

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

CRIMINAL PETITION No.11877 of 2013

ORDER :

This Criminal Petition is filed by the Petitioners/Accused 1 and 2 under Section 482 Cr.P.C seeking to quash the proceedings in Crime No.189 of 2013 of Khammam III Town Police Station, Khammam registered for the offences under Sections 418 and 420 I.P.C. The said crime is registered based on the private complaint of the 1st respondent/defacto-complainant to the quash petition showing the S.H.O and the State represented by the Public Prosecutor as respondents 2 and 3 to the quash petition.

2) The private complaint of the quash petition, 1st respondent-complainant dated 18.06.2013 running in 9 pages read that, A-2 is the manufacturer of Tata Hitachi Hydraulic Excavators and the 1st accused authorized dealer and service point at Khammam town. It is for the complainant's quarry works he is intended to purchase the Tata Hitachi and approached the 1st accused, the dealer supra and paid Rs.10,50,000/- advance by placing order for the Tata Hitachi Z-Axis 210 LCH Model, under hire purchase agreement with Tata Finance which is the sister concern of A-2 Telco Constructions Company Limited, Head Office at Bangalore and as per the hire purchase agreement, the balance amount to be paid by the complainant is in 36 monthly instalments of Rs.1,40,500/- each and after said completion of formalities on 07.12.2011, the machine model supra bearing No.DACE-001816 was delivered to the complainant vide delivery certificate D.No.024873 with one year warranty which starts from 07.12.2011 to 06.12.2012 and as per the delivery certificate during the above warranty period if any part or component of the machine, which have been found to be defective

and are replaced, shall become the property of the Company i.e., 2nd accused. It is further averred in the complaint that after taken delivery while the machine was under use in quarry operations, it is found not working properly for it is giving many problems and stopped for repairs and due to stoppage of repairs resulting in stoppage of quarry operations for days together and after three months apart from the other problems, the machine main track also getting problem and track links area are worn out abnormally and same continued in August, 2012 and by seeing the problems till August, 2012, later for several times, the complainant intimated to the accused dealer about the problems and there from the service engineers of the Company visited the machine on different dates and they mentioned their observations about condition of the machine in the service reports (hereinafter referred as 'SR')

- i) SR dated 02.03.2012- - - - The track link rubbing.
- ii) SR dated 25.03.2012 “- - - - Right side Track and track pitch 770mm, track – 270mm” and further mentioned that need RICON.
- iii) SR 25.05.2012 “- - - - Track links metal chipping out and sprocket and Idler metal chippings out- - -”,
- iv) SR 29.05.2012 “1. - - - - Found play at front attachment portion in between Blist & arm, boom, cylinders and main structure maintain area & track links are getting worn abnormally”
- v) SR 20.07.2012 “1. - - - - found play approximately-10mm at boom foot pin and boom cylinder foot pins, abnormal play at boom cylinders connectivity too boom area approximately-15mm play at bucket right side connectivity link arm place approximately – 19mm.”

Further mentioned that machine color shade.

Further fuel motor got failed not taking fuel from the fuel

barrel. Further found crack on hydraulic pump side door.

3) It is further averred in the complaint that in view of the service reports it is clear that from March, 2012 onwards apart from other problems machine track links metal chipping out on subsequent days the color is shaded and further they found crack on Super structure "H" frame main collar or boom stick. The same is happened, since the A-1 and A-2 are manufacturing the defect and non-standard materials and the same is supplying to the accused. By seeing the problems, from September, 2012, the complainant is requesting the accused Nos.1 and 2 to replace with new machine Track, to paint with new color and to replace with New Super Structure "H" frame main collar or boom stick and also to attend repairs, since the machine is under warranty period. At that time, the accused Nos.1 and 2 by accepting their warranty, the accused Nos.1 and 2 promised to the complainant, in the presence of T.Satyam Babu and M.Narendra of Khammam, they replaced with new machine track, new super structure "H" frame main collar or boom stick and to repaint with new color and promised to rectified all the problems, by attending the repairs. But without replacing with new machine track, new super structure "H" frame main collar or boom stick and without doing any repaint and without attending any repairing works, they postponed the same one pretext or the other. Further, due to non getting the repairs from December, 2012, the machine kept idle, for which the complainant suffered wrongful loss with a tune of Rs.3,00,000/- per month for a period of six months and after December, 2012, the complainant made many demands to accused to replace the parts and attend the repairs, upon which the accused requested the complainant to shift the machine into their garage and complainant accordingly shifted, but 1st accused without attending any repairs, kept the machine under his garage for 50 days

and vexed with the attitude of the accused persons, complainant made report to III Town Police Station, Khammam with the above facts and that due to their false promises and cheating, the complainant suffered loss to a tune of Rs.3,00,000/- per month and the S.H.O, III Town Police Station, Khammam made a requisition, after received the complaint to the R.T.O to examine the vehicle and give opinion as to the vehicle got any manufacturing defect and as on the date of complaint against A-1 and A-2, A-1 by knowing the same without replacing the parts and without attending the works returned the machine to the complainant by giving reckless answers and they caused wrongful loss to the complainant therefrom.

4) Further averments are the actual machine condition and its problem to know complainant made requisition to “Syndic Insurance Surveyor and Loss Assessors Private Limited”, Hanamkonda to inspect Machine, since he is independent and qualified surveyor, who inspected on 05.05.2013 and issued report stating at 6-column-machine condition the observations of which relevant are (c), (f) and (h) viz., super structure/ ‘H’ frame main collar found crack, track link area worn out abnormally, track links, plates, were found bent was cut/chipping off, its rollers, idler and sprocket wheel was cut/chipping off metal, it appears to be manufacturers defect due to uses of non-standard material and boom collar found crack and its arm stick found crack and connecting links found play, hence clearly indicating its non-standard manufacturing defect.

5) It is the averment further that the surveyors findings are clear that the accused 1 and 2 manufacturing non-standard by using defective material and supplied to the complainant from which complainant suffered wrongful loss and as such A-1 and A-2 cheated the complainant with knowledge that they cause wrongful loss and further they are bound by legal contract since the machine is under

warranty any part or component of the machine found defective to replace and replaced material shall become the property of the accused but they did not do so and thereby committed the offences punishable under Sections 418 and 420 I.P.C and as police III Town Police Station, Khammam did not take action from the report, the complainant is constrained to file the private complaint as the accused intentionally cheated not only the complainant who became a scapegoat in their hands but also the public at large. It is there from prayed to refer the complaint to the police for investigation against A-1 and A-2. It is supported by affidavit of even date stating, the contents in the complaint are true and correct.

6) It is there from the learned Magistrate referred the same to the police for investigation who registered the crime supra and it is impugning the same, present quash petition is filed.

7) The contention from the grounds and oral submissions during hearing of the accused quash petitioners are that the complainant undisputedly purchased the machine with make supported by certificate and warranty and used after purchase for quarry purposes and from whenever intimated any problems of the machine, it was attending repairs by their service engineers. The averments about giving frequent problems and intimated to attend the repairs and replace parts that was not attended and surveyor appointed by complainant found manufacturing defects from material used are not correct and from said allegations for the crime to register it no way attracts the alleged offences punishable under Section 418 or 420 I.P.C and the complaint on its face thereby not maintainable for no semblance of cause of action from its reading on its face but for any civil remedy where the defect if at all that was in the warranty period to be rectified; apart from factually undertaking free of cost the repairs and also obtained satisfaction letter from the

complainant for time to time repairs attended and there is no notice for the so called inspection by so called private surveyor cause appointed by complainant to know his knowledge in the field and thereby it is not even binding on the accused persons. It is also the contention that the 2nd accused is a leading manufacturer of excavators in the country and selling in thousands all over India and abroad with standards and specifications and there is no such complaint received even of the make and model purchased by the complainant and various averments in the complaint no way sustainable, but for if at all to gain sympathy of the Court and the complainant himself from his say in the complaint on his volition purchased the machinery for his business purpose and there is nothing inducement or deception and the forwarding of the complaint or registration of the crime and taking up for investigation for no cognizable offence even disclosing is misconceived and abuse of process and thereby the proceedings are liable to be quashed.

8) In support of the said version, the accused persons placed reliance upon ***Inder Mohan Goswami V. State of Uttaranchal***^[1] where it is observed that the inherent powers of the High Court under Section 482 Cr.P.C are though wide that has to be exercised sparingly with great caution and to exercise ex-debito justitia that is to do real and substantial justice for the administration of which the Courts exist, and for not to allow to use the prosecution is an instrument of harassment or private vendetta or with a motive to pressurize the accused to terms and the powers too could not be exercised to stifle a legitimate prosecution and Court should refrain from giving prima facie decision in a case where entire facts are incomplete and hazy, more so, when the evidence has not been collected and produced before the Court and the issue involved are of such a magnitude that they cannot be seen in the true perspective

without sufficient material, though no hard and fast rule can be laid down for exercise of the extraordinary jurisdiction. It is observed that Court should balance with personal liberty, the societal interest and a warrant for arrest of accused should not be issued without proper scrutiny of facts from complaint or F.I.R in application of judicial mind and where dispute is a pure civil in nature or from reading of F.I.R the ingredients of offence are absent, the proceedings can be quashed.

9) There on facts in relation to contract for sale and the respondent No.3, the prospective vendee of the sale agreement-cum-General Power of Attorney failed to pay balance amount despite requests of the appellants of the society and the respondents allegedly misusing the same for further sale of the property in question for the alleged prosecution maintained held, the offences alleged under Section 420 and 467 not made out. It was observed in paras 41 and 42 of the Judgment that intention is the gist of the offence of cheating defined under Section 415 I.P.C and to hold person guilty of cheating, it is necessary to show he had a fraudulent or dishonest intention at the time of making the promise and mere fact that primary could not keep his promise cannot be presumed that he all along had culpable intention to brake the promise from the beginning.

10) The other decision placed reliance is three Judge bench in ***State of West Bengal V. Swapan Kumar Guha***^[2] where Prize Chits and Money Circulations Act, 1978, application under Section 2(c) read with 3 and 4 involved or not was in question, the Apex Court observed, the transaction under which one party deposits with the other or lends to that other a some of money or promise of being paid interest at a rate higher, agreed rate cannot without more be a

money circulation scheme under Section 2(c) of the Act to attract the penal consequences.

11) The another Three Judges' bench expression in **Anil Mahajan V. Bhor Industries Ltd**^[3], where it is observed that in a contract for sale for supply of goods to allege the offence of cheating under Section 415 punishable under Section 418 or 420 I.P.C, it must be shown from the very beginning of the transaction, there exists fraudulent and dishonest intention and mere failure to keep a promise at a subsequent stage does not tantamount to cheating. A cheating is different from mere breach of contract and mere use of the words of cheating in the complaint would not be sufficient in the absence of such a substance from the complaint. On facts held a perusal of the substance shows a civil case of breach of contract and not a criminal case of cheating for supply of steel grip tapes on 50% advance payments against monthly quantity to pay the balance on receipt of goods for the breach subsequently committed pursuant to the M.O.U, in saying remedy of damages under Section 73 to 75 of Contract Act and the learned Magistrate held erred in issuing process under Section 204 of Cr.P.C. For the conclusion referred the earlier expression of the Apex Court in **Alpic Finance Ltd. V. Sadasivan**^[4] where on facts, it is alleged the accused was continuing payment of the instalments in default and the bank has dishonoured the cheques issued by him and the further allegation is on physical verification of certain chairs were supplied were found missing from premises of accused, for that alleged as committed the offence of cheating and misappropriation, the Apex Court observed the appellant has no case that the respondent obtained the article by any fraudulent inducement or willful misrepresentation and default in payment of instalments not an offence of cheating or misappropriation, but misappropriation of the chairs supplied which

were already sold in fact but a civil dispute.

12) The other decision placed reliance is two Judges bench in ***Uma Shankar Gopalika V. State of Bihar***^[5] where it is held that a breach of contract is different from the offence of cheating under I.P.C and in the absence of the allegation in the complaint that at the very inception there was intention on behalf of the complainant, no offence of cheating with criminal conspiracy would be made out in relation to the facts where the accused entity represented by its directors financing the truck purchased by the complainant under hire purchase agreement subsequently the truck not traced and when claim submitted to the insurance company, the claim was allowed, the representative of the complainant was allowed to handle the claim, received the amount and failed to pay therefrom that principal and in reference to the facts held no offence of cheating made out in quashing the F.I.R from non-disclosure of the offence not only against the accused impugning the F.I.R but also against the other non-disclosure also.

13) The other decision placed reliance is ***Ford India Ltd V. Sunbeam Ancillary P. Ltd***^[6] where it is observed in controversial allegations made in F.I.R when did not disclose any offence, the F.I.R can be quashed by referring to ***State of Haryana V. Bajanlal***^[7] and ***Pepsi Foods Limited V. Special Judicial Magistrate***^[8], ***Anil Mahajan*** supra and ***Umashankar Gopalika*** and another expression in ***Hotline Telegubes and Components V. State of Bihar***^[9], ***Ashok Sachdev V. G.S.Chauhan***^[10] in quashing the F.I.R for the offence under Section 420 I.P.C which is outcome of private complaint referred to police by the learned Magistrate for

investigation referring to ***Maksud sayeed V. State of Gujarat***^[11] it is observed the Magistrate did not apply his judicial mind in simply referring directing to register the crime, thereby held liable to be quashed. It was observed the essential ingredients of cheating that there must be misrepresentation and on that basis complainant's acts and suffered wrongful loss or it cause wrongful gain to accused and in the absence of which if one acts on credibility of a firm and there is no misrepresentation in its acting in purchase of the car there is no offence of cheating held made out. In ***Girish Sarwate V. State of A.P.***^[12], the full bench on reference, approved the expression in ***Gudavalli Murali Krishna V. Gudavalli Madhavi***^[13] of a single Judge differing to the earlier expressions holding not good law by mainly placing reliance upon ***Bhajanlal*** supra though while saying inherent power is to be exercised sparingly with care and circumspection.

14) It is the submission contra from counsel for complaint that the power to quash the F.I.R is available no doubt to the High Court, provided the conditions laid down in ***Bhajanlal*** are satisfied and a close reading of the complaint when clearly makes out the offence of cheating gives inference from its reading as laid down in ***Shivnarayana Kabre V. State of Madras***^[14] the dishonest intention from the inception of the supply of the machinery without disclosing the defects of manufacturing is clear and the surveyor found the manufacturing defects from his report, whether the same reliable or not and the contents correct or not when matters for investigation, this Court cannot venture for not a rarest of rare case within the four corners of the guidelines of ***Bhajanlal*** supra of no case made out and it is not a pure contractual civil liability though outcome of the contract of purchase and thereby, the quash petition is liable to be

dismissed for the F.I.R proceedings not liable to be quashed and placed reliance, in support of that contention further the expressions of two Judge bench expression in ***Rajesh Bajaj vs. State N.C.T.Delhi***^[15] wherein the offence of cheating, it is observed by the Apex Court that if averments in the complaint prima facie makes out case for investigation, High Court cannot quash the complaint merely because one or two ingredients of the offence have not been stated in detail and even otherwise quashing a complaint on mere grounds of it discloses a commercial or money transaction is unjustified as many a cheating being committed in the course of such transactions even.

15) The other decision placed reliance is of two Judges bench of the Apex Court in ***Moti Lal V. State of U.P***^[16] where on facts in seeking to quash the proceedings for the offence under Section 302 read with 149, 201 read with 452, 427 and 148 I.P.C and also under Section 307 read with 149 I.P.C, the case ended in conviction on sessions trial and while upholding the High Court modified the same and when came for consideration before the Apex Court on facts observed F.I.R need not be an encyclopedia, once the subsequent investigation on charge sheet shows the complicity that is proved from the evidence. Here, the decision has no application as it all depends on facts of each case as to knowledge of informant and a stranger with cryptic knowledge may set the law in motion with few facts in his knowledge or what he found though it does not contain the details as to accusation against specific accused. Whereas, a person who saw and witnessed the occurrence and failed to disclose and it is a subsequently stated as an improvement to implicate the accused that appreciation is different, thereby this decision has no application in the facts because the complainant himself is the

purchaser of the machinery and filed the complaint with specific averments of the complaint running in 8 to 9 pages referred supra and this decision then cannot be invoked to say in non-furnishing of the information no way requires to read the complaint on its face to decide makes out the offence or not and invariably to allow the investigation to go on. Such a contention in fact to say is running contrary to the principle laid down in **Bhajanlal** supra placed reliance of both sides and other expressions supra.

16) The other decision relied is **Ghanshyam Sharma V. Surendra Kumar Sharma**^[17] where it is an offence of cheating and breach of trust, the police filed charge sheet after registration of the crime that was taken cognizance by the learned Magistrate and a High Court quashing the proceedings against which on appeal the Apex Court held that what the High Court opined of no entrustment of money to attract any of the offences under Section 406 or 420 I.P.C and at best it tantamounts to theft of money under Section 379 concerned, when appellant lost is money kept in the car of 1st respondent High Court grossly erred in quashing and what the police final report showing a particular offence that too when not conclusive but for the trial Court while framing charges from the material to apply correct penal provision, to discharge or to frame charge as the case maybe, thereby set aside the said quashed order of the High Court.

17) From the above propositions, coming to the facts and the contentions referred supra, undisputedly the complainant before approaching the A-1 for purchase of TATA Hitachi Escavators, and with that intention having formed in his mind from the very complaint para No.2 averments, approached the 1st respondent dealer of 2nd respondent manufacturing entity and paid the advance amount of

Rs.10,50,000/- by confirmed his intention to purchase by placed order to purchase the TATA Hitachi Z Axis 210 LCH Model having entered the hire purchase agreement with TATA Finance and taken delivery of the machinery with specific make and number supported by delivery certificate and purchase bills and with warranty period for one year till 06.12.2012 and when there is no averment from reading of the complaint as a whole, as to he was influenced by any broucher of the complainant entity regarding make and use with assurances and same are untrue ultimately in practical use and thereby to say any fraud played from the contents of the broucher or deceived or induced from the broucher for purchase. He having make up his mind to purchase and approached and confirmed to purchase by placed the order and there is no single sentence saying either A-2 or even the dealer A-1 of A-2 instigated to purchase by misrepresented regarding its use, from which he suffered loss. When that is not the case, it is a purely civil and contractual transaction of purchase of the machinery under hire purchase, having purchased and within warranty period and even saying further from his reproducing service representatives more than 5 times during March, to July 2012 attended and rectified of the defects noticed and provided the service free of cost as within the warranty period, what he stated subsequently of not responding or by promises to attend not attending the repairs or service or to replace any parts to be rectified for its functioning and from that claiming suffered losses or in saying later asked to bring to the garage of A-1 and having been kept returned though as per the accused it was attended and repaired and satisfactory certificate even given, there is no any element of cheating or breach of trust to attract any of the two penal provisions referring to which the private complaint running in 8 to 9 pages filed against the accused persons, thereby there is no offence of cheating or breach of trust that could be made out muchless any other penal

offence including of one under Section 427 I.P.C.

18) Having regard to the above, when from reading of the complaint filed that was referred to the police for investigation by the Magistrate who in turn registered as F.I.R, no way makes out any of the offences from the complaint contents in detail running nearly 9 pages, the continuation of the proceedings no way subserve the ends of justice but for abuse of process, for remedy of complainant is otherwise to approach any consumer forum or to seek for damages for any civil liability or the like.

19) In the result, the criminal petition is allowed and the proceedings in Crime No.189 of 2013 dated 07.09.2013 of III Town Police Station, Khammam are quashed. The bail bonds of the accused if any shall stand cancelled.

20) Miscellaneous petitions pending, if any, in the Criminal Petition shall stand closed.

Dr. B. SIVA SANKARA RAO, J

11.12.2015

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[\[1\]](#) (2007) 12 SCC 1

[\[2\]](#) (1982)1 SCC 561

[\[3\]](#) (2005)10 SCC 228

[\[4\]](#) AIR 2001 SC 1226

[\[5\]](#) (2005)10 SCC 336

[\[6\]](#) MANU/DE/2535/2008, DATED 04.07.2008

[\[7\]](#) (1992) Supp.1 SCC 335

[\[8\]](#) AIR 1998 SC 128

[\[9\]](#) (2005)10 SCC 261

[\[10\]](#) MANU/DE/2077/2012, Dt.09.07.2012

[\[11\]](#) (2008)5 SCC 668

[\[12\]](#) 2005(1) ALD (CrI.) 150 (AP) (FB)

[\[13\]](#) 2001(1) ALD (CrI.) 689 (AP)

[\[14\]](#) AIR 1967 SC 986

[\[15\]](#) AIR 1999 SC 1216

[\[16\]](#) 2010(1) SCJ 305

[\[17\]](#) 2014(9) SCJ 538