IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.4529 OF 2013

Shri Bhanu Prakash S/o. Subhash Chandra Sharma ...Petitioner

Versus

The State of Maharashtra & Ors. ...Respondents

...

Mr. Ashok M. Saraogi with Mr. Sushil Upadhyay for the Petitioner.
Mr. V.V. Gangurde, APP for the State.
Mr. S.R. Pathak i/b. M/s. Lex Renedium for Respondent Nos.2 to 5.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED : 29th AUGUST, 2016.

P. C. :

The Petitioner herein had lodged a complaint No.170/SW/2011 before the Additional Metropolitan Magistrate, Railway Mobile Court, Andheri against the aforesaid Respondent Nos.2 to 5 for offences punishable under sections 403, 406, 415, 418, 420 r/w. section 120 B of the IPC.

2. The case of the complainant in brief is that the complainant entered into two contracts dated 25th August, 2007 with the Respondent No.2-company for sale of 100% Polyster DTY 150D/48F SD NIM unwaxed for weaving for total 840 containers for shipment to

M/s. Magdi Abou El-Alla Co., Sekka El-Ladobia, El-azhar, Cairo, Egypt. The complainant had paid advance amount of USD 86.340 (equivalent to INR 38, 85, 300/-) via two bank transfers. The accused No.2 was to ship the said goods to Cairo, Egypt by end of October, 2007. The accused No.2 expressed that due to some internal problems, the shipment was delayed and assured to ship the cargo by end of February, 2008. The complainant had further stated that there was series of correspondence between the complainant and the Respondent No.2-Company in respect of the said contracts. Finally accused No.1 agreed to refund USD 5000 every 15^{th} day starting from 25.6.2008. The complainant has alleged that the Respondent No.2 company neither fulfilled the obligation under the contract nor refunded the amount. The complainant therefore, alleges that the Respondent Nos. 2 to 5 have dishonestly conspired to cheat him. It is also alleged that the Respondent Nos.2 to 5 misappropriated the said amount of USD 86340.00. Based on these allegations the complainant claimed that the Respondent Nos.2 to 5 had committed offences as stated above.

3. The learned Magistrate recorded the verification statement of the complainant and thereafter referred the matter to Varsova Police Station for enquiry. Pursuant to the said order the concerned police

conducted an enquiry and submitted the report stating that the dispute was basically of a civil nature and that no offence as alleged was made out. The learned Metropolitan Magistrate heard both the parties and thereafter by order dated 4.10.2011 dismissed the complaint under section 203 of the Criminal Procedure Code. The complainant challenged the said order in Criminal Revision No.1249 of 2012 before the Court of Sessions, Greater Bombay. The learned Additional Sessions Judge, Greater Bombay also confirmed that the dispute is basically of civil nature and that no criminal offence is made out and hence, by order dated 15th November, 2013 dismissed the said revision application. Being aggrieved by the said order the Applicant has filed this petition.

4. Mr. Saraogi, the learned counsel for the Petitioner submits that the Petitioner had entered into two contracts with Respondent No.2-company and pursuant to the said two contracts the Petitioner had transferred USD 86,340.00. He has further submitted that the Respondent No.2-company did not fulfill the terms and conditions of the said contract despite assurance given by them from time to time. He contends that the conduct of the Respondents clearly reveals that the Respondent No.2 had dishonest intention of deceiving the

Petitioner-complainant. The learned counsel for the Petitioner has further submitted the Respondent No.2 has misappropriated the amount of USD 86,340.00. He therefore, claims that the complaint discloses the essential ingredients of the offences as alleged.

5. Mr. Pathak, the learned counsel for the Respondent Nos.2 to 5 submits that there were continuous business transactions between the Petitioner and the Respondent No.2-company since the year 2003. He has further submitted that mere breach of contract does not amount to criminal breach of trust or an offence of cheating. He has further submitted that an email dated 29.10.2009 was sent on behalf of Respondent No.5 to the complainant, wherein Respondent No.2 had offered to sell the office premises totaling 1660 sq. ft. alongwith two car parkings in lieu of money, which was due and payable to the complainant. But the Petitioner did not respond to the said email. Mr. Pathak, submits that said letter negates the contention of the Petitioner that Respondents had intention of cheating the Petitioner. He has further submitted that the police report clearly indicates that the dispute is basically of civil nature. He contends that the complaint does not disclose the essential ingredients of cheating or misappropriation.

6. I have perused the records and considered the submissions advanced by the learned counsels for the respective parties.

7. The records reveal that the Petitioner/complainant as well as the Respondent No.2-company had continuous business transactions since the year 2003. Present dispute arises from two contracts executed between the Petitioner and the Respondent No.2 some time in the year 2007. Pursuant to the said contracts, the Petitioner had transferred an amount of USD 86,340.00 in favour of the Respondent No.2-Company. Breach of the terms and conditions of the said agreements and non refund of the money has resulted in filing of the present complaint.

8. 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.

9. 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.

10. 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.

11. In the present case, as stated earlier, the averments made in the complaint reveal that there has been continuous business transactions between the complainant and Respondent No.2-company since the year 2003. The complainant and the Respondent No.2-company had entered into two contracts in the year 2007. Breach of the said contract has resulted in filing of the complaint in the year 2011. Perusal of the complaint as well as the correspondence entered into between the parties clearly indicates that the present complaint does not disclose element 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 absence of averments to indicate that the accused had entered into an agreement with dishonest intention, the breach of terms of the agreement, if any, would at the most give rise to civil cause of action. At this stage it would be relevant to refer to the decision of the Apex Court in ***M/s. Indian Oil Corporation Vs. M/s. NEPC India Ltd. & Ors. AIR 2006 SC 2780,*** wherein 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."*

12. 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.*
>
> *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."*

13. In the present case, in my considered view the complaint on the face of it does not disclose offence of cheating, breach of trust and criminal conspiracy as defined under sections 405, 415 and 120 A of the IPC. On the contrary, averments in the complaint reflects that on account of certain internal problems that the Respondent No.2-company was unable to comply with the terms and conditions of the

contracts. The Respondent No.5 having acknowledged the said fact had also offered to transfer the office premises with two car parkings in favour of the complainant, which fact also negates the contention that the Respondent No.2-company had the intention of cheating since the inception. 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.***

14. Under such circumstances, compelling the Respondents to face trial would be nothing but abuse of process of law. In view of discussion supra, the petition has no merits and is accordingly dismissed.

(ANUJA PRABHUDESSAI, J.)