THE HONOURABLE Dr.JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION No.9636 of 2013

ORDER:

The petitioner is A1 among the four accused of C.C.No.128 of 2013 on the file of XII Additional Chief Metropolitan Magistrate, Hyderabad, which is outcome of the report of the second respondent in Crime No.63 of 2012 of Central Crime Station, Hyderabad, registered for the offences punishable under Section 406 and 420 read with Section 34 of IPC, dated 14.03.2012 and the police after investigation filed the final report that was taken cognizance and impugning the same, the present quash petition is filed.

The averments in the report of the *defacto* complainant dated 13.03.2012 in crime supra reads that the company of the complainant K.Sharat Chandra, General Manager – Marketing EHV Power Transformers Division, Vijai Electricals Limited with registered office at Somajiguda, Hyderabad in the business of manufacture and distribution of power transformers, switchgear and projects with excellent track record including taking up various turn key projects and exports having specialized expertise among few of the Indian companies manufacturing transformers; that M/s.Sarosh Shipping Private Limited whose Chairman is the quash petitioner A1 engaged in the business of shipment of material to overseas and in the course of M/s.Vijai Electricals Limited's business, the company executives had discussions with the Chairman of Surosh supra and gave a turn key project order for shipment of power transformers of 13 in numbers (main units and accessories) including unloading at Kenya Power and Lighting Company Substations to the specified destinations located in Kenya country pursuant to which the complainant placed a purchase order No.VEL/SAROSH/2011-12/797 for Rs.1.13 crores for logistic services from complainant factory at Rudraram, Medak District, to various delivery points of Kenya power and Lighting Corporation, Kenya and another purchase order vide No.VEL/SAROSH/2011-2012/798 for a value of Rs.2.55 crores for logistic services for 8 transformers through SAROSH supra and the total value of contract is Rs.3.68 crores and the said Vishnukanth is Chairman to M/s.Sarosh Shipping Private Limited and Mr. Emlyn is the Director of M/s.Sarosh Shipping Private Limited. As per purchase order, Sarosh supra should undertake work of shipment which includes lifting of transformers from the factory satiated at Rudraram transporting to Mumbai, custom clearance of Mumbai, shipment by sea to Mombassa Port in Kenya, custom clearance at Mumbassa port and transporting to respective delivery points of Kenya Power and Lighting Company Substation/Stores and unloading at Substation/Stores;

that the first lot of 5 transformers supra were dispatched on 15th and 16/10/2011 supposed to be loaded on the ship arriving in the Mumbai port between 25th October and 5th November and second lot of 8 transformers dispatched between 1st November to 4th November reaching Mumbai port and custom clearance was done, that Sri Vishnukanth and his staff started demanding illegally Rs.87.76 lakhs as vessel detention/truck detention, which was pointed out to the Vishnukanth and his associates that the demand is not according to the contract, however, he threatened that unless the payments be made, the 9 transformers and accessories which were loaded in the ship will not be unloaded at Mumbassa Port and further penalties will be levied on the company.

It is further averred that said Vishnukanth demanded Rs.63.05 lakhs on the ground that the sum represents ship detention charges at Mumbai port for the first lot of 9 transformers and as per purchase order, detention charges be paid at actuals against submission of proof of documents and insisted for submission of proof, Vishnukanth promised to furnish the same in due course of time, however, insisted for immediate payment by threatening that if payment is not received as demanded, even second lot of transformers will not be shipped and further penalties will be levied and when complainant's executive A.K.Govil contacted the agent of ship owners, they clarified through e-mail that they have not levied any detention chargers. As the transformers are to be supplied to Kenya Power and Lighting Company in a time bound programme, the complainants' company had to temporarily accede to the illegal demands of the Vishnukanth and his staff and in the interest of the movement of Cargo, the complainant made payments on different dates by cheque No. 365207 for Rs.32,34,000/- on 25.10.2011, RTGS No. VYSAH11319702238 and VYSAH11335704433 for Rs.35 lakhs and 41,50,000/- on 15.11.2011 and 01.12.2011 respectively, another cheque No.365595 for Rs.33,47,000/- on 30.11.2011, another cheque 365594, Rs.49,98,000/- on the same date, other RTGS Nos.SBINH 11337313107 for Rs.1,01,92,000/- on 03.12.2011, RTGS No.SBINH11349334172 for Rs.59,54,328/- on 14.12.2011 and RTGS No.SBINH11349334688 for Rs.24,99,000/- in total Rs.3.78 crores was received by M/s.Sarosh supra represented by Vishnukanth as on 14.12.2011, which is more than the contract value and the purchase order placed by the company stipulates payment terms of 30% against placement of trailers and trucks for all transformers and accessories at VEL Works - 7 days credit from the date of original bill submission, 40 % against shipped on board BL issuance - 7 days credit from the date of original bill submission, 20% against all transformers with accessories reaches to Mombasa Port and completion of custom clearance - 7 days credit from the date of original bill submission and 10% against delivery pf all transformers along with accessories to proposed KPLC, Kenya substations and completion of unloading 7 days credit from the date of original bill submission.

It is further averred that M/s.Sarosh supra represented by Vishnukanth and others deliberately started demanding extra money on one pretext or the other and started black mailing the complainant in the guise of stopping the shipping of the transformers which are of Rs.36 crores worth to be delivered within time bound and they demanded amounts wrongfully with an intent to gain themselves and to cause loss to the complainant illegally, that on even date by 14.12.2011, Rs.3.78 crores paid to Sarosh only 9 transformers were shipped out of Mumbai port and rest 4 transformers were shipped on 25.12.2011 and the first lot of transformers arrived at Mombasa port and were not moved to required destinations in Kenya before 14.01.2012; that not withstanding earlier illegal demands, before the receipt of the transformers at Mombasa port, M/s.Sarosh supra represented by Vishnukanth started further demands for payments on pretext of detention, convoy charges, etc., and the company was forced to accede to the accede to the illegal demands of M/s.Sarosh represented by Vishnukanth for threats of unless amounts are paid, goods will not be delivered at agreed destinations and on coming to know about the methods of extracting extra money by M/s.Sarosh represented by Vishnukanth, complainant's company deputed personally to Kenya to supervise, expedite the movement of transformers and take preemptive actions and the complainant made to pay extra Rs.1.76 crores till the date over the contracted amount making totally Rs.5.63 crores to M/s.Sarosh supra by further payments from RTGS on 02.01.2012, 18.01.12, 24.01.12, 31.012012 and 08.02.2012 and as on date ten transformers out of 13 were moved from SDV yard, Mombasa to various Kenya Power and Lighting Company sites despite receiving extra money from the complainant, M/s.Sarosh supra is holding 3 transformers and 2 accessories and as the goods are under the custody of M/s.Sarosh supra, they threatened the complainant to fulfil the demands.

It is further averred that the movement of transformers in Kenya has been subcontracted by M/s.Sarosh Shipping to SDV India, who in turn subcontracted to SDV Kenya. M/s. Sarosh represented by Vishnukanth demanded Rs.1.78 crores on 14.02.12 and raised further to Rs.2.45 crores on 21.2.2012 and raised to Rs.4.6 crores on 08.03.2012 and was raised to Rs.5.35 crores on 09.03.2012 for releasing the transformers and accessories and these illegal demands came up for the two contracts till date is Rs.7.30 crores over and above the original purchase order value of Rs.3.68 crores and M/s.Sarosh represented by Vishnukanth has already extorted an amount of Rs.1.76 crores by keeping the company under threat of not shipping and transporting goods to Kenya Power and Lighting Company, Kenya. Vexed with the additional demand and non-fulfilment of the terms and conditions of the purchase order, complainant requested Vishnukanth for discussions and to provide proof/supporting documents to settle the issue. But he refused to come and provide supporting documents and complainant's representatives contacted M/s.SDV Indian officials and were informed that M/s.Sarosh supra has not paid their dues for movement of even ten transformers so far and the company proposed to M/s. Sarosh to have a combined meeting along with M/s.SDV India to resolve the issue and Vishnukanth of M/s. Sarosh even refused to come for discussions, when the complainants' officials tried to speak to Vishnukanth over phone, even he did not respond and when the complainant officials went to the office of M/s.Sarosh represented by Vishnukanth, he was not available and the said Vishnukanth made it clear that unless his demands for payment without any proof be met, he is not going to complete the work entrusted to him and will not release the goods unless full payment as demanded is made and requests to M/s.Sarosh supra in this regard of complainant remained with no response and Vishnukanth of Sarosh is making illegal demands forcing the complainant to pay the amount by detaining three transformers and two accessories amounts to extortion, breach of trust and cheating, that the complainant officials made efforts of holding discussion with M/s. Sarosh represented by Vishnukanth, Mr.Emlyn – Director, Ms.Rahath – General Manager, Ms.Nirmala - Accounts and other representatives were not showing any interest in the execution of the order given to them. Hence to take necessary action.

It is from the said FIR, police after investigation filed the final report in the form of charge sheet against four accused supra among whom only Vishnukanth is the main Chairman of the entity and others not shown anywhere. The main allegations are only against M.Sarosh represented by Vishnukanth from what is discussed supra for the IPC offences for no any vicarious liability in the absence of specific role to make liable personally for any of the offences. From the police final report they reiterated the FIR contents and stated Sri Christopher Philip, Director of Seatech Shipping and Project (I) Private Limited stated the facts of the transaction between A1's company and complainant's company, their owners have not charged any ship detention for both the vessels M.V.Liberty and M.V.Anke and Sanjay Geol also stated the facts. It is to say claim even made refusing to deliver unless there be payment of the additional amount demanded as additional amount incurred and the so called additional amount incurred from the investigation by examination of witness concerned stated as incorrect, even from that it nowhere shows from the inception with any dishonest intention in entering into contract by complainant by M/s. Sarosh represented by Vishnukanth. Thus, no offence of cheating that attracted, but for if at all from the goods entrusted to the destinations as per the contractual obligations, it is not mere breach of contract from investigation but with dishonest intention retaining for the extra money demanded and if at all true that is a breach of trust and if not true, there is no offence. The accused petitioner no doubt filed material to show basis for his contention of complaint is liable for the extra demands as were charged. Whereas the investigation shows such amounts not charged. Thus it is a disputed fact to be decided during trial. It is in view of the fact that the question of fact be decided so far as the criminal breach of trust is concerned from the police final report taken cognizance by the learned magistrate to face trial to prove in defence the said defence material. However, so far as offence of cheating is concerned as referred supra there is no offence made out to sustain as also held by the Apex Court in ***Uma Shanker Gopalika***

Vs. State of Bihar and another[1]. The legal position in this regard was settled in the expressions of this Court in Crl.P.No.3727 of 2013, dated 27.01.2016 and also in Crl.P.Nos.2715 and 2716 of 2013, dated 27.01.2016.

Accordingly and in the result, the criminal petition is allowed in part quashing the proceedings in C.C.No.128 of 2013 sofar as the offence under Section 420 of IPC and left open to the trial to proceed with regard to the offence under Section 406 of IPC with the hearing of parties by framing charges, if not already framed, to put to trial.

Consequently, miscellaneous petitions, if any, pending in this Criminal Petition shall stand closed.

Dr. B.SIVA SANKARA RAO J,

Date:28.01.2016
vhb

[1] (2006) 2 SCC (Crl.) 49