IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.02.2015

CORAM:

THE HON'BLE Ms.JUSTICE K.B.K.VASUKI

Crl.O.P.No.9250 of 2013

and MP.Nos.1 and 2 of 2013

1.Manoj Goel
2.Mukesh Goel
3.Seetharam Goel .. Petitioners/A1 to 3

Vs.

1.State represented by Inspector of Police,
Team IV EDF-II Central Crime Branch,
Egmore, Chennai.

2.Gimpex Ltd. rep.by its Company Secretary,
Uma Shankar
Gimpex House,
282, Linghi Chetti Street,
Chennai-1. .. Respondents/
Defacto Complainant

Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, praying to call for the records of the respondent relating to Crime No.21 of 2013 pending on the file of the respondent and quash the same.

For Petitioners : Mr.AR.L.Sundaresan, SC
for M/s.Rugan and Arya

For Respondents : Mr.C.Emalias, APP (R1)
Mr.Abudu Kumar Rajarathinam
for M/s.Karthikeyan (R2)

O R D E R

This Criminal Original Petition is filed by A1 to A3 for quashing the proceedings in Cr.No.21 of 2013 pending against the petitioners on the file of the first respondent police, arising out of the complaint given by the second respondent defacto complainant.

2.The criminal liability complained of by the second respondent is arising out of three High Seas Sale agreements entered into between M/s.Kalika Cement Limited, which is now known as Aanchal Cement Ltd, having originally the petitioners 1 to 3 as its Directors and presently petitioners 1 and 2 as its Directors and the second respondent company by name Gimpex Ltd, which is recognised as Trading House by the Government of India, carrying on business activities on minerals including mining, minerals processing for value added products, exports, imports and third country merchanting trade. The three High Seas Sale Agreements entered into between the parties are for purchase of Ordinary Portland Cement Clinker (OPCC) for total invoice value of Rs.29,54,86,859/- to be discharged and cleared through customs partly at Paradeep port and partly at Haldia port. In pursuance of the agreements, OPCC was received at Indian Ports in two shipments between 22.4.2012 and 10.5.2012 and were cleared by the petitioners company, which sold the same to third party and realised the sale proceeds.

3.The allegations raised in the complaint, arising out of which is the present Crl.OP. are regarding non payment of the amount due to the second respondent defacto complainant paid by them towards customs duty and wharfage charges to the tune of Rs.6,96,74,666/- and also the amount representing the outstanding of total invoice value of the goods to purchased by the petitioners to the tune of Rs.13,07,75,009/-. The complaint proceeds as if as per the terms of High Seas Sales Agreements, the buyer is bound to pay the customs duty and other Government levies of whatsoever nature, which is in the present case, wharfare charges. Whereas, the defacto complainant was made to pay the customs duty and warfare charges as above mentioned by the petitioners, who are the Directors of the buyer's company, by making false promise that they would repay the amount immediately. Thereafter, the buyer company did not pay the customs duty and other charges as well as the amount of invoice value of the goods and the failure to do so amounts to breach of trust and cheating. It is the further case of the defacto complainant that inspite of repeated demands made by the defacto complainant company, the petitioners failed to make any payment and the second petitioner/A2 also threatened the defacto complainant with dire consequences, if any demand is made for repayment of the amount.

4.With the above allegations, the complaint came to be filed on 10.9.2012 before the Commissioner of Police and the same was thereafter forwarded to the Central Crime Branch and was received and registered as FIR in Cr.No.21/2013 on 1.2.2013. In pursuance of the same, the second petitioner was arrested and remanded to judicial custody and was also taken on police custody. In the mean while, other two petitioners 1 and 3 obtained anticipatory bail. Much before the same, the second respondent Gimpex Company made repeated demands to the petitioners company orally and in writing, insisting payment of the amount due to Gimpex Company and there were some payments made by the petitioners' company to the respondent company Gimpex Limited by way of cash and cheques. The petitioners company also filed TS.No.1615/2012 before the City civil court, Calcutta against the second respondent/complainant Gimpex Limited for declaring the defendant's demand and claim of Rs.15 crores as illegal and void and not binding on the petitioners' company and for permanent injunction restraining the defendant from misusing 18 banking instruments for Rs.50,00,000/- each drawn on SBI, N.S.Road, Kolkatta of the plaintiff/petitioners' company. The respondent company has also come forward with separate arbitration proceedings for appointment of Advocate Commissioner to take possession of the remaining goods lying in the port trust address and for prohibitory order against the Garnishees/third party buyers restraining and prohibiting each of them from paying any amount to the tune of Rs.30,00,000/- to the petitioners' company and for directing the petitioners' company to furnish security and for appointment of arbitrator etc.

5.Pending above proceedings, the second petitioner moved this court for an order of bail and was taken on police custody for five days and there was also deed of compromise effected between the petitioners' company represented by the first petitioner and Gimpex Limited for settling the amount arrived at due to the respondent company. Thereafter, the second petitioner was granted bail and other petitioners got anticipatory bails. Pending investigation of the complaint, the petitioners have come forward with the present petition for the relief as stated supra.

6.The petitioners have sought to quash the criminal proceedings initiated against them mainly by denying the nature of their liability and by denying the nature of the dispute involved in the present case. According to the petitioners, the goods were supplied by the respondent in terms of joint venture agreement, thereby to share profit and loss in the ratio of 50:50 and there was no profit gained, but what was incurred is loss and the petitioners company already paid major part of the amount due to the respondent company and it is the respondent, who is liable to share the loss, whereas, the second respondent failed to come forward with the joint discussion for settlement of the accounts between the parties, but the second respondent company falsely demanded huge sum from the petitioners' company, inspite of receiving banking instruments for due repayment of the amount due to the respondent. Thereafter the petitioners' company apprehending ulterior motive behind the conduct of the respondent company, was compelled to file the suit and the respondent company also resorted to arbitration proceedings and sought for the reliefs arising out of the civil liability. As such, the dispute is civil in nature and the liability, if any, is also only of civil in nature, arising out of commercial transaction and no criminal liability arises so as to entertain the complaint. The allegations raised in the complaint even if taken on their face value, do not prima face constitute any offence and do not make out any case and is only an abuse of process of the court for the purpose of arm twisting and is only an attempt to recover the amount and there is no element of cheating and dishonest intention and it is only a case of adjustment of accounts and nothing more.

7.Whereas the learned Additional Public Prosecutor representing the first respondent/IO has in his counter stated the manner in which the complaint was received and compromise arrived at between the parties and the representation made before the court concerned, which granted the order of bail in favour of the second petitioner, on the basis of such representation regarding compromise arrived at between the parties.

8.This quash petition is seriously resisted by the second respondent, who raised serious counter allegations to the effect that but for the inducement of the petitioners, the respondent company would not have parted with huge sum above Rs.6 crores for payment of customs duty and wharfage charges and the same was paid only by believing the false promise that the same would be repaid immediately. However, the petitioners, contrary to their assurance, failed to repay the amount, inspite of repeated demands made by the petitioners company and also resorted to civil proceedings for denying their liability and by preventing the respondent company from enforcing their liability by encashing the banking instruments given to them. It is also their case that the petitioners committed an act of criminal breach of trust by reason of their failure to repay the entire amount of total invoice value of the goods and other charges and the petitioners also threatened the representative of the respondent company with dire consequences, in event of his making any demand for discharging their liability. Thus according to the second respondent, such conduct on the part of the petitioners would amount to cheating, criminal intimidation and breach of trust and the allegations made in the complaint are sufficient enough to make out the prima facie case to charge the petitioners. It is also their case that the arbitration proceedings are initiated by the respondent company only for recovery of the amount due from the petitioners, whereas the cause of action for filing the criminal complaint is false promise made by the petitioners to the respondent company to part with huge sum of above 6 crores towards customs duty and wharfage charges.

9.The learned senior counsel for the petitioners and the second respondent have also in support of their respective contentions, cited the following authorities:

On the petitioners' side:

(i)(2005) 10 SCC 336 (Uma Shankar Gopalika v. State of Bihar and another)

(ii)(2007) 12 SCC 1 (Inder Mohan Goswami and another v. State of Uttaranchal and others)

(iii)(2007) 14 SCC 776 (All Cargo Movers (India) Private Limited and others v. Dhanesh Badarmal Jain and another)

(iv)(2008) 11 SCC 670 (Suneet Gupta v. Anil Triloknath Sharma and others) (v)Judgment dated 24.2.2012 made in SCR.A/115/2011 of the High Court of Gujarat at Ahmedabad (Sudarshansingh v. State)

On the respondent's side:
(2006) 6 SCC 736 (Indian Oil Corporation v. NEPC India Ltd and others)

10.Heard the rival submissions made on both sides and perused the records.

11.The dispute arising out of the High Seas Sale Agreements entered into between the parties for the purchase of Ordinary Portland Cement Clinker (OPCC) is regarding the nature of the transaction, as to whether the same are High Seas Sale agreements or on the basis of the joint venture deal and regarding the nature of the liability, quantum of the amount paid and payable etc. According to the second respondent company, the petitioners' company owes huge liability to the tune of Rs.15 crores including the sum of Rs.6,96,74,666/- paid towards customs duty and wharfage charges and the complaint is mainly for the non payment of customs duty and wharfage charges.

12.The fact that the customs duty and wharfage charges were payable by the buyer company, as per the agreements between the parties, and the payment was made by the respondent company and it was made at the instance of the petitioners' company having the petitioners as its Directors during the relevant point of time and thereafter the petitioners did not repay the amount, is not in dispute. The entire reading of the averments raised in this petition would only show that the amount so far said to be paid is not towards the customs duty and wharfage charges. It is sought to be argued by the learned senior counsel for the petitioners that there is no separate account and the liability is common and the account is running account, as such, what is required to be done is adjustment of accounts through joint discussion and the second respondent, having failed to come forward with settlement, lodged the complaint, in order to give criminal colour to the civil liability. Whereas, the second respondent/complainant would urge before this court that the payment of customs duty and wharfage charges, is made by the respondent company only at the instigation of the petitioners and on the false promise and misrepresentation made by the petitioners that the petitioners would repay the amount immediately, after clearance of the goods and their failure to do so amounts to an act of criminal breach of trust and cheating. It is the further case of the second respondent that the act of the second petitioner in criminally intimidating the second respondent's representative with dire consequences if any demand made for any amount, would amount to an offence punishable under section 506(i) IPC. It is also the case of the second respondent that while the arbitration proceedings is initiated for recovery of the amount, the criminal complaint is given for the act of cheating criminal breach of trust and criminal intimidation and the dispute between the parties involves both civil and criminal liability and the petitioners are liable to be prosecuted for the criminal liability. This Court is inclined to accept the contentions so raised on the side of the second respondent for the following reasons.

13.The second respondent raised specific allegation in the complaint that the second respondent was made to part with huge sum, on the deception and inducement of the petitioner company, which is according to the second respondent with fraudulent intention to cheat the respondent. As rightly argued by the second respondent company, but for such inducement and misrepresentation, the second respondent would not have paid the customs duty and wharfage charges. The facts and circumstances of the case and conduct of the parties would reveal that the parties have been from the beginning denying their liability on one ground or other and have not come forward with clear cut denial in respect of the amount due and the amount paid. Such conduct on the part of the petitioners is, according to the second respondent, alleged to have been tainted with malafide intention not to repay the amount and the same do prima facie make out the case of cheating and criminal breach of trust and the second respondent company, having discharged the goods on the promise made by the petitioners to comply with the terms and conditions of the agreements entered into with the petitioners' company, having the petitioners as its Directors and the petitioners having cleared and sold the goods and realised the sale proceeds, ought to have settled the entire amount due to the second respondent company. The petitioners' contention that it is the second respondent company, who refused to come and sit for discussion for settling the accounts, appears to contain no merits and bonafide.

14.While the dispute regarding the quantum of the amount payable is civil in nature and is to be decided in the suit filed by the petitioners' company and in the arbitration proceedings initiated by the second respondent for recovery of the amount, the conduct of the petitioners in instigating the respondent company to part with huge amount is according to the second respondent, with criminal intention to cheat the respondent company. Whether such conduct constitutes the offence punishable under the provisions of the Indian Penal Code, is the matter to be decided only by way of criminal prosecution and the same cannot be delegated to the civil forum. In my considered view, the facts and circumstances of the case and the allegations raised in the complaint are sufficient enough to make out prima facie case and to continue the criminal prosecution against the petitioners herein. As such, this is not a fit case, wherein the criminal prosecution cannot be quashed at the threshold.

15.This Court has no quarrel with the principles laid down in the judgments cited on the side of the petitioners, wherein, the Apex court held that when on appreciation of the entire materials, it is found that the allegations do not make out prima facie case, the High Court while exercising inherent power should strive to serve the ends of justice and quash the criminal proceedings and when the dispute is purely civil in nature, the remedy lies before a civil court by filing a properly constituted suit and allowing the police investigation to continue would amount to an abuse of the process of court and to prevent the same, it is just and expedient for the High Court to quash the same by exercising the inherent powers under Section 482 Cr.P.C. which can be exercised: (a)to give effect to an order under the Code; (b)to prevent abuse of the process of court and (c)to otherwise secure the ends of justice. While exercising the said power, 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 and the inherent power should not be exercised to stifle a legitimate prosecution.

16.However, it is held by the Hon'ble Supreme court in the decision cited on the side of the second respondent that if allegations in the complaint taken at their face value, disclose a criminal offence, complaint cannot be quashed merely because it relates to a commercial transaction or breach of contract, for which, civil remedy is available or has been availed. A commercial transaction or dispute may also involve criminal offence. In my considered opinion, the present case is one of such cases.

17.Thus, applying the observation of the Hon'ble Apex Court in the decision cited on the side of the second respondent, this Court is not inclined to accept the grounds raised on the side of the petitioners that the the dispute between the parties is arising out of commercial transaction and is mere breach of contract and the civil proceedings is the appropriate remedy and as the civil remedy is already availed, the criminal prosecution is an abuse of process of the court and the same cannot be allowed to go on and the relief sought for in this petition is hence, liable to be negatived.

18.In the result, this Criminal Original Petition is dismissed. Consequently, connected miscellaneous petitions are closed.

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

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To

1.The Inspector of Police,
Team IV EDF-II Central Crime Branch,
Egmore, Chennai.

2.The Public Prosecutor, High Court, Madras.

1 cc to M/s. Rugan & Arya, Advocate, Sr. 6543

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PUR (CO)
kk 21/4