

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRI. WRIT PETITION NO. 543 OF 2002

- 1) Mr. Vijay Inamdar, Executive Vice ... Petitioners.
President, Blue Star Ltd., Blue Star House, (Org. Accused
Sakinaka -Ghatkpoar, Link Road, Nos.1 to 7 Resp).
Sakinaka, Mumbai -400 072.
- 2) Mr. D. P. Singh,
Blue Star Ltd.,
- 3) Mr. P. H. Ramani,
Blue Star Ltd., Trimurthi, 2nd floor,
Dr. Atmaram Borcar Rd, Near Municipal
Corporation, Panjim, Goa-403 001.
- 4) Mr. H.D.S.Khurana,
Manager Construction, Blue Star Ltd.,
2-A, DLF Corporate Park, Kutab Enclave,
Phase-3, Gurgaon – 122 002, Haryana.
- 5) Blue Star Ltd.,
- 6) Mr. Dalal,
Pheroze Kundianwala Industrial Designer
Pvt.Ltd., Mackinnan Mackenzie Bldg.,
Ballard Estate, Mumbai -038.
- 7) Mr. Navnit Singh, P.K.I.D.,
C/o. Madaus Pharmaceuticals Ltd.,
Kundiam Industrial Estate, Ponda,
Goa -403 110.

V/s.

- | | |
|---------------------------------------|------------------|
| 1. The State of Maharashtra, | ... Respondents. |
| 2. Mr. J. D. Shah, Sole Proprietor of | (Res.No.2-Org. |
| M/s. J.D. Industrial Insulation, | Complainant) |
| office at 108, Hiranandani | |
| Industrial Estate, Opp. Kanjur | |
| Marg Railway Station, Kanjur | |
| Marg (W), Mumbai – 400078 | |

Mr. Sangram S. Lotankar, Advocate i/by Prudentia Advisory
LLP for Petitioner No.5.

Mr. S. R. Agarkar, APP for the State.

CORAM : RAVINDRA V.GHUGE,J.

DATE : 23 MARCH, 2017

ORAL JUDGMENT :

1 The Petitioners are aggrieved by the issuance of process, the date of which is not mentioned in the body of the petition nor in the prayer clauses and copy of the impugned order of issuance of process is also not placed on record.

2 This court by the order dated 10.07.2002 directed that the order of issuance of process stands stayed.

3 Though the petitioners have not mentioned the date of the impugned order and have also not placed a copy of the impugned order on record in the last 15 years, it is stated by the learned counsel for the petitioners that the process has been issued by the trial court on the complaint filed by Respondent No.2 being C.C. No. 121/S/2000.

4 The learned counsel for the petitioners has strenuously submitted that the instant dispute between the parties is a civil dispute. Non-payment of amount cannot be a ground for filing of a complaint, invoking sections 420 and 468 r/w. 34 of the Indian Penal Code. He submits that after proper measurements were made with regard to the construction work done by the original complainant, the amounts were paid to the satisfaction of the complainant. A discount was agreed upon by the complainant for an amount of Rs. Five lakhs and hence, based on the same the amounts were paid.

5 The learned counsel for the Petitioners further submitted that it cannot be a matter of concern of the original complainant as to how the petitioners billed its principle concern (client) based on the agreement/contract between the principle and the petitioners. Merely because the petitioners have charged its clients namely M/s. German Remedies Ltd./ M/s.Madaus Pharmaceuticals Pvt. Ltd., differently, would not give a right to the complainant to seek the same charges as consideration.

6 Reliance is placed upon the judgment of the Hon'ble Apex Court dated 30.10.2014 in the matter of **Binod Kumar & Ors. vs. State of Bihar & Anr.**, being Criminal Appeal No. 2327 of 2014, to support the contentions of the

petitioners that merely because some amounts are unpaid in a business contract, it would not give a right to the complainant to invoke sections 420 and 468 of the IPC.

7 I have considered the submissions of the learned counsel for the petitioners and with his assistance, I have gone through the petition paper book.

8 It is trite law that in the matter of issuance of process, the learned Magistrate must be convinced that there are pleadings on record which would attract the relevant provisions of the Indian Penal Code and prima facie, there is material before the Magistrate to issue process. In short, the Magistrate must be convinced that there is some material available on record on the basis of which the trial can be commenced. It is equally settled that the Magistrate, while issuing process, is not required to consider whether the pleadings in the complaint and the material available would ultimately lead to the conviction of the accused or not. The process is to be issued without considering the final fate of the matter.

9 In paragraph 12 of the complaint, the complainant has specifically averred that the petitioners were liable to make payments to the complainant based on the measurement of the work done by the complainant firm. The final bills in

relation thereof were to be settled in the light of the terms of the contract. The entry books maintained by M/s. German Remedies Ltd. | M/s. Madaus Pharmaceuticals Pvt. Ltd., indicate different measurements. Accused Nos. 2, 3 and 4 have given some measurements noted on a paper of Hotel Nova Goa which was signed by accused no. 4 and the complainant was informed that the re-measurements have been taken on 19.3.1999 and it was found that the earlier joint measurements taken were excessive. Based on such documents, the complainant consented for reducing charges at Rs.5 lakhs.

10 It is further specifically contended by the complainant that the measurements taken on 19.03.1999 were camouflaged since the entire place was plastered with plaster of paris and the same was applied to the ceiling and that the re-measurement was made in such a way so as to reduce the actual size of the construction. This was done clandestinely and illegally.

11 It is then averred in paragraphs 13 and 14 that the discount of Rs. Five lakhs given by the complainant was induced as it was projected by the fabricated sheet of re-measurement than the actual measurement is less than the joint measurement. It is, therefore, stated that by playing such a fraud, the re-measurements was arrived at by camouflaging

the actual construction and hence it indicated lesser measurements.

12 Further averments are found in paragraph nos. 17, 18 and 21 of the complaint.

13 Considering the above, it is obvious that these allegations of fabricated measurements and preparation of a false document of measurement, other than the exact measurement, needs to be investigated into. Based on the averments and the documents available, there was some material before the learned Magistrate for issuance of process. Since, prima facie, the material available indicates the commission of an offence under sections 420, 468 read with section 34 of the IPC, process has been issued.

14 Reliance placed by the petitioners on the judgment of the Binod Kumar (supra) is misplaced. The very second paragraph of the judgment indicates that the only issue before the Hon'ble Apex Court was regarding retaining the bill amount and not paying money to the complainant. Paragraph 3 of the judgment indicates the facts wherein the University Engineer had addressed to the Principal of the College that the payment of Rs. 48,505/- is payable to the contractor. As such in Binod Kumar's case the grievance of the complainant was that an amount of Rs. 14,000/- was paid to him and an

amount of Rs. 34,505 was withheld and was unpaid to him. In these circumstances, it was concluded that the charge under sections 406 and 120-B of IPC was not attracted as it was a civil dispute.

15 Considering the above, I find that the order of issuing process cannot be termed as being perverse and erroneous, keeping in view the law laid down by the Hon'ble Apex Court in the cases of **Shalini Shyam Shetty & Anr. vs. Rajendra Shankar Patil** (2010) 8 Supreme Court Cases 329, **Syed Yakoob vs. K. S. Radhakrishnan**, AIR 1964 SC 477 and in the matter of **Surya Dev Rai vs. Ram Chander Rai & Ors.** (2003) 6 SCC 675.

16 This petition, being devoid of merits, is, therefore, dismissed.

17 Needless to state that since the proceedings before the learned Magistrate dates back to 2000, I deem it appropriate to direct the Magistrate to give preference to C.C. N. 121/S./2000 and expedite the hearing of the said matter, to be completed on or before 31st Day of March, 2018.

(RAVINDRA V.GHUGE,J.)

.....