the complainant's witnesses, summonses were issued to the present petitioners. The said order has been impugned in this instant Criminal Petition.

4. Mr. A. M. Bora, learned senior counsel for the petitioners has submitted that in this case, there was a continuing business transaction between the petitioners' company as well as

respondent's company. He has submitted that there is no dispute that the petitioners' company had availed the services of the respondent's company regarding sourcing of candidates, however, a dispute arose between them regarding payment of charges for hiring of two candidates, namely, Shridhar Prabhu Anantharaman and Neetika and due to the petitioners' request to adjust some charges against the service charges already paid in respect of another candidate, namely, Mr. Anish Dhatavkar. Learned senior counsel for the petitioners has submitted that the dispute which has arisen between the parties is purely a commercial dispute and is civil in nature. He has submitted that there are no ingredients of offence under Section 420 of the Indian Penal Code in the instant case. He has also submitted that the complaint case has been filed by the Respondent No. 1 against the present petitioners only to give a criminal colour to a commercial dispute and to pressurize and harass the present petitioners.

- 5.** Learned senior counsel for the petitioners has also submitted that the dispute between the parties is in respect of payment of hiring charges amounting to Rs. 4,30,700/- with regard to which the respondent's company has also issued a legal notice to the petitioners, and the petitioners have replied to the said legal notice putting forth their version. He has stated that it is not a case where there was any deception from the very inception of transaction between the parties. He has submitted

that the Respondent No. 1 has admitted in her complaint that her company was providing services to the petitioners' company and received payment for the same. It is submitted by learned senior counsel for the petitioners that the Respondent No.1 has failed to show in her complaint that the petitioners had fraudulent or dishonest intention at the time of making promise or representation, hence, no offence under Section 420 of the Indian Penal Code has been made out in this case. It is further submitted by learned senior counsel for the petitioners that the learned Judicial Magistrate 1st Class, Kamrup (M) had taken cognizance under Section 420 of the Indian Penal Code against the present petitioners and issued summonses to them without there being any ingredient of the offence under Section 420 of the Indian Penal Code specifically averred against any of the petitioners. He has submitted that in absence of a culpable intention on the part of the petitioners at the time of making initial promise, no offence under Section 420 of the Indian Penal Code can be said to have been made out and therefore, learned Judicial Magistrate was wrong in taking cognizance against the present petitioners and issuing summonses to them. In support of his submission, learned senior counsel for the petitioners has cited a ruling of the Apex Court in the case of **"Vesa Holdings Pvt Limited and Another Vs. State of Kerala and Others"** reported in **(2015) 8 SCC 293**, wherein it was observed as follows:

"12. From the decisions cited by the appellant, the settled proposition of law is 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 other words for the purpose of constituting an 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. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Penal Code, 1860 can be said to have been made out."

6. Learned senior counsel for the petitioners has also submitted that for establishing an offence of cheating the complainant is required to show that the accused had fraudulent and dishonest intention at the time of making promise or representation, merely, on failure to keep the promise subsequently due to some dispute which has arisen between the parties, the culpable intention right at the time of beginning when the promise was made cannot be presumed. He has submitted that no specific averment has been made in complaint petition, by the Respondent No.1, against the present petitioners to show that the petitioners had culpable

intention at the time of entering into an agreement with the Respondent No. 1. He has submitted that in a business transaction dispute may arise between the parties, however, in absence of any culpable state of mind from the initial stage on the part of one party to deceive the other, such dispute may not be given colour of a criminal case. In support of his submission, he has cited the ruling of the Apex Court in the case of **"Sushil Sethi and Another Vs. State of Arunachal Pradesh and Others"** reported in **(2020) 3 SCC 240**.

7. Learned senior counsel for the petitioners has also submitted that, though, the Respondent No.1 has alleged in her Complaint Petition that one Vinayak representing the petitioners' company had instructed the complainant not to co-operate with Shridhar Prabhu Anantaraman as he wanted to deal with him himself, however, the said Vinayak has not been made an accused in the complaint case by the Respondent No.1.
8. Learned senior counsel for the petitioners has also submitted that though names of Petitioner Nos. 2 to 4 are there in the Board of Directors of Petitioner No.1 Company, however, they are in no way involved in day-to-day affairs of the company and therefore, unaware about the business transaction between petitioners' company and respondent's company. He has also submitted that no specific allegations have been made against the petitioners individually and no specific role

has been attributed to each of them in the complaint petition, as to how they had committed the offence of cheating against the present petitioners, therefore, learned Judicial Magistrate was not justified in issuing summonses to the present petitioners. To fortify his submission, learned senior counsel for the petitioners has cited a ruling of the Apex Court in the case of **"Ravindranatha Bajpe Vs. Manglore Special Economic Zone Limited and Others"** reported in **2021 SCC OnLine SC 806**.

9. Learned senior counsel for the petitioners has also submitted that the respondent No. 1 has made vague and general allegations against the present petitioners in the complaint petition without bringing to specifying the particulars of offence committed by each and every petitioner and role played by each and every petitioner in committing the alleged offence under Section 420 of the Indian Penal Code. He has submitted that in absence of such particulars in the complaint petition to show that there was existence of fraudulent or dishonest intention on the part of the petitioners at the time of making initial promise, the learned Judicial Magistrate 1st Class, Kamrup (M) had erred in taking cognizance of the case under Section 420 of the Indian Penal Code and issuing processes to the present petitioners. In support of his submission, learned senior counsel for the petitioners has cited a ruling of the Apex Court in the case of **"Neelu Chopra Vs.**

Bharti” reported in **(2009) 10 SCC 184**, wherein it was observed as follows:

"9. In order to lodge a proper complaint, mere mention of the sections and the language of those sections is not the be all and end all of the matter. What is required to be brought to the notice of the court is the particulars of the offence committed by each and every accused and the role played by each and every accused in committing of that offence."

10. Learned senior counsel for the petitioners has also submitted that the learned Judicial Magistrate, 1st Class, Kamrup (M) has failed to apply mind before summoning the present petitioners and initiating criminal proceeding against them, without there being sufficient materials on record to take cognizance against them under Section 420 of the Indian Penal Code. He has submitted that the summoning of an accused in a criminal case is a serious matter and the criminal law cannot be set into the motion as a matter of course. In this regard, he has cited a ruling of the Apex Court in the case of **"Pepsi Food Limited Vs. Special Judicial Magistrate"** reported in **(1998) 5 SCC 749**.
11. The learned senior counsel has submitted that by filing a criminal complaint for a dispute which is purely civil in nature and arising out of commercial transaction between the parties, the complainant has abused the process of law only for the purpose of pressurizing the present petitioners and therefore, the complaint Case No. 5875/2022 is liable to be quashed as

per the guidelines laid down by the Apex Court in the case of **"State of Haryana Vs. Bhjanlal and Others"** reported in **(1992) Supp (1) SCC 335**.

- 12.** On the other hand, Mr. D. Saraf, learned counsel for the Respondent No. 1 has submitted that in the instant case, the Respondent No. 1 has categorically mentioned, in Paragraph Nos. 12 and 13 of her complaint, filed before the learned Judicial Magistrate 1st Class, Kamrup (M), Guwahati, that the petitioners had criminal intentions from the very beginning and had made false representation with an intention to defraud the respondent's company and such intention further came to the light in the reply filed by the petitioners' company to the legal notice sent to them by the Respondent No. 1.
- 13.** Learned counsel for the Respondent No. 1 has also submitted that one Mr. Vinayak representing the petitioners' company, had instructed the respondent's company not to co-ordinate with the candidate Shridhar Prabhu Anantharaman. He has also submitted that though, the entire process of selecting the said candidate was undertaken by the respondent's company, however, the petitioners' company later on, endorsed the action of Vinayak in their reply to the legal notice of the Respondent No. 2 and failed to make the payment against charges for hiring the said candidate, which itself shows that the petitioners' company had culpable intention to defraud the respondent's company from the very beginning of formation of

contract with the respondent's company. He has also submitted that the learned Judicial Magistrate 1st Class, Kamrup (M), Guwahati took the cognizance of the offence under Section 420 of the Indian Penal Code after following all the procedures prescribed by law and after application of mind on the materials available on record. Therefore, he has submitted that the instant criminal petition is liable to be dismissed.

14. I have considered the submissions made by learned counsel for both the sides and have carefully perused the materials available on record.
15. In the case of **"Pepsi Food Limited Vs. Special Judicial Magistrate" (Supra)**, the Apex Court has observed as follows:

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the

evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.”

- 16.** Under Section 190 of the Code of Criminal Procedure, 1973, one of the mode by which any Magistrate of 1st Class may take cognizance of an offence is upon receiving a complaint of facts which constitute such offence. On the other hand, under Section 204 of the Code of Criminal Procedure, 1973, if in the opinion of the Magistrate taking cognizance of offence, there is sufficient ground for proceeding, he may issue processes against the accused. In the instant case, the cognizance of offence under Section 420 of the Indian Penal Code has been taken by the Judicial Magistrate 1st Class, Kamrup (M), Guwahati. Thus, a Magistrate can take cognizance of an offence on a complaint, if facts narrated in the said complaints constitute such an offence. Further, before issuing process to the accused, the Magistrate must be satisfied that there are sufficient ground for proceeding against the accused for an offence, the cognizance of which has been taken under Section 190 (1)(a) of the Code of Criminal Procedure, 1973. Before issuing the process under Section 204 of the Code of Criminal Procedure, 1973, the Magistrate shall also examine upon oath the complainant and the witnesses present, if any. Further, in a case where the accused is residing at a place

beyond the area in which such Magistrate exercise his jurisdiction, he shall postpone the issuance of process against the accused and shall either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit under Section 202 of the Code of Criminal Procedure, 1973. The purpose of such an inquiry or the investigation is for deciding whether or not, there is sufficient ground for proceeding. Thus, apart from the complaint, the statement of the complainant, the deposition of witnesses recorded under Section 200/202 of the Code of Criminal Procedure, 1973, and other documentary evidence brought on record by the complainant would be relevant for the Magistrate for deciding whether or not, there is sufficient ground for proceeding against the accused for the offence of which cognizance has been taken by such Magistrate under Section 190 (1)(a) of the Code of Criminal Procedure, 1973. As observed in "***Pepsi Food Limited Vs. Special Judicial Magistrate***" (***Supra***), the Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is *prima facie* committed by all or any of the accused.

17. Though, the Respondent No. 1 had filed the complaint under Section 200 of the Code of Criminal Procedure, 1973, praying

for taking cognizance of offences under Section 384/406/420 of the Indian Penal Code against the present petitioners, however, learned Judicial Magistrate 1st Class, Kamrup (M), Guwahati took cognizance of offence only under Section 420 of the Indian Penal Code and issued processes to the petitioners. Let us now examine as to whether there were sufficient ground for proceeding against the present petitioners in CR Case No. 5875/2022.

- 18.** It appears on perusal of the complaint petition filed by the Respondent No. 1, that there were business transactions between the respondent's company and the petitioners' company regarding hiring of suitable candidates for petitioners' company since the year 2020. It also appears that the petitioners' company used to pay service charges for such hiring to the respondent's company. Though, the respondent has alleged that the petitioners' company used to make delayed payment from the very beginning, however, there is no allegation of making no payment at all by the petitioners' company to the respondent's company. It also appears that in the month of May 2022, there arose a dispute between the parties regarding payment of hiring charges in respect of two candidates, namely, Shridhar Prabhu Anantharaman and Neetika. The total amount due was Rs, 4,30,700/- and in this regard, the Respondent No.1 issued a legal notice to the petitioners which was replied by them, wherein certain issues

were raised including some allegations made against one candidate, namely, Mr. Anish. It also appears that in its reply to the notice of the Respondent No.2, the petitioners have raised the issue of deficiency of service and requested to adjust the invoice of Neetika against the payment made towards Mr. Anish's appointment.

19. From above materials, it appears that though, the existence of a dispute during business transaction, between the parties, is apparent on record, however, no materials are there either in the complaint petition or in the testimony of complainant and her witnesses recorded under Section 200/202 of the Code of Criminal Procedure, 1973, to show that the petitioners had culpable intention, right from the beginning when the agreement to avail the services of Respondent No. 1 was entered into by the petitioners.
20. In the case of **"Sushil Sethi and Another Vs. State of Arunachal Pradesh and Others"** (*Supra*), the Apex Court has referred to a catena of decisions, regarding the requirements for taking cognizance of an offence under Section 420 of the Indian Penal Code. Some of the decisions cited in the aforesaid case are quoted herein below:

"7.3. In Hira Lal Hari Lal Bhagwati [*Hira Lal Hari Lal Bhagwati v. CBI*, (2003) 5 SCC 257 : 2003 SCC (Cri) 1121] , in para 40, this Court has observed and held as under: (SCC p. 280)

"40. It is settled law, by a catena of decisions, that for establishing 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 his making failure to keep promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed.”

7.4. In V.Y. Jose [V.Y. Jose v. State of Gujarat, (2009) 3 SCC 78 : (2009) 1 SCC (Cri) 996], it is observed and held by this Court that one of the ingredients of cheating is the existence of fraudulent or dishonest intention of making initial promise or existence thereof, from the very beginning of formation of contract. It is further observed and held that it is one thing to say that a case has been made out for trial and as such criminal proceedings should not be quashed, but it is another thing to say that a person should undergo a criminal trial despite the fact that no case has been made out at all.

- 21.** In the instant case, it appears that though, the petitioners' company was availing the services offered by the respondent's company since the year 2020, however, when a dispute arose between them regarding the payment of Rs. 4,30,700/- by the petitioners' company to the respondent's company against hiring charges for two candidates and after the reply given by the petitioners to the notice dated 27.07.2022, of the Respondent No. 1, she has lodged the criminal complaint, alleging the offence of cheating, extortion and criminal breach

of trust against the present petitioners. Though, learned Judicial Magistrate 1st Class, Kamrup (M) only took cognizance of offence under Section 420 of the Indian Penal Code, however, for the purpose of constituting 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, which the Respondent No.1 has failed to show in his complaint as well as in testimony of witnesses recorded under Section 200/202 of the Code of Criminal Procedure, 1973.

22. Further, merely stating that the accused had criminal intention from the very beginning and had made false representation with an intention to collectively deceive the respondent's company without any specific averment against each of the petitioner as what role has been played by each of the petitioner in committing the alleged offence, in the complaint petition or in the statements recorded under Section 200/202 of the Code of Criminal Procedure, 1973, would not fulfill the requirement necessary to take cognizance of offence under Section 420 of the Indian Penal Code, against the present petitioners. It would, therefore, be an abuse of process of law to allow the prosecution in CR Case No. 5875/2022 to continue against the present petitioners.
23. The Apex Court has observed in the case of "**Joseph Salvaraj A. Vs. State of Gujarat**", reported in **(2011) 7 SCC 59** that when

dispute between the parties constitutes only a civil wrong and not a criminal wrong, the courts would not permit a person to be harassed although no case for taking cognizance of the offence has been made out. In the instant case also, though, there appears to be a commercial dispute between the parties, however, no ingredient of offence under Section 420 of the Indian Penal Code was available on record when the learned Judicial Magistrate 1st Class, Kamrup (M), Guwahati issued summons to the present petitioners. From the materials available on record, it appears that there are no sufficient grounds for proceeding against the present petitioners under Section 420 of the Indian Penal Code. Under such circumstances, learned Judicial Magistrate 1st Class, Kamrup (M), Guwahati ought not to have issued summonses against the present petitioners in CR Case No. 5875/2022.

24. The Apex Court has observed in the case of “***Inder Mohan Goswami v. State of Uttaranchal***” reported in ***(2007) 12 SCC 1***, that the Court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurise the accused. It is further observed and held by this Court that it is neither possible nor desirable to lay down an inflexible rule that would govern the exercise of inherent jurisdiction. It is further observed and held that inherent jurisdiction of the High Courts under Section 482 of the Code of Criminal Procedure, 1973,

though, wide has to be exercised sparingly, carefully and with caution and only when it is justified by the tests specifically laid down in the statute itself. In the instant case also it appears that the Respondent No.1 has tried to give the colour of criminal litigation to a dispute which is exclusively civil in nature arising out of the business transaction between the parties. No *prima-facie* case for the offence under Section 420 of the Indian Penal Code is made out against the present petitioners.

25. In view of above, discussions and reasons, this Court is of the considered opinion that this is a fit case to exercise the powers under Section 482 of the Code of Criminal Procedure, 1973, and to quash CR Case No. 5875/2022, against the present petitioners under Section 420 of the Indian Penal Code.
26. Accordingly, the impugned order dated 28.11.2022, passed in CR Case No. 5875/2022, is hereby set aside and the proceedings of the CR Case No. 5875/2022, is hereby quashed.
27. Send back the case record of CR Case No. 5875/2022, along with a copy of this judgment to the Court of learned Judicial Magistrate 1st Class, Kamrup (M), Guwahati.

JUDGE

Comparing Assistant