

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

WRIT PETITION No. 38043 of 2016

ORDER:

1) The petitioners, who are accused Nos.1 to 4 in Crime No.143 of 2016 of Banjara Hills Police Station, Hyderabad, filed the present writ petition under Article 226 of the Constitution of India, seeking quashing of investigation in the above crime, registered against them and another for the offences punishable under Sections 420 and 406 IPC.

2) The allegations in the first information report are as under:

Fourth respondent herein, lodged a report stating that petitioner No.2/ accused No.2, who is the C.M.D. of accused No.1 company, approached the fourth respondent claiming that Borg Energy India Private Limited is subsidiary of Borg Inc.USA and is a billion dollar company. They claimed to have installed over 1000 MW of solar power in the world and that they were one of the largest solar power equipment manufacturing companies. Petitioner No.1 offered to finance and build a solar power project of 3 MW initially in a debt/ equity ratio of 90:10 for the informant on payment of 10% of the project cost to accused No.1 upfront. On 04.05.2015 Mr.Boaz and his team issued a sanctioned letter showing as if Borg has approved a term loan of Rs.16.20 crores to respondent No.4 and accordingly directed respondent No.4 to pay initial advance of Rs.90.00 lakhs and return the copy of the pre-

sanctioned letter on or before 05.05.2015. The allegations further indicate that respondent No.4 company was not happy with some of the conditions in the sanctioned letter and as such they did not sign the same but however the accused pressurised them to pay upfront 5% of equity. Believing the representations made, respondent No.4 paid Rs.90.00 lakhs (upfront 5% equity) on 05.05.2015. Later, the capacity of the project was hiked to 23 MW. It is alleged that all the accused along with accused No.1 pressurised respondent No.4 to pay Rs.48.00 lakhs more as 1% upfront advance equity for 23 MW project. It is alleged that under the threat of loosing the project, respondent No.4 paid Rs.48.00 lakhs to Borg on 04.08.2015. It is further alleged that since the project was not proceeding further and as the accused have suddenly become non-committal having received Rs.1.38 crores, respondent No.4 made enquiries which revealed that Borg Energy India is a sham company and Mr.Boaz and all other accused have been cheating the companies by collecting crores of rupees as upfront advance from the companies and individuals. In the month of October, 2015, a communication through e-mail was sent withdrawing the aforesaid 23MW solar power project. Thereafter, respondent No.4 sought for return of the amount paid to the Borg. Their inaction lead to lodging of the present report.

3) The averments in the affidavit filed in support of the writ petition and the allegations in the first information report show that the accused were postponing the issue on one pretext or the other. It is further alleged that accused No.1 started harassing

respondent No.4 to further invest in solar project by increasing the capacity to 13MW from 3 MW stating that more funds can be availed from Borg.Inc.USA. Though he addressed an e-mail on 08.05.2015, Borg advised respondent No.4 to form a special purpose vehicle company in India or Singapore where the worth of special purpose vehicle should be more than Rs.100 cores. Thereafter, the accused visited Hyderabad and negotiated the debt equity ratio for 20MW solar power project, issued a fresh sanctioned letter for Rs.120.00 crores and forced the respondent no.4 to execute an un-principled sanctioned letter with payment of 5%of the project cost amounting to Rs.6.00 crores. Though the respondent No.4 did not sign the said sanctioned letter, the Secretary (Finance) of the accused company started pressurising the respondent No.4 to execute important documents such as personal guarantees, corporate guarantees and declaration from the Board of Directors etc.

4) The averments in the report and contents of the affidavit also show that though the respondent No.4 was reluctant to pay additional money and did not sign any agreement with accused No.1 company, accused No.2 and his team have been asking the respondent No.4 to pay additional amount of Rs.48.00 lakhs by issuing new sanctioned letter stating that atleast 1% of equity must be paid as per their Head Quarters requirement to keep the option of their funding open. At this point of time the respondent No.4 got information that Borg Energy India was registered in USA but no business was done by them and it was a sham company

that the accused have been cheating public by collecting crores of rupees as upfront advance from the companies and individuals. It is further alleged that the information provided by the Borg Energy India over their companies and subsidiaries was totally false and incorrect, as there is no separate entity as per Registrar of Companies in India and as advertised on Borg's website. It was also found that Borg Energy India Private Limited is not a subsidiary of Borg. Inc.USA.

5) It is the case of the petitioners that the matter is purely civil in nature and that the police have erred in registering a criminal case. Relying upon the e-mail correspondence between the parties, learned counsel for the petitioners would submit that money was paid to establish a solar power plant but for reasons best known the respondent No.4 went back and started demanding return of the money paid by them. Since the money was already spent towards establishment of power project as agreed upon by the respondent No.4, the accused were reluctant to return it immediately. Therefore, it is urged that, even accepting the entire allegations and the correspondence between the parties through e-mail, it cannot be said that there was any criminal intention to cheat. It is further urged that having transferred an amount of Rs.48.00 lakhs on 04.08.2015 to the bank account of the petitioner company and having accepted the terms and conditions of the agreement for 23MW project, respondent No.4 went back on the terms and only with a view to harass and to get back the money the present report came to be lodged. It is

said that the petitioner company has incurred an expenditure of nearly Rs.4.00 crores towards the initial payment of material which is to be procured for 3 MW solar power project and it is the liability of respondent No.4 to accept the material. Along with the writ petition number of documents and additional documents which are in the form of e-mail came to be filed in support of their plea.

6) A counter came to be filed by respondent No.4 opposing the same. The averments in the counter show that petitioner No.2 as well as respondent No.4 developed acquaintance when both of them attended Executive Management Program at Harvard Business School in Boston, U.S.A. in the year 2007. In the year 2015, petitioner No.2 contacted respondent No.4 and after reminding him with the acquaintance referred to, claimed that he is the C.M.D. of Borg Energy India Private Limited, which is subsidiary of Borg Inc.U.S.A. and that it is a billion dollar company. While reiterating the averments made the first information, the counter further states that Borg Inc.U.S.A. and Borg Energy India Private Limited both are sham companies registered by petitioner No.2 with an intention to cheat the customers, distributors and investors. Borg Inc.U.S.A. website is now having Indian contact numbers which clearly shows that the Borg Inc. was created only to cheat the companies. He also refers to a programme telecasted in television as to how Borg Energy has duped buyers across India. It is further stated that the Texas Franchise Tax Public Information Reports for the year 2013-

2015 indicate that Borg Inc. U.S.A. has no subsidiaries and that Borg Energy India Private Limited was incorporated on 14.10.2011 while Borg. Inc. was incorporated on 23.10.2012. It is said that infact Borg Energy India Private Limited is a subsidiary of AAPL Infra Private Limited which holds 96% stake in Borg Energy India Private Limited. It is further stated that the information available with Texas Secretary of State, show that there are no transaction of any kind as indicated by the petitioners. The averments in the counter further show that neither Borg Energy India Private Limited nor Borg Capital are licensed by R.B.I. to operate as non-banking financial company. Apart from that it is further stated that the independent Directors referred to in the additional material papers namely Mr. T.S.Krishnamurthy, Mr.Vinod Kumar Thripathi, Mr.V.Panganathan, Mr.Joseph Fournier and Mr.Jeff Craig are all false. It is said that no data is found with the Registrar of Companies and Texas Secretary of State, U.S.A. as regard the above information. It is further stated that the duplicity of the petitioners is further established by the fact that as on 31.10.2015 the cash reserve surplus of Borg Energy India Private Limited was Rs.3.15 crore only while the total outside liabilities were at Rs.30.03 crores. The counter also refers about five crimes being registered against the petitioners, as such he submits that the matter requires investigation.

7) No reply has been filed by the petitioners denying the averments made in the counter. On the other hand, number of

documents came to be filed in support of their plea vide CrI.P.M.P.Nos.49795 and 53531 of 2016.

8) The Government Pleader for Home placed on record the C.D. file to show the material collected by the police during the course of investigation. According to him, three witnesses have been examined by the prosecution and further investigation is still in progress. It is specifically stated that they have verified the bank accounts of the petitioners thoroughly and found that some of the amounts were transferred to the accounts of other companies and some of the amounts were transferred to the personal accounts of the Directors of the company. Their enquiries with R.O.C. found that there is no company called Borg Capital, which promised to finance Rs.110.00 crores to the informant company. It is further stated that though a notice under Section 41-A Cr.P.C. was issued, the petitioners have not responded to the said notice. It is his case that the about six cases have been registered against the petitioners for collecting money by adopting same modes operandi.

9) Reiterating the averments in the affidavit filed in support of the writ petition and also the e-mail correspondence and agreements entered into between the parties, learned counsel for the petitioners would submit that the matter is purely civil in nature and even accepting the allegations in the report to be true no offence is made out by the prosecution.

10) On the other hand, learned counsel for respondent No.4 would submit that earlier the petitioners have filed an application under Section 482 Cr.P.C. seeking quashing of the proceedings, but after arguing the matter for some time withdrew the same. Since no liberty was granted for filing fresh application, he submits that this Court cannot entertain a fresh application under Article 226 of the Constitution of India. He further submits that non-filing of entire text of the first information report along with the affidavit filed in support of the writ petition is sufficient to dismiss the writ petition. Even otherwise it is his case that having regard to the nature of allegations made against the petitioners and that the companies are sham and bogus, the issue requires investigation.

11) In order to appreciate the rival contentions, it would be necessary to refer to few judgments of the Supreme Court which are referred to by both the parties. In order to establish his plea that no offence under Section 420 IPC is made out as there was no intention to cheat at inception, the counsel relied upon the following two judgments.

12) In *International Advanced Research Centre for Powder Metallurgy and New Materials (ARCI) and others v. NIMRA Ceramics Technics Private Limited and another*¹ the Apex Court while drawing the distinction between cheating and criminal breach of trust held that it will depend upon the intention of the

¹ (2016) 1 SCC 348

accused at the time of alleged inducement. It is further held that 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. However, if all that is established is that a representation made by the accused was 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 before the civil Court.

13) In *Thermax Limited and others v. K.M.Johny and others*² the Apex Court after referring to various cases on the subject reiterated the established principles of law that there has to be dishonest intention to deceive another person.

14) However, the learned counsel for the fourth respondent relied upon number of judgments in support of his plea that if the allegations in the report do *prima facie* make out a case, the Court shall not quash the investigation at the threshold.

15) In *State of Orissa and another v. Saroj Kumar Sahoo*³ the Apex Court while dealing with an application for quashing of investigation under Section 482 of Cr.P.C. held as under:

“Exercise of power under [Section 482](#) of the Cr.P.C. is the exception and not the rule. The Section does not confer any new powers on the High Court. It only saves the

² (2011) 13 SCC 412

³ (2005) 13 SCC 540

inherent power which the Court possessed before the enactment of the Cr.P.C. The inherent powers have been conferred, apart from express provisions of law, which are necessary for proper discharge of functions and duties imposed upon it by law. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Cr.P.C., (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise.

While exercising the powers under the section 482 Cr.P.C., the High court does not function as a court of appeal or revision. Inherent jurisdiction under the section, though wide, has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/ continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice.

However, the inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a *prima facie* decision in a case where the entire facts are incomplete and hazy, more so when the

evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. But no hard and fast rule as regards cases in which such power can be exercised can be laid down.”

16) In *Trisuns Chemical Industry v. Rajesh Agarwal and others*⁴ the Apex Court held as under:

“Time and again this Court has been pointing out that quashment of FIR or a complaint in exercise of inherent powers of the High Court should be limited to very extreme exceptions [vide [State of Haryana vs. Bhajan Lal](#)⁵ and [Rajesh Bajaj vs. State NCT of Delhi](#)⁶.]

In the last referred case this court also pointed out that merely because an act has a civil profile is not sufficient to denude it of its criminal outfit. We quote the following observations:

“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.”

We are unable to appreciate the reasoning that the provision incorporated in the agreement for referring the disputes to arbitration is an effective substitute for a criminal prosecution when the disputed act is an offence. Arbitration is a remedy for affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the

⁴ (1999) 8 SCC 686

⁵ (1992) SCC (Cr.) 426

⁶ (1999) 3 SCC 259

agreement. Hence, those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases as indicated in *State of Haryana vs. Bhajaj Lal* (5 Supra)."

17) In *Medchal Chemicals and Pharma (P) Limited v. Biological E.Limited and others*⁷ the Apex Court after referring the various judgments held as under:

"On careful reading of the complaint, in our view, it cannot be said that the complaint does not disclose the commission of an offence. The ingredients of the offences under Sections 415, 418 and 420 cannot be said to be totally absent on the basis of the allegations in the complaint. We, however, hasten to add that whether or not the allegations in the complaint are otherwise correct has to be decided on the basis of the evidence to be led at the trial in the complaint case but simply because of the fact that there is a remedy provided for breach of contract, that does not by itself clothe the Court to come to a conclusion that civil remedy is the only remedy available to the appellant herein. Both criminal law and civil law remedy can be pursued in divers situations. As a matter of fact they are not mutually exclusive but clearly co-extensive and essentially differ in their content and consequence. The object of criminal law is to punish an offender who commits an offence against a person, property or the State for which the accused, on proof of the offence, is deprived of his liberty and in some cases even his life. This does not, however, affect civil remedies at all for suing the wrongdoer in cases like arson, accidents etc. It is anathema to suppose that when a civil

⁷ (2000) 3 SCC 269

remedy is available, a criminal prosecution is completely barred.”

18) In *Iradium India Telecom Limited v. Motorola Incorporated and others*⁸ the Apex Court while dealing with the definition of cheating as defined in Section 415 I.P.C. held as under:

“A bare perusal of the aforesaid section would show that it can be conveniently divided into two parts. The first part makes it necessary that the deception by the accused of the person deceived, must be fraudulent or dishonest. Such deception must induce the person deceived to: either (a) deliver property to any person; or (b) consent that any person shall retain any property. The second part also requires that the accused must by deception intentionally induce the person deceived either to do or omit to do anything which he would not do or omit, if he was not so deceived. Furthermore, such act or omission must cause or must be likely to cause damage or harm to that person in body, mind, reputation or property. Thus, it is evident that deception is a necessary ingredient for the offences of cheating under both parts of this section. The complainant, therefore, necessarily needs to prove that the inducement had been caused by the deception exercised by the accused. Such deception must necessarily produce the inducement to part with or deliver property, which the complainant would not have parted with or delivered, but for the inducement resulting from deception. The explanation to the section would clearly indicate that there must be no dishonest concealment of facts. In other words, non-disclosure of relevant information would also be treated as a misrepresentation of facts leading to deception.

⁸ (2011) 1 SCC 74

In the present case, the parties are yet to place on the record the entire material in support of their claims. The issues involved are of considerable importance to the parties in particular, and the world of trade and commerce in general. In such circumstances, in our opinion, the High Court ought to have refrained from indulging in detailed analysis of very complicated commercial documents and reaching any definite conclusions. In our opinion, the High Court clearly exceeded its jurisdiction in quashing the criminal proceeding in the peculiar facts and circumstances of this case. The High Court noticed that while exercising jurisdiction under [Section 482](#) Cr.P.C. "the complaint in its entirety will have to be examined on the basis of the allegations made therein. But the High Court has no authority or jurisdiction to go into the matter or examine its correctness. The allegations in the complaint will have to be accepted on the face of it and the truth or falsity cannot be entered into by the Court at this stage." Having said so, the High Court proceeded to do exactly the opposite."

19) In *Rajiv Thapar and others v. Madan Lal Kapoor*⁹ the Apex Court held as under:

"Recently, this Court again had an occasion to examine the ambit and scope of [Section 482](#) of the Cr.P.C. in *Rukmini Narvekar Vs. Vijaya Satardekar & Ors.*, (2008) 14 SCC 1, wherein in the main order it was observed, that the width of the powers of the High Court under [Section 482](#) of the Cr.P.C. and under [Article 226](#) of the Constitution of India, was unlimited. In the instant judgment, this Court held that the High Court could make such orders as may be necessary to prevent abuse of the process of any court, or otherwise to secure the ends of justice. In a concurring separate order passed in the same case, it was

⁹ (2013) 3 SCC 330

additionally observed, that under [Section 482](#) of the Cr.P.C., the High Court was free to consider even material, that may be produced on behalf of the accused, to arrive at a decision whether the charge as framed could be maintained. The aforesaid parameters shall be kept in mind while we examine whether the High Court ought to have exercised its inherent jurisdiction under [Section 482](#) of the Cr.P.C. in the facts and circumstances of this case.”

20) Learned counsel for the fourth respondent also relied upon the judgment of this Court in *W.P.No.28215 of 2010 (P.Anji Babu v. Govt. of A.P. and others)*. It was a case where the petitioner having failed to get a relief under Section 482 Cr.P.C. invoked the jurisdiction of the High Court under Article 226 of the Constitution of India. The said application came to be dismissed on the ground that since the petitioner therein has not secured quashing of criminal proceedings against him under Section 482 Cr.P.C., he cannot agitate the relief under Article 226 of the Constitution of India.

21) Learned counsel for respondent No.4 also relied upon the judgment of this Court in *V.Ramesh Babu and another v. State of Andhra Pradesh and another*¹⁰ wherein this Court while dealing with the issue of cheating held that subsequent conduct of the petitioners coupled with his antecedents can be taken into consideration to hold that *prima facie* there was dishonest intention from inception. The Court held that it is always open to the petitioners to plead and adduce evidence to show that they had no dishonest intention at inception and definitely the same

¹⁰ (2013) 2 ALD (Gr.) 731 (A.P.)

cannot be the basis for quashing of the proceedings by invoking the inherent jurisdiction of the High Court.

22) From the judgments of the Apex Court and also of this Court referred to above, it is clear that the High Court while exercising jurisdiction either under Section 482 Cr.P.C. or under Article 226 of the Constitution of India should be slow in interfering with the investigation, which is still at its threshold.

23) Keeping in view the judgments referred to above, I shall now decide as to whether the allegations in the report do make out a *prima facie* case against the petitioners.

24) From a reading of the averments in the first information it is clear that petitioner No.2 and respondent No.4 were known to each other from 2007, thereby respondent No.2 is alleged to have promised respondent No.4 for establishment of a solar power project on an equity/ debt ratio of 90:10. It was represented that their company is in tie up with Borg. Inc.USA which is a billion dollar company. Believing the representations made, respondent No.4 is alleged to have entered into some talks and then parted with substantial amount to the accused. Learned counsel for the petitioners mainly relied upon a memo of understanding which has been filed along with the affidavit. The said document which was filed along with the affidavit do not contain the signature of the representatives of either of the parties or that of a person representing respondent No.4, but along with the additional material papers they filed the very same document containing the

signature of the representation of Borg Energy India Limited, but the said document did not contain either signature or seal of respondent No.4. Apart from that the counsel for the respondents also placed on record the material to show that the name of some of the Board of Directors referred to in the brochure printed by the petitioners company do not figure in the list given by the Registrar of Companies. It is also to be noted that the investigation done by the police revealed that amounts received by the petitioners were transferred to other companies and also to the personal accounts of the Directors. The preliminary investigation done by the police found that there was no company called Borg Capital at R.O.C.website, which company has promised to finance Rs.110.00 crores to respondent No.4 company. As stated earlier, learned counsel for the petitioners mainly relied upon the correspondence between the parties by way of e-mail to show that the matter is purely civil in nature. As held by the Apex Court in *Anvar P.V. v. P.K.Basheer*¹¹ copies of the electronic evidence produced before the Court cannot be treated as substantial evidence. These documents are required to be proved before the Court in the manner prescribed under Section 65 (B) (4) of the Evidence Act. In fact, the Apex Court in *Anvar case* (11 supra) held as under:

“Any documentary evidence by way of an electronic record under the [Evidence Act](#), in view of [Sections 59](#) and [65A](#), can be proved only in accordance with the procedure prescribed under [Section 65B](#). [Section 65B](#) deals with the admissibility

¹¹ (2014) 10 SCC 473

of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the [Evidence Act](#), any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub- Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under [Section 65B\(2\)](#).”

25) Therefore, the e-mail correspondence between the parties which has been relied upon by the learned counsel for the petitioners cannot be accepted at this stage of the matter, in view of the judgment of the Apex Court referred to above. A reading of the First Information Report and a perusal of the C.D. file would show that the companies which are projected to execute the agreement are *prima facie*, sham companies, therefore, it is too premature to say, there was no dishonest intention to cheat from inception. The case is still at the threshold and investigation is at the crucial stage. Therefore, the request of the petitioners for quashing of investigation cannot be accepted. At this stage, learned counsel for the petitioners submits that having regard to the nature of allegations made atleast the authorities/police may be directed not to arrest the petitioners. I am afraid the said request cannot be accepted, since the allegations in the report establish a *prima facie* case against the petitioners.

26) For the aforesaid reasons, the writ petition is dismissed.

There shall be no order as to costs.

27) Consequently, miscellaneous petitions, if any, pending in this Writ Petition shall stand closed.

JUSTICE C. PRAVEEN KUMAR

25.01.2017
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