IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.547 OF 2013

1. Darton Zink
Adult, Inhabitant of United States of America, President and Chief Executive Officer of ZEECO, INC having its registered address at 22151 East 91st Street Broken Arrow, Oklahoma 74014, United States of America

2. M/s. ZEECO INC
Company registered under the laws of the Staet of Oklahoma, United Staets of America, having its registered address at 22151 East 91st Street Broken Arrow, Oklahoma 74014, United States of America ...Applicants
(Original accused Nos.1 & 4)

Versus

1. The State of Maharashtra
Through the Public Prosecutor

2. Sunil Laxman Gupta
of Bombay, adult, Indian Inhabitant carrying on business in the firm name and style of M/s. Zeeco India having office situated at 2A, Marve, Link Building Mith Chowki, Malad (W), Mumbai- 400 064. ...Respondents
(Respondent No.2-original complainant.)

WITH
CRIMINAL APPLICATION NO.781 OF 2013

Nigel Palfreeman
Adult, Inhabitant of United Kingdom
Managing Director of Zeeco Europe

Limited having its registered address at The Woolfox Depot, Great North Road, Ruthland United Kingdom, Leicester 15, 7QT

2. M/s. Zeeco Europe Limited
a company registered under the law of the United Kingdom, having its registered address at The Woolfox Depot, Great North Road, Ruthland United Kingdom, Leicester 15, 7QT.
...Applicants
(Orig. Accused Nos.2 and 5)

Versus

1. The State of Maharashtra
Through the Public Prosecutor.

2. Sunil Laxman Gupta
of Bombay, adult, Indian Inhabitant carrying on business in the firm name and style of M/s. Zeeco India having office situated at 2A, Marve, Link Building Mith Chowki, Malad (W), Mumbai- 400 064.
...Respondents
(Respondent No.2-original complainant.)

CRIMINAL APPLICATION NO.1133 OF 2012

1. Sanjeev Chipalkatti
Age 59, Indian Inhabitant,
Carrying on business in the firm name and style of M/s. Zeeco (India) Pvt. Ltd., having office situated at 801, Swastik Chambers Sion Tombay Road, Chembur, Mumbai 400 071.

2. M/s. Zeeco India Pvt. Ltd.
having office situated at 801, Swastik Chambers Sion Trombay Road, Chembur, Mumbai 400 071.
...Applicants
(Orig. accused Nos.3 and 6)

Versus

The State of Maharashtra

Through the Public Prosecutor

2. Sunil Laxman Gupta
of Bombay, adult, Indian Inhabitant
carrying on business in the firm
name and style of M/s. Zeeco India
having office situated at 2A, Marve,
Link Building Mith Chowki, Malad
(W), Mumbai- 400 064.

...Respondents
(Respondent No.2-original complainant.)

....

Mr. Niteen Pradhan with Mr. Rajat Agarwal with Mr. Omkar Kelkar i/b. Mr. Anish Ghoshal for the Applicants.
Mrs. G.P. Mulekar, APP for Respondent No.1-State.
Mr. Manoj Mohite with Mr. Anand Mishra i/b. Mr. A.M. Saraogi for Respondent No.2.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

JUDGMENT RESERVED ON : 2nd AUGUST, 2016.

JUDGMENT PRONOUNCED ON: 5th AUGUST, 2016.

JUDGMENT :

By these applications filed under section 482 of the Cr.P.C., the Applicants, have sought to quash the order of issuance of process dated 8th February, 2012 in Criminal Case No.36/SW/2009 for offences punishable under sections 406, 420 and 120 B r/w. 34 of the IPC.

2. The aforesaid Applicants are the accused in Criminal Case No.36/SW/2009. Darton Zink-accused No.1 is a foreign national and

is a President and Chief Executive Officer of accused No.4 -M/s. Zeeco INC, a company having its registered office in the State of Oklohoma, USA, engaged in designing, manufacturing and supplying various industrial equipments. The accused No.5 M/s. Zeeco Europe Limited is the European affiliate of M/s. Zeeco INC, accused No.4-company. The accused No.2 Nigel Palfreeman is the Director of accused No.5 company. Accused No.6-M/s. Zeeco India Pvt. Ltd. is the Indian affiliate of the accused No.4 company and Shri Sanjiv Chipalkatti-accused No.3 is the business Director of the accused No.6 company.

3. The accused No.4 company entered into an agreement dated 31st August, 1994 with a company called USCO ltd. through its President-Atulkumar, thereby appointing USCO as the sales representative and granting sole and exclusive right to promote the sale and solicit orders for the products of the accused No.4-M/s. Zeeco INC Company. In terms of the said agreement USCO was entitled to get necessary commission for the services provided under the contract. USCO operated as a sales representative since the date of the execution of the said agreement till February, 2005. The Respondent No.2-Sunil Gupta is the complainant in Criminal Case No.36/SW/2009, who as per the said agreement dated 31st August, 1994 was appointed as a sales representative. The complainant Sunil Gupta claims that he had

procured several contracts and assurances for the accused No.4- M/s. Zeeco INC from various corporate sectors in India. The complainant claims that it was only because of his efforts that the accused No.4 company could raise market within India as well as other countries.

4. The complainant has alleged that the accused in collusion and connivance with each other tried to remove him from the picture even though he had been looking after the work of accused No.4- M/s. Zeeco INC and helped the accused No.4 in establishing its business in Indian market and also in acquiring global business. The complainant further claimed that accused Nos.1 to 4 had assured that they would start a subsidiary company and that they would accommodate him as a Director with a good percentage of profit and requested him to close the original company and business.

5. The grievance of the complainant is that some time in the year 2005, he procured a contract with Indian Oil Corporation. The complainant signed an agreement with Indian Oil Corporation under an authority from the accused No.3 and also received an advance amount of Rs.51,86,464/-. The complainant has stated that since a huge amount was due and payable to him by the accused No.3-Shri Sanjiv Chipalkatti, it was agreed that he would retain the said amount

received by him from Indian Oil Corporation towards dues payable to him by accused No.3. The complainant has stated that even after adjusting the said amount of Rs.51 lakhs, accused was liable to pay to him a sum of Rs.1.2 crores. The complainant has stated that when he had requested the accused to settle his dues and comply with the contract assigned by Indian Oil Corporation, the accused started pressurising him to transfer the said contract in the name of the accused No.6- M/s. Zeeco India Pvt. Ltd. as if the said contract was procured by accused No.6 directly from the Indian Oil Corporation. The accused also suggested to the complainant that all future contracts which would be obtained by the company would be shown as if directly procured by accused No.6.

6. The grievance of the complainant is that though he has been appointed exclusively as sales representative, slowly and gradually the said arrangement was sought to be shared with the accused Nos.6. Since the said suggestions were not accepted to him, the accused in order to pressurise him started suggesting that amount of Rs.51,86,464/- received by the complainant from the Indian Oil Corporation should be transferred in the account of accused No.6.

7. The complainant has further stated that the accused created one document termed as MOU on the basis of which they claimed that the entire assignment procured by the complainant from the Indian Oil Corporation stands transferred in the name of accused Nos.4 and 6. The complainant has denied having entered into any such MOU. The complainant has stated that he had procured the said contract from Indian Oil Corporation as exclusive sales representative of accused No.4 company and there was no question of transferring the assignment to any other party including the accused No.6.

8. The complainant has alleged that the accused Nos.1 to 3 got themselves introduced to the officers of the Indian Oil Corporation and by misleading the officers of the Indian Oil Corporation they claimed that they had procured the agreement directly from the Indian Oil Corporation. This act, according to the complainant constitutes an offence under section 406 of the IPC.

9. The complainant further claimed that right from the beginning the accused had no intention to continue the services rendered by the complainant and that they have side lined him after utilising his services and after having established themselves in the Indian market. The complainant has further stated that the accused

have refused to pay to him sum of Rs.2 crores as sales commission in addition to Rs.1.2 crores, which was due to him as estimated profit under the contract and an amount of Rs.6 crore 70 lakhs towards investment in establishing the accused No.4 company in India. The complainant therefore, claimed that accused have made illegal profits for themselves and loss to him to the equivalent amount. The said act according to the complainant constitutes an offence of cheating.

10. The learned Magistrate recorded the statement of the complainant under section 200 of the Cr.P.C. and thereafter forwarded the complaint for further enquiry under section 202 of Cr.P.C. Since the concerned police submitted a report stating that dispute was of civil nature, the complainant /Respondent No.2 filed a protest petition and after hearing the complainant, the learned Magistrate by order dated 8th February, 2012 issued process under sections 406, 420 and 120 B as well as section 34 of the IPC. Being aggrieved with this order the Applicants /accused have filed these applications under section 482 of the Cr.P.C. for quashing and setting aside the order of issuance of process.

11. The learned counsel for the Respondent No.2-complainant at the outset submitted that the order being revisable, the Applicants

cannot be permitted to invoke the inherent jurisdiction of the Court under section 482 of the Criminal Procedure Code. It may be mentioned here that out of these criminal applications, Criminal Application No.1133 of 2012 was admitted as early as in 2013 and hence the Applicant cannot be non suited at this stage on the ground of availability of alternative remedy.

12. Be that as it may, in the case of ***Madhu Limaye Vs. The State of Maharashtra 1977 (4) SCC 551***, three Judge Bench of the Apex Court while considering the scope of section 482 and objective of section 397(2) vis-a-vis section 482 of the Cr.P.C. has observed as under:

> *"At the outset the following principles may be noticed in relation to the exercise of the inherent power of the High Court which have been followed ordinarily and generally, almost invariably, barring a few exceptions :-*
>
> (1) That the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party ;
>
> (2) That it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice;
>
> (3) That it should not be exercised as against the express bar

of law engrafted in any other provision of the Code.

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On a plain reading of section 482, however, it would follow that nothing in the code, which would include subsection (2) of section 397 also, "shall be deemed to limit or affect the inherent powers of the High Court". But, if we were to say that the 754 said bar is not to operate in the exercise of the inherent power at all, it will be setting at naught one of the limitations imposed upon the exercise of the revisional powers. In such a situation, what is-the harmonious way out ? In our opinion, a happy solution of this problem would be to say that the bar provided in sub-section (2) of section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one of the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code. the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far

> *between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of, a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction."*

13. In my considered view, for the reasons stated below the present case is one of those exceptional cases which warrants exercise of inherent jurisdiction to prevent abuse of process of the Court and to secure the ends of justice.

14. It is pertinent to note that the learned Magistrate has issued process under sections 406, 420 and 120 B of the IPC. It may be mentioned that offence of criminal breach of trust, as defined under section 405 of the IPC necessarily involves entrustment of the property or dominion over the property and dishonest misappropriation or conversion of the property by the agent to his own use or dishonest use or disposal of the property in violation of mandate of the law or dishonest use or disposal of the property in land in terms of any illegal contract.

15. Similarly, in order to constitute an offence of cheating, there must be deception and fraudulent or dishonest intention to induce the person so deceived to part with his property. It is well

settled that intention to deceive should be at the inception and a mere failure to keep the promise cannot be an act of cheating.

16. So far as section 120 B of the IPC is concerned the essential ingredients are that there should be an agreement between the persons who are alleged to have conspired. The agreement should be for doing an illegal act or an act by illegal means.

17. Reverting to the facts of this case, a plain reading of the complaint reveals that some time in the year 1994 Shri Atulkumar, brother of the complainant, who is the President of USCO has entered into an agreement with the accused No.4 company thereby appointing USCO as the sales representative and granting sole and exclusive right to promote sale and solicit order for the product of accused No.4 company. The grievance of the complainant, as it is revealed from the averments made in the complaint, is that the accused No.4 company has now decided to sideline the complainant as its sales representative. The accused No.4 company also set up accused No.6 Indian affiliate company, which obtained a contract from the Indian Oil Corporation.

18. The complaint on the face of it does not contain any allegations of entrustment of property or dishonest misappropriation or conversion of the property. The complaint also does not contain any

allegations of deception or inducement or dishonest or fraudulent representation. Suffice it to say that mere breach of the contract cannot give rise to criminal prosecution under sections 406, 420 or 120 B of the IPC unless the averments in the complaint prima facie disclose essential ingredients of the offence. In the instant case there are no averments to indicate that the accused had entered into an agreement with dishonest intention. Hence, breach of terms of the agreement, if any, would at the most give rise to civil cause of action. In ***M/s. Indian Oil Corporation Vs. M/s. NEPC India Ltd. & Ors. AIR 2006 SC 2780,*** the Apex Court has observed as under:

> *"a growing tendency in business circles to convert purely civil disputes into criminal cases is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal*

offence, by applying pressure though criminal prosecution should be deprecated and discouraged."

19. In ***V.Y. Jose and Anr. Vs. State of Gujarat and Anr. (2009) 3 SCC 78,*** the Apex court has held that :-

> *"15. There exists a distinction between pure contractual dispute of civil nature and an offence of cheating. Although breach of contract per se would not come in the way of initiation of a criminal proceeding, there cannot be any doubt whatsoever that in absence of the averments made in the complaint petition wherefrom the ingredients of an offence can be found out, the court should not hesitate to exercise its jurisdiction under Section 482 of the Code of Criminal Procedure.*
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> *We may reiterate that one of the ingredients of cheating as defined in Section 415 of the Indian Penal Code is existence of an intention of making initial promise or existence thereof from the very beginning of formation of contract.*
>
> *Section 482 of the Code of Criminal Procedure, saves the inherent power of the court. It serves a salutary purpose viz. a person should not undergo harassment of litigation for a number of years although no case has been made out against him.*
>
> *It is one thing to say that a case has been made out for trial and as such the 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."*

20. In the instant case, the complaint on the face of it does not disclose offences of cheating, breach of trust and criminal conspiracy as defined under sections 405, 415 and 120 A of the IPC. On the contrary, the averments in the complaint reflect that certain differences

between the parties have culminated in civil dispute. Consequently, the present case, meets all the parameters laid down by the Apex Court in ***M/s. Indian Oil Corporation Vs. M/s. NEPC India Ltd. & Ors*** and ***V.Y. Jose and Anr. (supra) as well as M/s. Pepsi Food Ltd. Vs. Special Jud. Magistrate & Ors. AIR 1998 SC 128.***

21. Under such circumstances, compelling the accused to face criminal prosecution, would be nothing but abuse of process of law. Hence, this is a fit case to invoke the powers under section 482 of the Cr.P.C. to secure the ends of justice. In view of discussion (supra) the applications are allowed. The impugned order dated 8th February, 2012 passed in C.C. No.36/SW/2009 is quashed and set aside.

(SMT. ANUJA PRABHUDESSAI, J.)