*** THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**

+ Criminal Petition No.6114 of 2014

%28.04.2015

Between:

D.B.Power Limited

Rep. by DGM Legal Mr. Vikas Adhia

Mumbai

and others. .... Petitioners

AND

The State of Telangana

Rep. by Public Prosecutor,

High Court of Judicature at Hyderabad

For the State of Telangana and

The State of Andhra Pradesh

and another. …. Respondents

! Counsel for Petitioners : M/s. Vikram Pooserla

^ Counsel for Respondent No.1 : Addl. Public Prosecutor

^ Counsel for Respondent No.2 : Sri Thumu Chandra Shaker

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? Cases referred:

1. (2009) 3 SCC 78
2. (2010) 8 SCC 442
3. CDJ 2010 SC 1001

HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

Criminal Petition No.6114 of 2014

ORDER:

In this petition filed under Section 482 Cr.P.C., the petitioners/A1 to A4 seek to quash the proceedings in C.C.No.605 of 2014 on the file of XI Additional Chief Metropolitan Magistrate, Secunderabad.

2) The factual matrix of the complaint allegations is thus:

a) The Director of *defacto* complainant filed a private complaint alleging that the complainant company deals in civil engineering contract works under the name and style M/s.Sangha Erectors Private Limited and as per the meeting held between the accused company and complainant, the accused company placed a work order dated 31.05.2010 for unloading, storage, intra-site transportation, fabrication of water pipe line from pump house at Chandrapur to power plant site at Baradarha village, Jangjir-Champa District, Chattisgarh State. A2 is the Managing Director, A3 and A4 are coordinating officials of A1's company. The further case of the complainant is that he completed all the works as per work order and submitted RA bills and payment receipts including final bill dated 18.11.2013 for an amount of Rs.2,03,43,573/- which includes:

i. reimbursement of service tax Rs.45,49,666/-

ii. return of security deposit of Rs.74,13,265/-

iii. balance of contract amount of Rs.83,80,642/-.

A number of requests were made both oral and in the form of letters by the complainant but there was no positive response from the accused. Even the service tax amount which as per the agreement is repayable by the accused was also not paid in time. To the surprise of the complainant, the accused have supplied a revised summary dated 20.08.2013 making an unwarranted deductions and further, falsely showing that the complainant alone is due amounts to the accused. Thus, the final bill dated 18.11.2013 was unduly withheld by the accused by fabricating the false statements in order to deprive the rights of the complainant and with an intent to cheat and avoid the payments to the complainant as agreed as per the work order dated 31.05.2010. Besides, when the complainant requested the accused to clear the final bills, the accused have threatened with dire consequences and thereby accused have committed offences punishable under Sections 406, 420, 464, 477A and 506 IPC. The above complaint was taken cognisance by learned XI Additional Chief Metropolitan Magistrate, Secunderabad.

Hence the instant petition.

3) Heard arguments of Sri D.V.Seetharam Murthy, learned senior counsel for Mr.P.Vikram, learned counsel for petitioners/accused and Sri Thumu Chandra Shekar, learned counsel for 2nd respondent/complainant.

4) Denying the compliant allegations, learned senior counsel sought for quashment of proceedings on two main grounds. Firstly, he argued that even if all the compliant allegations are uncontroverted and accepted to be true, still no criminal offence, much less offence under Sections 406, 420,464, 477A and 506 IPC could even remotely be constructed to have been committed by the petitioners/accused. Expatiating, learned senior counsel argued that the genesis of case pivots on a civil contract which is discernable from legal notice dated 11.06.2013 issued by the complainant which itself shows that accused placed a work order for fabricating and erecting pipe line system in Chattisgarh State under contract VK/DBPL/CG/RWP/ERN/01 dated 31.05.2010 and in pursuance of the said work order the complainant company alleges to have executed the contract work and its only grievance is that certain amounts under three heads i.e. balance of contract amount, refund of service tax amount paid by the complainant on behalf of accused company and security deposit amount totalling Rs.2,03,43,573/- are repayable to it by the accused and accused company failed to pay the same. He argued that even admitting that the amounts as claimed by the complainant were not paid by the accused company, still the issues touching the said claim such as whether the amount

claimed is correct one or whether the petitioners/accused have already paid service tax or whether the complainant paid on their behalf to be entitled for reimbursement etc. are issues purely concerning to civil contract and if the complainant is aggrieved by non-payment of amount claimed by him, the first and foremost option for him as per clause 21 of Terms and Conditions of the contract is to seek for an arbitration award in view of arbitration clause included in the Terms and Conditions and other civil remedies legally permissible for him but not through this instant criminal complaint, which is nothing but converting a pure civil dispute into criminal dispute only to intimidate and harass the accused. Learned senior counsel vehemently argued that the fulcrum of the offences alleged is the cheating under Section 420 IPC and in order to sustain an offence under Section 420 IPC, the complainant must be able to establish that the accused had a deceptive intention to cheat the victim since inception and in the instant matter it is not the slightest of the allegation of the complainant that the accused company had such deceptive intention not to perform its part of contract and not intended to pay contract amount to the complainant even at the inception of entering into contract. He argued, except making an allegation that the amounts due to him were not paid, which is a matter of claim and counter claim to be decided either amicably or in arbitration, the complainant has nowhere substantiated even inferentially that the accused had entered into contract with a deceptive intention. He vehemently argued that every failure to perform civil contract, particularly non-payment of the amount will not *per se* invite a criminal action unless it is established that the crooked intention to cheat was entertained by one party from the inception of the contract which is absent here. Hence, continuation of criminal proceedings, he argued, will amount to sheer abuse of process of law and liable to be quashed under the inherent jurisdiction of the High Court. In this regard, he relied upon the following decisions.

1. ***V.Y. Jose v. State of Gujarat***

2. ***Rajeswar Tiwari v. Nanda Kishore Roy***

b) Secondly, learned senior counsel attacked the complaint on the point of territorial jurisdiction. He would submit that the contract and entire transactions between accused and complainant took place at Delhi and work was executed in the State of Chattisgarh and as such, even if non-payment of claimed amount is construed as an offence, no part of offence took place within the territorial jurisdiction of learned XI Additional Chief Metropolitan Magistrate, Secunderabad to entertain the criminal proceedings. Learned senior counsel submitted that except mentioning in the complaint that place of business of the complainant is at Secunderabad and within the territorial jurisdiction of learned XI Additional Chief Metropolitan Magistrate, Secunderabad which is immaterial, the complainant could not show that any part of the alleged offence did take place within the jurisdiction of the aforesaid Court. This is another abuse of process of law to harass the accused. He thus prayed to quash the proceedings.

5 a) In oppugnation, learned counsel for 2nd respondent/complainant argued that it is not a case of mere failure to honour a civil contract by the accused and on the other hand, their deceptive intention is manifest from the fact that they induced the complainant to pay the service tax as per clause 3 of work order with a promise to reimburse on producing the documentary proof and on such inducement, the complainant paid the service tax to a tune of Rs.45,49,666/- and when he put up his legitimate claim the accused company with lame excuse did not reimburse the amount which shows their criminal mentality to cheat the complaint even from the beginning. Not only the security deposit amount, but the balance contract amount was also withheld without any plausible cause which would also manifest the deceptive intention of the accused. He argued that non-payment of the claimed amounts apart from inviting a civil action for which the complainant is taking appropriate steps including invocation of arbitration clause, simultaneously invites the criminal action also since such non-payment of the amounts was only with an intention to defraud the complainant. He argued, when the same action gives

cause of action for both civil and criminal proceedings both go together. When the criminal proceedings are not infested with malicious intention, High Court shall not invoke its jurisdiction under Section 482 Cr.P.C. On this aspect he relied upon the decision reported in ***Iridium India Telecom Ltd. v. Motorola Incorporated and others***.

b) Nextly, he argued XI Additional Chief Metropolitan Magistrate, Secunderabad has got jurisdiction to try the case since the victim of the offence staying within the jurisdiction of the said Court. He thus prayed to dismiss the petition.

6) In the light of above rival arguments, the point for determination is:

"Whether there are merits in this petition to allow?"

7) **POINT**: The admitted facts in this case are that the complainant is engaged in civil engineering works under the name and style M/s.Sangha Erectors Private Limited whereas the accused company engaged in power house installation under the name and style D.B.Power Limited, Gurgaon, Haryana State. While so, the accused was engaged in installing two units of coal based power plants 2 x 600 MW power plant at Baradarha, Janjir—Champa District, Chattisgarh State and intake pump house at village Chandrapur on Mahanadi River near Monnet pump house. For this purpose, accused company required a pipe line from Mahanadi River to reservoir set up at power plant. Hence, the work of erection, testing and commissioning of 1220 mm OD x 9 mm thick x 27 KM long (approximate) cross country pipe line at Mahanadi River at Chandrapur village to raw water reservoir at DB power limited plant site at Baradarha village was entrusted by the accused company to complainant under work order dated 31.05.2010 vide VK/DBPL/CG/RWP/ERN/01. Now, the claim of the complainant is that it has completed all entrusted works as per the work order and submitted RA bills and payment receipts including final bill dated 18.11.2013 for an amount of Rs.2,03,43,573/- which includes

i. reimbursement of service tax Rs.45,49,666/-

ii. return of security deposit of Rs.74,13,265/-

iii. balance of contract amount of Rs.83,80,642/-.

The grievance of the complainant is that in spite of raising the final bill, the accused with an intention to cheat the complainant evaded payment of amount including reimbursement of service tax. Now, the question is even if the complaint allegations are uncontroverted, whether the offence alleged could be made out.

The core offence is cheating under Section 420 IPC.

a) Speaking about when the offence of cheating can occur, in the cited decision in ***V.Y. Jose***'s case (1 supra) the Apex Court held thus:

> *"14. An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied:*
>
> *i) deception of a person either by making a false or misleading representation or by other action or omission;*
>
> *(ii) fraudulently or dishonestly inducing any person to deliver any property; or to consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.*
>
> *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 absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out."*

So, to constitute an offence under Section 420 IPC the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. When applying this principle to the present facts, it must be said, except making an allegation that balance of the contract amount, service tax amount and security deposit amounts were not returned, the complainant has not been able to show that accused had a fraudulent or dishonest intention at the time of entering into contract not to pay these amounts. On the other hand, on the complainant's own allegations, some part of the contract amount was already paid to him. So, in such back ground, for mere non-payment of certain amounts it cannot be said that the accused had a malicious intention of deceiving the complainant even at the inception of the contract. Without establishing the core ingredients, the complainant cannot say the accused company cheated him.

c) Sofaras the offence under Section 406 IPC i.e. criminal breach of trust is concerned, admittedly there is no entrustment of property by the complainant to the accused so as to ascribe that the accused committed criminal breach of trust. Assuming that security deposit was the amount entrusted by the complainant to the accused, the same is liable to be repaid after amicable settlement of the claim or after passing of arbitration award in favour of complainant. So, at this juncture, the accused cannot be dubbed to have committed criminal breach of trust in respect of that amount.

d) Then, the alleged offences under Sections 464—making false documents and 477A—falsification of accounts are concerned, whether the accused have created false documents and false accounts or not has to be decided if the parties resort to arbitration or a suitable civil proceedings. So, at the outset, it must be said that the contractual relationship between the parties is purely a civil matter and non-payment of the amounts claimed is also a civil dispute. The allegations of the complainant even if admitted to be true and uncontroverted, still they do not disclose commission of criminal offence at this juncture. The decision in ***Iridium India Telecom Ltd.***'s case (3 supra) will not enure to its benefit. In that case the Supreme Court cautioned that the inherent power under Section 482 Cr.P.C. shall not be exercised by the High Courts to stifle a legitimate prosecution. There is no demur about the said principle. However, the facts in the instant complaint do not give a scope for holding the commission of criminal offence. Hence, continuation of such proceedings, in the considered view of this Court, will amount to abuse of process of law.

8) Then the territorial jurisdiction of the trial Court is concerned, from the narration of facts in the complaint, it is clear that the contract was entered at Delhi and executed in Chattisgarh State and no part of the offence could take place at Hyderabad to confer jurisdiction on the trial Court. Except mentioning that the office of the complainant is located within the jurisdiction of XI Additional Chief Metropolitan Magistrate, Secunderabad, the complainant could not establish how the said Court has got territorial jurisdiction to decide the case. Mere location of the complainant's office will not give jurisdiction. On the other hand, Section 177 Cr.P.C lays down that every offence shall ordinarily be enquired into and tried by a Court within whose local jurisdiction it was committed. Since that is not the case here, the complainant cannot invoke jurisdiction of learned XI Additional Chief Metropolitan Magistrate, Secunderabad.

9) In the result, this Criminal Petition is allowed and proceedings in C.C.No.605 of 2014 on the file of XI Additional Chief Metropolitan Magistrate, Secunderabad are quashed against the accused.

As a sequel, miscellaneous petitions pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 28.04.2015

<u>Note</u>: L.R. copy to be marked: Yes / No

Murthy