IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPLICATION NO. 3848 OF 2005

1. M/s. G. S. Fertilisers Pvt. Ltd.
   Having its address at Podar Point,
   113, Park Stree, Block-A,
   1st floor, Kolkata, 700 016.

2. Mr. Amit Kumar Sanei,
   aged 26 years,
   having his address at Podar Point,
   113, Park Street, Block-A,
   1st Foor, Kolkata 700 016. …... Applicants

Versus

1. M/s. Dhanlaxmi Engineering Enterprises
   a partnership firm, having its office at
   D-1, Vibha Co.op Society Ltd.,
   73/1, Erandavane, Pune 411 004.

2. State of Maharashtra …... Respondents

Mr. Subodh Desai, Advocate for the Applicants.

Mr. Ishwar Nankani & Ms. Ruja Pol I/b M/s. Nankani & Asso. For the Respondent no. 1.

Ms. M. R. Tidke, APP for the State-Respondent no. 2.

Coram :- **C. V. BHADANG, J**

Reserved for Judgment of Date : **11th March, 2016**

Judgment Pronounced on Date: **21st March, 2016**

JUDGMENT

By this application, under Section 482 of the Code of Criminal Procedure, the Applicants, (original Accused nos. 1 and 2) are challenging the

Order dated 23.04.2004 passed by the learned J.M.F.C. (AC) Pune in R.C.C. no. 1296 of 2004. By the impugned Order, the learned Magistrate has issued process against the Applicants for the offence punishable under Section 420 read with Section 34 of the Indian Penal Code.

2. The brief facts necessary for the disposal of the application may be stated thus :

That, the Applicant no. 1 is a private limited Company registered under the Companies Act, 1956 having a registered office at Kolkata. The Applicant no. 2 is a Director of the Applicant no. 1. The Applicant-Company is, inter alia, engaged in manufacture and sale of fertilizers. The first Respondent is a partnership firm having office at Pune.

3. In the year 1997, the Applicant no. 1 had invited tenders for design engineering, supply, erection and commissioning on turn-key basis of 10 TPH NPK Granulation plant at Orgaon Burdwan. It appears that eventually the first Respondent was granted the work order by the Applicants on 11.06.1997 for the turn-key project. The material term being Clause no. 5 of the work Order, reads thus :

> "Sales Tax & Excise :
> For the equipments to be supplied by you from Maharashtra, CST @4% against Form 'C' will be given by us. For the equipments to be purchased by you in West Bengal on our account, the purchase should be made in our name as we enjoy exemption of W. B. Sales Tax against P.C. These local purchases will be

> adjusted to your account. Excise duty on Rs.70,00,000/- @ 3% equal to Rs.2.10 Lacs max. shall be payable by G. S. Fertilisers Private Ltd. Any extra payment on account of Excise shall be taken care of M/s Dhanalaxmi Engineering Enterprise."

The work order further stipulated that the plant should be ready for production by 28.02.1998 and, in the event of failure thereof, the first Respondent was liable to a penalty as stipulated in the Order.

4. According to the Applicants, from time to time, an amount in excess of Rs. 1 Crore has been paid to the first Respondent towards the bills raised. However, inspite of the payment, the first Respondent failed to complete the work in terms of the Work Order/Contract dated 11.06.1997. The Applicants also claimed that the first Respondent deviated from the specifications for the granulation plant by supplying defective machineries. In short, certain disputes arose between the parties as to the compliance to the work orders/contract and the Applicants claimed that the first Respondent failed to rectify the defects inspite of being called upon to do so. It further appears that the Applicants had invoked the Arbitration Clause under contract and had approached the Calcutta High Court. However, according to the Applicants, the first Respondent requested and prevailed upon the said Applicants not to press the said Application and undertook to rectify the defects and to give performance trial guarantee. However, the first Respondent again failed to keep the promise.

5. According to the Applicants, in order to camouflage their shortcomings

and in order to escape from their liabilities under the Work Order/Contract dated 11.06.1997, the first Respondent issued a notice to the Applicants on 04.09.2002 calling upon the Applicant no. 1 to submit form 'C' under the Central Sales Tax Act. It was contended that the non-submission of the said forms was in breach of the Contract as a result of which the first Respondent had to incur financial loss since the assessment for the years 1997-98 and 1998-99 were completed without submission of the said forms. According to the first Respondent, this had resulted in a demand raised by the Sales Tax Authorities against the first Respondent towards difference in the Sales Tax applicable at the normal rate which was 13% and the Sales Tax at concessional rates at 4% on submission of the form 'C'. Further, according to the first Respondent, the Applicants had wrongfully gained Rs.15,32,378/- and had misappropriated the said amount.

6. It is in these circumstances, that the first Respondent filed a private complaint before the learned JMFC at Pune alleging commission of offences under Section 403, 406 and 420 read with Section 34 of the Indian Penal Code. In short, the case made out in the complaint was that the Applicants misrepresented that they had the necessary authority and permission to issue form 'C' on the basis of which the first Respondent supplied to the Applicants the materials and raised invoices charging therein sales tax at 4% against submission of form 'C' to be issued by the Applicants. It was contended that the Applicants dishonestly induced the first Respondent to deliver the material by charging @ 4% sales tax against form 'C' without having the form 'C' or the authority to issue form 'C'.

7. The learned Magistrate by the impugned Order issued process against the Applicants for the offence punishable under Section 420 read with Section 34 of the Indian Penal Code. Feeling aggrieved, the Applicants are before this Court.

8. I have heard the learned Counsel appearing for the Applicants, the learned Counsel appearing for the Respondent no. 1 and the learned APP appearing for the Respondent no. 2.

9. It is submitted by the learned Counsel for the Applicants that no ingredients of the offence punishable under Section 420 of the Indian Penal Code are made out. It is submitted that the dispute is essentially of a civil nature arising out of the breach of Contract, that too by the first Respondent. It is submitted that only by way of a counter blast and to camouflage the breach of the Contract by first Respondent, that the first Respondent raked up the issue of non-submission of the form 'C'. It is submitted that out of the consideration of Rs.103.75 lacs, the amount of Rs.103.50 lacs has already been paid to the first Respondent and, as such, no intention to cheat can be gathered. It is submitted that the learned Magistrate failed to apply mind to the complaint and the allegations therein and erred in issuing process for an offence of which no ingredients are made out.

It is next submitted that the Contract was entered into in West Bengal and the machinery was also to be supplied in West Bengal and thus Pune Court cannot have territorial jurisdiction to entertain the complaint. It is submitted that the learned Magistrate failed to address himself on this aspect and erroneously assumed jurisdiction, when there existed none, while issuing the process. It is submitted that the complaint read as a whole, does not make out a case for issuance of process and the complaint deserves to be quashed.

10. On the contrary it is submitted on behalf of the first Respondent that the Applicant has alternate remedy of challenging the order in a revision application and, as such, this Court may not invoke its inherent powers under Section 482 of the Code of Criminal Procedure. In so far as merits are concerned, it is submitted that the issue about the alleged breach of Contract or non-compliance with the Work Order/Contract, is not involved in this case and the material issue is about a misrepresentation and deceit practiced by the Applicants of inducing the first Respondent to deliver the machinery by charging sales tax at a concessional rate and of misrepresentation about the submission of the form 'C' when the Applicants were not having the 'C' form or the authority to do so. It is submitted that this was the intention of the Applicants since inception and the learned Magistrate was justified in finding that a case for the issuance of process under Section 420 of the Indian Penal Code, is made out.

11. In so far as the objection to the territorial jurisdiction of the Court at Pune is concerned, it is submitted that the Court within whose jurisdiction consequences ensue will have territorial jurisdiction. The learned Counsel has referred to the complaint in order to show that the consequences had ensued in Pune where under the Sales Tax authorities had raised a demand against the first Respondent for the difference in the sales tax. He submitted that the matter is at a

preliminary stage and the Applicants would get an opportunity to establish their innocence at the trial and this is not a case where the Court should exercise inherent jurisdiction under Section 482 of Code of Criminal Procedure.

12. I have given my anxious consideration to the rival circumstances and the submissions made. Undoubtedly, the matter arises out of a contract for supply, erection and commissioning of a plant and to that extent the dispute may have over tones of a civil dispute. However, in a given case, an act of commission or omission can give rise to a liability which may be both civil and criminal in nature. The essential difference between a claim for breach of Contract simpliciter and fraud/cheating is about the intention of the party at the inception of the contract. If it is shown that since beginning the intention was not to abide by the Contract and/or where there is a misrepresentation, the act/omission would also involve criminal consequences. At the stage of issuance of process, the Magistrate was required to confine himself to the allegations in the complaint and the verification recorded. The probable defence, if any, would not come in picture at the stage of issuance of process. The first Respondent has contended in Para 9 of the complaint that the first Respondent during his personal visit in or around March-April 2002 had visited the Commercial Tax Department, West Bengal, where he learnt that the Applicants had not even applied to the Sales Department, West Bengal till that time for authority to issue form 'C'. Indisputably, as per Clause 5 of the Work Order/Contract reproduced above, the Applicants had agreed to submit form 'C' on the basis of which CST at the concessional rate of 4% was chargeable. Clause no. 5 further makes it clear that this pertains to the equipments supplied by the first

Respondent from Maharashtra, inasmuch as the equipments to be purchased by the first Respondent for supply to the Applicants in West Bengal was to be in the name of the Applicants as the Applicants were enjoying exemption under the West Bengal Sales Tax Act against P.C. Thus, the material dispute essentially turns upon, as to whether the Applicants were indeed having the form 'C' or the authority to issue the same on the date on which the Work Order/Contract was issued/entered on 11.06.1997. This aspect can be gone into by the learned Magistrate when the complaint proceeds further.

13. There is one more aspect of the matter which may be significant. The process is issued for the offence punishable under Section 420 of the Indian Penal Code and, as such, the Criminal case before the Magistrate would be a warrant triable case which is instituted otherwise than on police report. Thus, in view of the provisions of the Code of Criminal Procedure, the Magistrate would be obliged to record evidence before charge and then decide whether charge needs to be framed after hearing the first Respondent and the Applicants. Thus, the Applicants would get an opportunity to contest the matter and demonstrate that no case for framing of charge is made out, It will always be open for the Applicants to demonstrate that they were indeed having the form 'C' or the necessary authority to issue the same on the date on which the Work Order was issued. The learned Magistrate shall consider the said aspect and then decide whether a case for framing of charge is made out.

14. The offence under Section 420 of the Indian Penal Code can be seen

as a species of the offence of cheating as defined under Section 415 of the Indian Penal Code. The offence under Section 415 of the Indian Penal Code envisages deceit where any person fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit, if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. The explanation to Section 415 of the Indian Penal Code, makes it clear, that dishonest concealment of fact is a deception, within the meaning of said Section. Thus, intentional inducement and dishonest concealing whereunder the person deceived is induced to do or omit to do anything, which he would not have done or omitted, if he was not so deceived and the consequent damage or harm is a sina qua non for the offence of cheating. Section 420 of the Indian Penal Code envisages the offence of cheating and dishonestly inducing delivery of property.

15. The learned Counsel for the Applicants had referred to a copy of form '7' issued under the West Bengal Sales Tax Rules, 1995, to show that the sales of class/classes of goods of the business of the Applicants as set out in the said form '7' were exempted from tax under sub-clause (xi) of clause (a) of sub-section (3) of Section 17. Prima facie, at this stage, the issue is about the submission of form 'C' under the Central Sales Tax Act and the Clause no. 5 as referred earlier, would show that the submission of form 'C' was agreed insofar as the equipments which were to be supplied from Maharashtra are concerned.

In such circumstances, I am unable to persuade myself to hold that a case for invoking inherent powers under Section 482 of Cr. P. C. for quashing of the complaint is made out.

16. Insofar as the issue about territorial jurisdiction is concerned, the learned Counsel appearing for the first Respondent has submitted that the offence can also be tried where the consequences had ensued which may be an argument referable to Section 179 of the Code of Criminal Procedure. Indisputably, the said Section would be attracted only where the Act alleged, is an offence by reason of anything, which has been done and of consequences which have ensued. It will be thus open for the Applicants to raise this issue before the learned Magistrate and the learned Magistrate shall decide the same whilst deciding whether a charge needs to be framed in the light of the documentary and other evidence on record and the provisions of Section 179 of Code of Criminal Procedure. As the complaint is still pending before the learned Magistrate, I do not propose to record any conclusive finding, so as to prejudice any of the parties.

17. The learned Magistrate shall appropriately consider the relevant provisions of Section 415 and 420 of the Indian Penal Code along with Section 179 of the Code of Criminal Procedure and shall decide on the question of territorial jurisdiction also. Needless to mention that the learned Trial Court shall proceed to decide the matter uninfluenced by any of the observations herein as this Court has not recorded any final or binding opinion on merits.

18. In the result, the Criminal Application is hereby dismissed.

C. V. BHADANG, J.

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