

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL WRIT PETITION NO.58 OF 2016

- 1 Mr. Nilesh N. Shah,
47 years of age,
Son of Narendra Shah,
Resident of H. No.E-568,
Opposite Nova Goa,
Dr. A. B. Borkar Road,
Panaji 403 001.
 - 2 Mrs. Hema N. Shah,
73 years of age,
wife of Narendra Shah,
Resident of H. No.E 568,
Opposite Nova Goa,
Dr. A. B. Borkar Road,
Panaji 403 001.
- Petitioners.

Versus

- 1 The Officer in charge/
Investigating Officer,
Panjim Police Station,
Panjim- Goa.
 - 2 Air India Limited, Goa,
through its Station Manager
Manjiri Shirodkar,
Major of age,
Having office at Dempo House,
Campal, Panji , Goa 403 001.
- Respondents.

Shri A. D. Bhobe with Ms. S. Bhobe, Advocate for the petitioners.

Shri S. R. Rivankar, Public Prosecutor for the respondent no.1.

Shri R. Menezes with Ms. P. Sawant, Advocate for the respondent no.2.

**CORAM :- F. M. REIS &
NUTAN D. SARDESSAI, JJ**

Reserved on : 13th February, 2017.

Pronounced on : 20th June, 2017.

JUDGEMENT : (Per NUTAN D. SARDESSAI, J.)

Rule. Rule made returnable forthwith. The learned Public Prosecutor waives service for the respondents. Heard finally with the consent of the parties.

2. It was the case of the petitioners that they were in the business of sale of air tickets as the partners of a partnership firm handling online ticketing of several of their clients, both domestic and international. Air India Limited had appointed the partnership firm as a sales agent at Panaji, Goa for the sale of tickets of Air India Limited w.e.f. 19/01/2001 and they were insured with United India Insurance Company Limited at the instance of IATA and subsequently was declared as a member of IATA having acquired the accreditation on 19/01/2001. In terms of the arrangement between the firm and Air India Limited, the firm had obtained the Credit Risk Insurance Policy, International Air Transport Association-Billing and Settlement Plan India (IATA-BSP-India) which was renewed w.e.f. 01/01/2012 and valid upto 31/12/2012. The

petitioners challenged the F.I.R. no.51/2016 registered by the Respondent no.1 on 03/03/2016 against them under Sections 403, 405, 409, 420, 425 r/w Section 34 of Indian Penal Code on the basis of the application filed by the respondents no.2, 3 and 4. The allegations in the complaint were that the petitioners as the partners of the firm with the intention to commit offences had induced Air India Limited to part with their airline tickets and consequently, dishonestly misappropriated the sale proceeds of the Air tickets of Air India aggregating to ₹1,38,683,853/- and induced Air India Limited to believe that they were in the process of settling the dues which were fully secured by an insurance cover with reference to the insurance policy the firm had with IATA.

3. It was the petitioners' case further that they were in receipt of the notice from the respondent no.1 informing them about the complaint filed by the respondent no.2 and they had brought to their notice the falsity of the said complaint. Besides, Air India Limited had filed a Civil Suit seeking the recovery of the stated amount from the petitioners/ firm in the Court of the Senior Civil Judge, "B" Court, Panaji which related to the amount claimed in the complaint. They had filed their Written Statement opposing the suit filed by Air India Limited and raised a counterclaim seeking an amount of ₹93,21,593/-. They were shocked to come across a

report in the local daily on 05/03/2016 that the respondent no.1 had registered an F.I.R. against the petitioners within three days of the filing of the Written Statement and raising of the counter claim by them. The complaint filed by the respondent no.2 was false, frivolous, malafide, mischievous and an abuse of the process of law.

4. The respondent no.2 with the assistance of the respondent no.1 had made an attempt to give a criminal flavour to a civil dispute and which indicated their intention to pressurize the petitioners to give in to the demands when factually the respondent no.2 was liable to pay the amount as claimed by the petitioners and their firm. The complaint neither disclosed any offence under the Indian Penal Code or under any other law nor did the same disclose the commission of any offence and no cognizance was required to be taken by the respondent no.1 on the basis of the said complaint. Without prejudice, it was their case that the contents of the complaint dated 28/07/2015 at the highest would indicate a civil dispute between the firm and the respondent no.2 arising out of a contract. The respondent no.2 was already before a competent Civil Court in respect of the very claim as sought to be pursued in the complaint. None of the offences as alleged in the complaint were attracted to the case at hand nor any of the ingredients made out as to prosecute the petitioners and the sole reason for filing the

complaint was to cause harassment to the petitioners, malign their reputation and to pressurize them to give in to the claim, hence, the F.I.R. No. 51/2016 had to be quashed and set aside.

5. The contesting respondent no.2 had denied the case set up by the petitioners, alleged that the petition was liable to be dismissed summarily with costs being misconceived in facts and in law. There were seriously disputed questions of fact that arose in the petition which could not be gone into in exercise of the extraordinary writ jurisdiction of this Hon'ble Court under Article 226 of the Constitution of India. The contents of the petition were incorrect, misleading and suffered from omission and suppression of material facts. There was no basis for the case of the petitioners that their dues were covered by the insurance policy. The petitioners using the partnership firm had made repeated assurances to the respondent no.2 that it would make remittances to the respondent no.2 and induced the respondent no.2 upto the second fortnight of June,2012 to part with the airline tickets of a substantial value, with the dishonest and fraudulent intention of not making remittances of the proceeds of sale. The petitioners had defrauded the respondent no.1 in the amount of ₹1,38,68,853/- by practicing deception. They were not entitled to the reliefs as claimed and therefore the petition had to be dismissed.

6. Shri A.D. Bhole, learned Advocate came to be heard on behalf of the petitioners who contended that they were the booking agents for the respondent no.2. An entirely civil dispute with contractual obligations was sought to be converted into a criminal prosecution. The period of default alleged by the respondent no.2 was covered in an insurance policy. The respondent no.2 had filed a Civil Suit in November,2015 in respect of the very same claim and the dues claimed were thus allegedly misappropriated in the complaint. The petitioners were entitled to certain amounts from the respondent no.2 who had raised the counter claim in defence. They were in business with the respondent no.2 since 1994 and whatever transactions took place between them were of a contractual nature. Even assuming without admitting that there was a delay in payment, it did not constitute a case of misappropriation or cheating. He relied in **Sussanne Khan v/s. The State of Goa and others** (Criminal Writ Petition No.87 of 2016) and that in **International Advanced Research Centre for Powder Metallurgy and New Materials (ARCI) and Others v/s. Nimra Cerglass Technics Private Limited and another** [2016(9) SCC 348] and pressed for the quashing of the F.I.R.

7. Shri S. R. Rivankar, learned Public Prosecutor on behalf of the respondent no.1 conceded that there was an agreement of agency

between the petitioners and the respondent no.2. He further contended that the investigation revealed that the insurance claim was pending and in case it was settled, no question of any criminal liability arose. Besides, there was a Civil Suit filed by the respondent no.2 in which the petitioners had raised a counter claim and considering these aspects, it was a fit case to quash the F.I.R.

8. Shri R. Menezes, learned Advocate for the respondent no.2 contended at the outset that the second limb of Section 415 IPC was attracted to the case. IATA was the nodal agency in respect of the payments which the petitioners had to effect to the respondent no.2. He relied in **Rajesh Bajaj v/s. State NCT of Delhi and others** [(1999)3 SCC 259] and otherwise submitted that the insurance did not cover the dues. No case whatsoever was made out and therefore the petition had to be dismissed.

9. **International Advanced Research Centre** (supra), brought forth a distinction between cheating and breach of contract where the Hon'ble Apex Court held at para no.16 as below:

"16. Distinction between mere breach of contract and the cheating would depend upon the intention of the accused at the time of alleged inducement. If it is established that the intention of the accused was

dishonest at the very time when he made a promise and entered into a transaction with the complainant to part with his property or money, then the liability is criminal and the accused is guilty of the offence of cheating. On the other hand, if all that is established that a representation made by the accused has subsequently not been kept, criminal liability cannot be foisted on the accused and the only right which the complainant acquires is the remedy for breach of contract in a civil court. Mere breach of contract cannot give rise to a criminal prosecution for cheating unless fraudulent or dishonest intention is shown at the beginning of the transaction.”

10. Shri Menezes, learned Advocate for the respondent no.2 relied on an order of the learned Single Judge of this Court in **Mr. Panchali Chakravarty v/s. The State of Maharashtra** (Criminal Anticipatory Bail Application No.30 of 2014) where the question which arose for consideration was whether the applicant had not committed any offence as alleged by him but it was a monetary transaction of a civil nature and he was ready to return the amount even as on date. The learned Single Judge on a consideration of the material at large before her and on a perusal of the F.I.R. as

also the order passed by the Sessions Court rejecting the anticipatory bail was of the view that there was prima facie evidence against the applicant that she had committed the offence for which she was charged. The submission on her behalf that it was a transaction of a civil nature would have been accepted, if she had not given 14 postdated cheques and a single rupee to the complainant indicating thereby that there was dishonest intention right from the inception of the complaint. This judgment was in the peculiar facts of the case which is clearly distinguishable and no parity can be drawn with the case in hand.

11. In **Sussanne Khan** (supra), this Court held while dealing with the quashing of the offence under Section 420 I.P.C. that it was necessary to examine the said Agreement to find out the nature of the services sought from the Petitioner by the Respondent no.3 before examining the complaint to ascertain whether the ingredients of an offence of cheating stood satisfied based on the allegations therein. A reference was made to the judgment of the Hon'ble Apex Court in *ARCI v. Nimra Cerglass Technics (P) Ltd.*, 2016 (1) SCC 348 where the Hon'ble Apex Court had observed at Para 22 and 23 thus :

"22. By an analysis of the terms and conditions of the agreement between the parties, the dispute between the parties appears to be purely of civil nature. It is a settled

legal proposition that criminal liability should not be imposed in disputes of civil nature. In *Anil Mahajan v. Bhore Industries Ltd.*, this Court held as under: (SCC p. 231, paras 6-7)

"6. ... A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the transaction.

* * * *

8. The substance of the complaint is to be seen. Mere use of the expression 'cheating' in the complaint is of no consequence. Except mention of the words 'deceive' and 'cheat' in the complaint filed before the Magistrate and 'cheating' in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MoU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay. ... We need not go into the question of the difference of the amounts mentioned in the complaint which is much more than what is mentioned in the notice and also the defence of the accused and the stand taken in reply to notice because the complainant's own case is that over rupees three crores was paid and for balance, the accused was giving reasons as above-noticed. The additional reason for not going into these aspects is

that a civil suit is pending inter se the parties for the amounts in question.”

23. In *Indian Oil Corpn. v. NEPC India Ltd.*, this Court observed that civil liability cannot be converted into criminal liability and held as under: (SCC pp. 748-49, paras 13-14)

“13. 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 breakdown 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 through criminal prosecution should be deprecated and discouraged.

In *G. Sagar Suri v. State of U.P.* this Court observed: (SCC p. 643, para 8)

‘8. ... It is to be seen if a matter, which is essentially of a 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 the 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.'

14. 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 CrPC more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may."

12. In **Suzzanne Khan** (supra), a reference was also made to *Inder Mohan Goswami & anr. vs. State of Uttaranchal & Ors.*[(2000) 4 SCC 168] in the matter of exercise of powers under Section 482 Cr. P.C. which held at paragraphs 23, 24 and 46 as under :

"23. This Court in a number of cases has laid down the scope and ambit of courts' powers under Section 482 Cr.P.C. Every High Court has inherent power to act *ex debito justitiae* to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Section 482 CrPC can be exercised:

- (i) to give effect to an order under the Code;
- (ii) to prevent abuse of the process of court, and
- (iii) to otherwise secure the ends of justice.

24. Inherent powers under Section 482 CrPC though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the statute.

...

...

46. The court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurise the accused. On analysis of the aforementioned cases, we are of the opinion that it is neither possible nor desirable to lay down an inflexible rule that would govern the exercise of inherent jurisdiction. Inherent jurisdiction of the High Courts under Section 482 Cr.P.C though wide has to be exercised sparingly, carefully and with caution and only when it is justified by the tests specifically laid down in the statute itself and in the aforementioned cases. In view of the settled legal position, the impugned judgment cannot be sustained."

Ultimately, it was held in **Sussanne Khan** (supra), that

there was nothing disclosed in the complaint which could even remotely suggest that the petitioner had deceived the Respondent no.3 with a criminal intention to part with any amounts as alleged. The dispute appeared to be a breach of the contract and there was no criminal liability which could suggest that the ingredients of cheating in terms of Section 415 of the Indian Penal Code had been made out and ultimately concluded that the FIR registered was an abuse of the process of law initiated by the Respondent no. 3 on the basis of a purely alleged misrepresentation which could not by any stretch of imagination meet the requirements of cheating as provided under Section 415 I.P.C. Allowing such FIR to be registered would be an abuse of process of law and something unfair and wrong that the Court should not allow a procedure to proceed which was in all other respects a purely civil case.

13. In **Rajesh Bajaj** (supra), the Hon'ble Apex Court held at paragraphs 9 and 10 as below:

"9. It is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent. Splitting up of the definition into different components of the offence to make a meticulous scrutiny, whether all the ingredients have been precisely spelled out in the

complaint, is not the need at this stage. If factual foundation for the offence has been laid in the complaint the court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence.

In *State of Haryana vs. Bhajan Lal* (supra) this Court laid down the premise on which the FIR can be quashed in rare cases. The following observations made in the aforesaid decisions are a sound reminder:

"103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

10. It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions. One of the illustrations set out under Section 415 of the Indian Penal Code (illustrations f) is worthy of notice now:

"(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats."

This judgment with respect is clearly distinguishable on facts and cannot find any parity with the case at hand.

14. Coming to the facts of this case, it is not particularly in dispute that the petitioners were in a long association with the respondent no.2 in the matter of business of sale of air tickets, both domestic and international and somewhere from 2001 onwards. There was also no dispute that the petitioner's firm was insured with the insurance company at the instance of IATA and subsequently was declared as a member of IATA having the accreditation on 19/01/2001 and besides the firm had obtained the Credit Risk Insurance Policy. Therefore, the transaction entered into between the petitioners through their firm with the respondent no.2 was in the normal course of their business transaction and it was not as if there was any intention on their part to cheat the respondent no.2 much less to commit the offence of criminal breach of trust punishable under Section 405 I.P.C.

12. Moreover, it was equally not in dispute that the

respondent no.2 had filed a suit against the petitioners and the firm before the Court of the Senior Civil Judge, Panaji seeking the recovery of an amount of ₹1,38,8683.853 which amount was alleged to have been misappropriated on cheating. It was equally not in dispute that the petitioners herein had raised a counter claim in the suit filed by the respondent no.2 in respect of their business transactions regarding the sale of tickets at their instance. Hence, it is farfetched to accept the contention on behalf of the respondent no.2 that the conduct of the petitioners was to cheat the respondent no.2 and dishonestly misappropriate the properties for their own use. There appears force in the contention of Shri A.D. Bhobe, learned Counsel appearing on behalf of the appellants that it is ultimately a civil dispute arisen out of the contractual obligations between the petitioners / firm and the respondent no.2 which is sought to be given a criminal flavour with the assistance of the respondent no.1.

15. Assuming at the highest that there was delay in payment made by the petitioners to the respondent no.2, it could not by any stretch of imagination be construed to amount to an act of misappropriation of properties or to cheat the respondent no.2.

14. A cursory perusal of the complaint reveals a verbatim

reproduction of offences which are lodged against the petitioners in the context of their dues for the fortnight 14/09/2012 which was ending on 16/12/2013. However, the complaint broadly speaks about the dishonest misappropriation of the sale proceeds of the tickets, both domestic and international by the applicants as to cause wrongful loss to the respondent no.2 to the tune of ₹1,38,68,853/- without spelling about the period during which such sale transaction had taken place. Thereafter, the respondent no.2 has alleged that the petitioners had defaulted for the fortnight ending on 31/05/2012, 15/06/2012 and 30/06/2012 aggregating to an amount of ₹1,38,68,853/- indicating their intention to defraud the respondent no.2 and seeking action against them in accordance with law. However, it is pertinent to note that the complaint in respect of the said transaction of May to June 2012 was lodged only in June, 2015, more than three years later without any explanation for the delay in lodging the complaint. It rather substantiates the contention on behalf of the petitioners that the complaint was precipitated only after the petitioners had filed their written statement in defence to the suit filed by the respondent no.2 and raised a counter claim against them.

16. The petitioners had also relied upon the proceedings of the suit filed by the respondent no.2 where the respondent no.2 had

clearly admitted that the petitioners were appointed as their sales agents w.e.f. 01/01/1994 and were entitled to all the domestic sectors and selling their tickets of non-IATA sectors. They made reference to the default in payment and all their claim to an amount of ₹1,38,68,853/- and prayed for a decree in their favour. The petitioners had contested the claim in their written statement in defence as being barred by limitation, non-joinder of necessary parties and also spelt out that they were covered under the Insurance Policy which was valid till 31/03/2012 and raised the counter claim against the respondent no.2 while pressing for the dismissal of the suit. Therefore, from a consideration of the material it is clearly apparent that the respondent no.2 was trying to add a criminal flavour to a civil transaction between them and to allege the various offences. Moreover, Shri Rivankar, learned Public Prosecutor on behalf of the respondent no.1 had clearly indicated that the insurance claim was pending between the parties and if settled, no criminal liability would arise and no purpose would be achieved by the said prosecution. The contention of Shri Menezes, learned Advocate that IATA was a nodel agent in respect of the payment and that the insurance did not cover the said dues are matters which would fall for scrutiny during the course of the suit filed by the respondent no.2 against the petitioners/firm and which cannot be looked into while considering the tenability of the F.I.R.

against the petitioners.

17. Considering the judgment in **Suzzanne Khan** and that in **International Advanced Research Centre** (supra), and clearly distinguishing the order in **Panchali Chakravarty** (supra), we find that a continuance of the proceedings would amount to a gross abuse of the process of law and therefore hold that it is a fit case to quash the F.I.R.

18. In the result, we pass the following

ORDER

1. Rule is made absolute in terms of prayer clause (a).

NUTAN D. SARDESSAI,J.

F.M. REIS,J.

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