IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.49244 of 2013

Arising Out of PS.Case No. -1006 Year- 2012 Thana -PATNA COMPLAINT CASE District- PATNA

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1. Minar International Ltd., having its Office at 308, Navyung Industrial Estate, 167 T.J. Road, P.S.- Sewree, Mumbai
2. Unnikrishnan Nambiar @ U.K. Nambiar Son Of Sri Cherad Govindan Nair, Resident of 308, Navyung Industrial Estate, 167 T.J. Road, P.S.- Sewree, Distrct- Mumbai

.... Petitioners

Versus

1. The State of Bihar
2. Dharmdeo Singh, proprietor of M/S Prashant Packing Industries, through Manoj Kumar Sharma, son of Sri Kameshwar Singh, resident of Ghagha Ghat Lane (Near Malaria Office), P.S.- Sultanganj, District- Patna

.... Opposite Party/s

Appearance :

For the Petitioners	:	Mr. Manish Kumar No.-13, Advocate
		Mr. Rohit Kumar, Advocate
For the State	:	Mr. Jharkhandi Upadhyay, APP
For Opposite Party No. 2	:	Mr. Pushkar Narayan Shahi, Sr. Advocate
		Mr. Devendra Kumar Choudhary, Advocate

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 27-07-2017

Heard Mr. Manish Kumar, learned Advocate for the petitioners, Mr. Jharkhandi Upadhyay, learned Additional Public Prosecutor for the State and Mr. Pushkar Narayan Shahi, learned Senior Advocate for complainant/opposite party no. 2.

2. The petitioners have invoked the inherent power of

this Court under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') for quashing of the order dated 10.05.2013 passed in Complaint Case No. 1006 of 2012 by the learned Judicial Magistrate, Patna City, Patna whereby finding a *prima facie* case to be made out under Sections 406 and 420 of the Indian Penal Code (for short 'IPC'), the petitioners have been summoned to face trial.

3. The complainant/opposite party no. 2 filed Complaint Case No. 1006 of 2012 in the court of Additional Chief Judicial Magistrate, Patna City alleging *inter alia* therein that he is the proprietor of M/S Prashant Packaging Industries, which has its registered office at Ghagha Ghat Lane at Patna. The accused Unnikrishnan Nambiar (petitioner no. 2), who was familiar to him since long, approached him at his registered office at Patna. After full satisfaction, he had agreed to purchase packaging materials from him. He had requested him to supply goods on credit and assured that he would make payment within the same financial year. It is stated that the complainant supplied packaging materials to the accused petitioners on credit, but the petitioners made irregular payment of the outstanding dues. A request was made to the accused petitioner no. 2 to make the payment of the outstanding dues of the supplied materials, but he failed to pay the due amount.

Looking no way out, the complainant sent various legal notices to him, but he is evading to make the payment. It is stated that in the financial year 2009-2010, the total sum of Rs. 70,49,461.59/- was due against the petitioner and the huge due amount was also accepted by the petitioner no. 2, but neither the petitioners replied to the notices sent by the complainant nor did they make payment of outstanding dues to the complainant. It is stated that the aforesaid act of the accused persons has caused wrongful financial loss to the complainant.

4. On the basis of the aforesaid allegations, it has been alleged in the complaint that it is obvious that from the very beginning intention of the accused persons was to grab the hard earned money of the complainant.

5. After institution of the complaint, the complainant was examined on solemn affirmation and in course of inquiry conducted under Section 202 of the Cr.P.C., apart from the complainant, three witnesses, namely, Harikant Sharma, Ravindra Kumar and Shailendra Kumar were examined in support of the complaint.

6. In the statement made on oath, the complainant has alleged that on the order given by the petitioners, he had supplied goods worth Rs.84,99,461.61/- to them for which he had received payment to the tune of Rs.14,50,000/-. He has stated that an amount

of Rs.70,49,461/- is still lying due against the petitioners for which legal notice was given, but no reply had been received. The witnesses examined in course of inquiry under Section 202 of the Cr.P.C. have also made identical allegations.

7. After conducting inquiry, the learned Judicial Magistrate, Patna City, vide order dated 10.05.2013, summoned the petitioners to face trial in exercise of powers conferred under Section 204 of the Cr.P.C. for the offences punishable under Sections 406 and 420 of the IPC.

8. Mr. Manish Kumar, learned Advocate for the petitioners has submitted that the petitioner no. 2 is a reputed businessman and doing business of export of textile material since last many years. He was the Director of Minar International Ltd. (petitioner no. 1). He has submitted that the petitioners had never entered into any business deal with any Bihar based firm having its office at Patna. However, he has submitted that a party doing business under the name and style of “Prashant Packaging”, having its office at Mumbai and not at Patna, was one of the companies doing packaging work for the petitioners. He has submitted that since there was no dealing with Patna based firm, there is no question of making payment to it. He has submitted that entire dispute with respect to settlement of accounts arising during

transaction of business with “Prashant Packaging” is purely a dispute of civil nature. He has submitted that there is nothing to suggest that the complainant had been induced or dishonestly deceived by the petitioners.

9. A counter-affidavit has been filed on behalf of the complainant in which, it has been stated that there was a total outstanding of Rs.24,43,027.61/- till 31.03.2006 in the name of the petitioner company. Subsequently, the amount increased to an extent of Rs.70,49,461/- till 31.03.2011, which has already been confirmed by the company by endorsing the same. It has further been stated that on several occasions, the petitioner no. 2 had assured that he would clear the dues, however, he did not adhere to his commitment and led to creation of such heavy dues with the intention to defraud the opposite party no. 2.

10. Mr. Pushkar Narayan Shahi, learned Senior Advocate for the complainant has submitted that it is true that the complainant’s firm has its Branch Office at Mumbai and certain payments were made by the petitioners to the Branch Office at Mumbai, but it is not true that the complainant has no base at Patna. He has contended that the manner in which the payments were made would clearly indicate that the petitioners had intention to cheat the complainant right from the beginning. He has contended

that the ingredients of the offences punishable under Sections 406 and 420 of the IPC are clearly attracted in the present case. According to him simply because the allegations may make out a case of breach of contract, which may lead to filing a civil suit, a criminal complaint would not be barred in law, if the ingredients of the offences alleged are attracted.

11. Mr. Jharkhandi Upadhyay, learned Additional Public Prosecutor for the State has adopted the submissions made by the learned Senior Advocate appearing for the complainant. He has submitted that at the stage of summoning an accused meticulous analysis of evidence is not to be done. According to him, since a *prima facie* case is made out against the petitioners, no illegality can be found with the order whereby finding a *prima facie* case to be made out, the petitioners have been summoned to face trial.

12. I have heard learned counsel for the parties and perused the record.

13. The offences under which cognizance has been taken are of ‘cheating’ punishable under Section 420 of the IPC and ‘criminal breach of trust’ punishable under Section 406 of the IPC. In the background of the allegations made, it is to be seen as to whether these offences are made out against the petitioners or not.

14. In so far as, the offence punishable under Section 420

of the IPC is concerned, it reads as under :-

> ***"420. Cheating and dishonestly inducing delivery of property.-***
>
> *Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

15. From a reading of Section 420 of the IPC, it would be manifest that it requires not only 'cheating' but also dishonest inducement to delivery of property.

16. The offence of 'cheating' has been defined under Section 415 of the IPC, which is reproduced as under :

> ***"415. Cheating —***
>
> *Whoever, by deceiving 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, is said to "**cheat**"."*

17. It is well established principle of law that every breach of contract or civil dispute under a contract or an agreement does not amount to the offence of 'cheating'. A breach of contract would amount to 'cheating' only in those cases where there was any deception played at the very inception. The subsequent events in this regard are not important.

18. In ***G. V. Rao vs. L. H. V. Prasad & Ors. [(2000) 3 SCC 693]***, while examining the offence of 'cheating' the Supreme Court held : *"This part speaks of intentional deception which must be intended not only to induce the person deceived to do or omit to do something but also to cause damage or harm to that person in body, mind, reputation or property. The intentional deception presupposes the existence of a dominant motive of the person making the inducement. Such inducement should have led the person deceived or induced to do or omit to do anything which he would not have done or omitted to do if he were not deceived. The further requirement is that such act or omission should have caused damage or harm to body, mind, reputation or property".*

19. In ***Hridaya Ranjan Pd. Verma & Ors. vs. State Of Bihar & Anr. [(2000) 4 SCC 168]***, highlighting the importance of

intention of the accused at the time of inducement for attracting the offence of 'cheating' the Supreme Court observed : *"In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed".*

20. In ***Uma Shankar Gopalika vs. State of Bihar & Anr. [(2005) 10 SCC 336]***, the Supreme Court held : "… *it is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very*

inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In the present case it has nowhere been stated that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 IPC".

21. In ***V. Y. Jose & Anr. vs. State Of Gujarat & Anr. [(2009) 3 SCC 78]*** held as under :-

> *" An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied:*
>
> *i) deception of a person either by making a false or misleading representation or by other action or omission;*
>
> *(ii) fraudulently or dishonestly inducing any person to deliver any property; or to consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.*
>
> *For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a*

culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out."

22. In the said case, the Supreme Court further held as under :

" There exists a distinction between pure contractual dispute of a 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 Penal Code is existence of an (sic fraudulent or dishonest) intention of making initial promise or existence thereof from the very beginning of formation of contract."

23. Reiterating the principle of law that every breach of contract would not give rise to an offence of 'cheating' in ***Vesa***

Holdings Private Ltd. & Anr. vs. State of Kerala & Ors. [(2015) 8 SCC 293], the Supreme Court held : *"...the settled proposition of law is that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In other words for the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Penal Code, 1860 can be said to have been made out".*

24. In view of the legal position enunciated in the above judgments of the Supreme Court, it is obvious that merely because the agreed amount was not paid by the petitioners to the complainant, the ingredients of 'cheating' punishable under Section 420 of the IPC would not be attracted. What was required to attract the offence of 'cheating' was existence of dishonest intention right from the beginning and intentional inducement at the very

inception. It is the admitted case of the complainant that during the transaction of business certain payments were made by the accused. Thus, simply because the full payment was not made and payments made were irregular, the existence of dishonest intention right from the beginning and intentional inducement at the very inception cannot be inferred. Obviously, such ingredients are wanting from the complaint.

25. As far as Section 406 IPC is concerned, it prescribes punishment for 'criminal breach of trust'. Section 405 IPC defines the offence of 'criminal breach of trust', which reads as under :

> ***"405. Criminal breach of trust —*** *Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits* ***"criminal breach of trust"****."*

26. A careful reading of Section 405 IPC shows that a criminal breach of trust involves the following ingredients:-

> *(a) a person should have been entrusted with*

> *property, or entrusted with dominion over property;*
> *(b) that person dishonestly misappropriated or converted to his own use that property, or dishonestly used or disposed of that property or willfully suffered any other person to do so;*
> *(c) that such misappropriation, conversion, use or disposal was in violation of any direction of law prescribing the mode in which such trust was discharged.*

27. It would, thus, appear that for the offences punishable under section 406 IPC, the prosecution must prove :-

> (*i) that the accused was entrusted with property or with dominion over it; and*
> *(ii) that he (a) dishonestly misappropriated it, or (b) dishonestly converted it to his own use, or (c) used it, or (d) disposed of it in violation of any direction of law prescribing the mode in which such trust was discharged.*

28. In order to attract the offence punishable under Section 406 of the IPC there must be evidence to show that the misappropriation was done in a dishonest manner. Looking at the nature of allegation, I am of the opinion that it is not a case of dishonest misappropriation of property. At best, it is a simple case of breach of contract, which may give rise to civil proceeding.

29. It is well settled in law that in proceedings initiated on criminal complaint exercise of inherent powers to quash the proceedings is called for in a case where the complaint does not disclose any offence or is frivolous. It is equally well settled that power under Section 482 of the Cr.P.C. should be sparingly invoked with circumspection. It should be exercised to see that the process of law is not misused or abused.

30. In ***Smt. Nagawwa vs. Veeranna Shivallngappa Konjalgi & Ors. [(1976) 3 SCC 736]***, the Supreme Court enumerated the cases where an order of Magistrate issuing process against the accused can be quashed or set aside as under :-

> *"(1) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;*
>
> *(2) Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;*
>
> *(3) Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on*

no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) Where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like."

31. While enumerating the category of cases, the Supreme Court pointed out that the cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings.

32. In ***Indian Oil Corporation vs. NEPC India Ltd. & Ors [(2006) 6 SCC 736],*** the Supreme Court has summarized the principles relating to exercise of jurisdiction under Section 482 of the Cr.P.C. to quash complaint and criminal proceedings as under :-

"(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a *complaint.*

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a

criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not."

33. Highlighting the growing tendency in business circle to convert purely civil dispute into criminal cases, the Supreme Court in ***Indian Oil Corporation vs. NEPC India Ltd.*** (Supra) held as under :-

"While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This 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. In G. Sagar Suri vs.

State of UP [2000 (2) SCC 636], this Court observed :

> *"It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."*

While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise *their power under section 250 Cr.P.C. more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may.”*

34. Thus, it would be evident that a given set of facts may make out purely a civil wrong or purely a criminal offence or a civil wrong as also a criminal offence. There is substance in the argument of learned Senior Advocate for the complainant that a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. However, simply because civil law remedies are time consuming, a matter, which is essentially of civil nature cannot be allowed to be converted into a criminal offence, as criminal proceedings are not short cut of other remedies available in law. The Supreme Court has cast a duty upon the courts to deprecate and discourage any effort to settle civil disputes and claims, which do not involve any criminal offence by applying pressure through criminal prosecution.

35. In the present case, looking at the allegations made in the complaint on the face of it, I reiterate that no case is made out attracting the ingredients of Section 406 and 420 of the IPC. Excepting the bald allegation that the petitioners did not make full

payment to the complainant in time, there is no iota of allegation as to the dishonest intention misappropriation of property. To make out a criminal case, it is not sufficient to show that the money has not been returned by the accused persons. It must also be shown that the accused persons dishonestly disposed of the same in some way or dishonestly retained the same. The mere fact that the petitioners did not pay the money to the complainant does not amount to ‘criminal breach of trust’. Though it has been alleged in the complaint that from the very beginning the intention of the accused was to grab hard earned money of the complainant and that the action of the petitioners has caused wrongful loss to the complainant, the allegations made in the complaint do not corroborate the charges made in this regard. Apparently, it is not a case of dishonest inducement of delivery of property, rather it is a case of non-payment of the entire due amount which accrued in course of business transaction. There is sufficient material to show that the petitioners have made certain payments in course of business transaction. Had there been any intention to cheat right from beginning, the petitioners would not have made even part payment. Since no case of ‘criminal breach of trust’ or dishonest intention of inducement is made out and the essential ingredients of the offence of ‘cheating’ and ‘criminal breach of trust’ are missing, the prosecution of the petitioners under Sections 406 and 420 of the IPC is liable to be quashed.

36. Accordingly, the impugned order dated 10.05.2013 passed by the learned Judicial Magistrate, Patna City, Patna in Complaint Case No. 1006 of 2012 and the entire criminal proceedings arising out of the aforesaid complaint, are hereby quashed.

37. The application stands allowed.

(Ashwani Kumar Singh, J.)

Kanchan/-

AFR/NAFR	AFR
CAV DATE	NA
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