IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.449 of 2016

Arising Out of PS.Case No. -263 Year- 2014 Thana –Sri Krishnapuri District- PATNA

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1. Dr. Andal Arumugam, Wife of Dr. S Arumugam, Managing Director, R.K.M Powergen Pvt. Ltd null
2. T.M Singaravel Son of T. Muthurangam, Director, M/s R.K.M. Powergen Pvt. Ltd.
3. Mr. R. Saravanan S/o Mr. Radhakrishan Chief General Manager, R.K.M Power Pvt. Ltd
4. J. Mohan Son of Mr. Jegadtheesan General Manager, R.K. M Powergen Pvt. Ltd. All having office at 14, Dr. Giriappa Road, T. Nagar, P.S. Teynampur, Chennai 600 017

.... Petitioner/s

Versus

1. The State of Bihar through the Director General of Police, Bihar, Patna
2. The Director General of Police, Bihar, Patna
3. Inspector General of Police, Patna
4. The Deputy Inspector General of Police, Patna
5. The Senior Superintendent of Police, Patna
6. The Deputy Superintendent of Police, Sachivalaya, Patna
7. The Officer - in - Charge, Sri Krishnapuri Police Station, Patna
8. Investigating Officer, Sri Krishnapuri Police Station, Patna
9. Mr. Shailendra Pratap Son of Late Sita Ram Lal, Director, Om Astha Construction Pvt. Ltd., Flat No. 301, Majestik Vishnu, North S.K. Puri, P.S. S.K. Puri, District - Patna

.... Respondent/s

with

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Criminal Writ Jurisdiction Case No. 470 of 2016

Arising Out of PS.Case No. -263 Year- 2014 Thana –Sri Krishnapuri District- PATNA

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1. K.M. NATARAJ @ K.M. NATRAJAN, Son of K. Umabathi, Deputy General Manager (Civil), M/s Axon Construction Pvt. Ltd.
2. V.V. Ram, Son of V.B. Venkataraghavan, Authorized Signatory, M/s Axon Construction Pvt. Ltd. Both having office at First Floor, Western Wing, 14, Dr. Giriappa Road, T. Nagar, P.S.- Teynampet, Chennai- 600 017

.... Petitioner/s

Versus

1. The State of Bihar through the Director General of Police, Bihar, Patna
2. The Director General of Police, Bihar, Patna
3. Inspector General of Police, Patna
4. The Deputy Inspector General of Police, Patna
5. The Senior Superintendent of Police, Patna
6. The Deputy Superintendent of Police, Sachivalya, Patna
7. The Officer-in-Charge, Sri Krishnapuri Police Station, Patna

8. Investigating Officer, Sri Krishnapuri Police Station, Patna
9. Mr. Shailendra Pratap, son of Late Sita Ram Lal, Director, Om Astha Construction Pvt. Ltd., Flat No. 301, Majestik Vishnu, North S.K. Puri, P.S. S.K. Puri, District- Patna

.... Respondent/s

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Appearance :

(In Cr. WJC No.449 of 2016)

For the Petitioner/s : Mr. Sandeep Kumar, Adv.
Mr. Rabindra Kumar, Adv.
Mr. Rohit Raj, Adv.
For the State : Mr. Mrigendra Kumar, AC to GA-4
For the Respondent no.9: Mr. Ramakant Sharma, Sr.Adv.
Mr. Sheo Narayan Singh, Adv.

(In Cr. WJC No.470 of 2016)

For the Petitioner/s : Mr. Sandeep Kumar, Adv.
Mr. Rabindra Kumar, Adv.
Mr. Rohit Raj, Adv.
For the State : Mr. Manish Kumar, AC to AAG-6
For the Respondent no.9 : Mr. Ramakant Sharma, Sr.Adv.
Mr. Sheo Narayan Singh, Adv.

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

Date: 23-08-2018

Heard learned counsel for the petitioners, learned senior counsel representing the respondent no.9 as well as learned counsel for the State.

2. Since both the writ applications are arising out of the same First Information Report (in short 'F.I.R.') giving rise to Sri Krishnapuri P.S. Case No.263 of 2014 registered for the offence alleged under Sections 406 and 420 of the Indian Penal Code (in

short 'I.P.C.'), with the consent of the parties both the matters have been clubbed together and are being disposed off by this common judgment and order.

3. Petitioners in both the cases have prayed for quashing of the F.I.R. on the ground that a bare reading of the F.I.R. without adding or subtracting anything out of it would show that no case at all is made out for the offences alleged against the petitioners and a purely civil and commercial dispute has been converted in a criminal proceeding only to get rid of the liability arising out of the breach of terms and conditions of the works contract. It is also one of the grounds pleaded on behalf of the petitioners that it is a malafide prosecution of the petitioners who are all working in managerial capacity in the company which had awarded the works contract to a sub-contractor and the respondent no.9 had obtained a part of the works contract as a petty contractor.

4. Before this Court would proceed to consider the submissions advanced on behalf of the petitioners, it would be necessary to take note of the allegations for which the F.I.R. has been lodged.

Allegations in the F.I.R.

5. The respondent no.9 is a Director of one Om Astha Construction Pvt. Ltd. (referred to as the company of the Informant)

having its office at Plot No.301, Majestik Vishnu, North S.K. Puri, P.S.-S.K. Puri, District-Patna. He submitted a written complaint to the Officer In-charge, S.K. Puri Police Station, Patna on 24.07.2014. In his written complaint, the respondent no.9 wrote as under:-

"To
The Officer In-Charge
Sri Krishnapuri Police Station, Patna

Subject:- Complaint to lodge First Information Report against accused:- (i) Dr. Andal Arumugam, Managing Director, Axon Construction Pvt. Ltd. & M.D. R.K.M. Powergen Pvt. Ltd. having office at First Floor, Western Wing, 14, Dr. Giriappa-Road, T.Nagar, Chenai-600017, (Tamil-Nadu), (ii) Mr. S. Subburaj, D.G.M. (Civil), Axon Construction Pvt. Ltd. 1st Floor, Western Wing, 14, Dr. Giriappa Road, T. Nagar, Chenai-600017, (iii). V.V. Ram (Authorized signatory) AGM (Civil), Axon Construction Pvt. Ltd. 1st Floor, Western Wingh, 14, Dr. Giriappa Road, T.Nagar, Chenai-600017, (iv). Mr. Singravel Director, Axon Construction Pvt. Ltd. 1st Floor, Wester Wing 14, Dr. Giriappa Road, T.Nagar, Chenai-600017, (Tamilnadu), (v). Mr. J. Mohan, Director Axon Construction Pvt. Ltd. First Floor, Western Wing, 14, Dr. Giriappa Road, T.Nagar, Chenai-600017, (Tamil-Nadu), (vi). Mr. V. Nand Gopal, Executive Director (Finance), Axon construction Pvt. Ltd at First Floor, Western Wingh, 14, Dr. Giriappa Road, T. Nagar Chenai-600017 *(vii). Mr. Sarvanan Chief General Managar (Civil) R.K.M. Powergen Pvt. Ltd, at-1st Floor, Western Wingh, 14, Dr. Giriappa Road, T. Nagar, Chenai-600017, (Tamil Nadu). (Viii). Mr. K.M. Natrajan, S/o K.M. Umapathi, R/o Mohalla-Linghyadhi, Sipat Road, Phase-II, Bilaspur, P.S. & District-Bilaspur, (Chhattisgarh) DGM (Civil) Axon Construction Pvt. Ltd. 1st Floor, Western Wingh 14, Dr. Giriappa Road, T. Nagar, Chenai-600017 (Tamilnadu).*

FOR COMMITTING CRIMINAL OFFENCES OF BREACH OF TRUST AND CHEATING

SIR,

I Shailendra Pratap s/o late Sita Ram La, Director, OM ASTHA CONSTRUCTION PVT. LTD. and is a registered contractor at-301, Mazestic Vishu, North Sri Krishna Puri, Boring Road Patna, P.S.-SRI KRISHNA PURI Patna, District-Patna, State as follows:-

(i). That I am carrying on my contract-work within & out side Bihar all over India & one of my work-site is at-village-unchhpinda, P.S.-Kharasiya, District-Jajgir-champa, chatisgarh.

(ii). That accusedno-1& 2 entered into sub-contract agreement at my office at Patna with complainant for construction work for the Packages & got four work order by accused no-1(a)WONO-AXON/WO/85/2011-2012on 02.03.2012(b) Letter of Intent on-16.4.2012 (c) WONO-AXON/WO/017/2012-13 on dated-10.5.2012 (d) WONOAXON/WO/026/(c) WONO-

AXON/WO/017/2012-2013 on dated-10.5.2012 (d) WONOAXON/WO/026/2012-2013 on dated-29.5.2012& thereafter the complainant started construction work.

(iii). That after getting work-order, complainant requested accusedno-1 for mobilization advance for Rs.35,00,000/-& Rs.1,00,00,000/-=Rs.1,35,00,000/-(Rs. One crore & Thirty Fives lacs)& thereafter accusedno-1 requested complainant to deposit Advance Bank Guarantees for Rs. 1,35,00,000/-as security with the accusedno-1 from Patna then only interest free said mobilization advance would be released to the complainant.

(iv). That the complainant deposited with the accusedno-1 Advance Bank Guarantees (i) vide BG No-19/2012 for Rs.35,00,000/-(Rs. Thirty fives lacs) issued on 19.03.2012 valid for the period 19.03.2012 to 18.03.2013 & (ii)BG No-25/2012 for Rs. 1,00,00,000/-(Rs. One crore) issued on 30.05.2012 valid for the period 30.05.2012 to 29.05.2013& Bank Guarantees have been issued by CANARA BANK, Patna Main Branch, PATNA, Bihar.

(v) That when complainant deposited Advance Bank Guarantees for (i). Rs.35,00,000/- + (ii) Rs.1,00,000/- as security with accused no.1, thereafter the accused no.-1 issued mobilization-advance for Rs.1,35,00,000/- to the complainant & as per terms of work order the entire amount of aforesaid mobilization advance for Rs.1,35,00,000/- have been

recovered from Running Account Bills of the complainant by accused no.1.

(vi). That as soon as accused no-1 recovered entire mobilization advance from the Running Account Bills of complainant thereafter soon accusedno.-1 had to refund the bank Guarantees to complainant but in spite of several request made by complainant accusedno-1 in place of refunding the same to complainant, invoked the same illegally.

(vii). That on dated 28.10.2013 illegally accusedno.-3 suddenly invoked both aforesaid Bank Guarantees for Rs.35,00,000/- & Rs.1,00,00,000/- without giving any prior notice to complainant with malafide intention arbitrarily& presented both Bank Guarantees in bank& requested Bank for their encashment in favor of accusedno-1 and then bank informed on dated-01.11.2013 to the complainant requesting complainant to deposit Rs.1,35,00,000/-in the bank within 12 hours. Under the circumstances, the condition of complainant became very critical& alarming and complainant surprised on illegally invoking of both bank guarantees by the accusedno-3 which amounts to fraudulently cheating the complainant& his company with dishonest intention by the accusedno-3.

(viii). That complainant filed Title SuitNo-789/2013 and Hon'ble court of subjudge-6, Patna heard & passed order on 4.01.2014 directing all accused persons including Canara Bank Patna Main Branch

to maintain status quo of the Bank Guarantees till final hearing.

(ix). That accusedno-1 violating said status quo order of the Hon'le court invoked the BG No-25/2012 for Rs. One crore on 10.5.2014& tried to encase it in bank illegally.

(x). That complainant trusted upon accused but accused in lieu of refunding Bank Guarantees to complainant, invoked the same repeatedly illegally, fraudulently & dishonestly & so they have committed offences of Breach of Trust & Cheating.

(xi). That all accused have threatened& charged me illegally to face dare consequences if I would demand refund of the aforesaid Bank Guarantees with sole dishonest intention to digest bank guarantees amount Rs. 1,35,00,000/-by cheating me.

(xii). That all accused have defaced Valuable security-the Bank Guarantees for their illegal gain& thus accusedno-1to 8 have committed offences of Breach of Trust, Cheating and they have defaced Valuable security-the Bank Guarantees.

(xiii). That accused have committed criminal offences punishable U/S 406 IPC, 420 IPC & 477 IPC& so all accused are liable to be prosecuted U/S 406 IPC, 420 IPC&477 IPC.

(xiv). That from facts stated above it has been proved that all accused with a view to cheat complainant invoked bank guarantees illegally in place of refunding same.

(xv). That all accused have criminal antecedents& are indulged in antinational activities.

(xvi). That all accused persons are always indulged & associated with antisocial bad and goondas elements of the locality, society and the country.

You are therefore requested to lodge FIR & institute criminal case against all accused personsno-1to 8 of the offences punishable under section 406 IPC, 420 IPC and 477 of the Indian Panal Code & arrest them soon and take proper stern action against all accused persons& put them behind the bar and oblige.

Thanking You. *Yours faithfully*

(Shailendra Pratap)

Director"

Submissions on behalf of the Petitioners

6. While addressing this Court on behalf of the petitioners, learned counsel submits that the facts disclosed in the written complaint clearly demonstrate that the respondent no.9 was working as a sub-contractor of M/S Axon Construction Pvt. Ltd. and for that purpose he had entered into an agreement for construction work. The company of which the respondent no.9 is a Director had got four works order and he had admittedly received mobilization advance amount of Rs.1,35,00,000/- against the bank guarantees as security. The mobilization advance was provided interest free and the respondent no.9 having signed the works contract, upon getting the

works order had submitted the bank guarantees in terms of the contract. It is the claim of the respondent no.9 that the entire amount of the mobilization advance had been recovered from the running account bills of the complainant by accused no.1 and, therefore, according to the informant the accused no.1 had to return the bank guarantees to the complainant/informant but in spite of several requests made by the informant, the accused no.1, in place of returning the same to the informant invoked the bank guarantees. The informant has termed this invocation of bank guarantee as illegal as according to him it was invoked without giving him any prior notice and this according to him amounts to fraudulent cheating of the complainant and his company.

7. Learned counsel submits that the action of the accused no.1 in the matter of invocation of bank guarantee has been termed as illegal and fraudulent only ornamentally to bring this case within the ambit of a criminal offence which may be clearly found from the narration of the allegations in the written complaint itself. It is submitted that the allegation of fraudulent invocation of the bank guarantee is based on the claim of the petitioner that the entire mobilization advance were recovered from the running account bills of the complainant/informant, however these are the matters of dispute arising out of a purely civil and commercial transaction under

a works contract and only by saying that the entire amount of mobilization advance was recovered from the running account bills of the complainant and, therefore, steps taken by accused no.1 to invoke the bank guarantee was illegal and fraudulent, the respondent no.9 cannot be allowed to give this purely commercial dispute a colour of criminal proceeding.

8. It is further submitted that the written complaint itself mentions about the filing of a Title Suit No.789 of 2013 i.e. much before the lodging of the present F.I.R. It is the allegation of the respondent no.9 that on 04.01.2014 the learned Sub-Judge-VI, Patna heard and passed order directing all the respondents including Canara Bank Patna Main Branch to maintain 'status quo' of the bank guarantees till final hearing, but the accused no.1 violating the status quo order of the learned court invoked the bank guarantee no.25/2012 for rupees one crore on 10.05.2014 and tried to encash it in bank illegally. It is therefore reiterated by the informant in the written complaint that the accused in lieu of returning the bank guarantees to the petitioners invoked the same repeatedly illegally and fraudulently and, therefore, they have committed offence of breach of trust and cheating.

9. Learned counsel has submitted that after issuance of the work order the informant was not carrying on the work as per the

work schedule. During inspection of site it was found that the work was lagging behind schedule at all stages of construction, therefore the informant was cautioned by M/s Axon Construction Pvt. Ltd. and it was pointed out to the informant that the work is not being done as per the work schedule. The company of respondent no.9 responded vide letter dated 21.03.2013 wherein it was agreed that the progress of the work was not going as per the schedule given due to labour scarcity but a promise was made by the company of respondent no.9 that it will increase the labour strength and shall catch the schedule in order to do the work as per the programme.

10. A copy of the letter dated 21.03.2013 written by one M.N. Singh for and on behalf of the company of respondent no.9 has been enclosed as Annexure-2 to the writ application. It is submitted that when the informant failed to complete the work as per the assurance and thereafter suddenly stopped its construction work without there being any pending dispute, the accused tried to contact the respondent no.9 but the calls of M/s Axon Construction Pvt. Ltd. were not attended by respondent no.9, instead, the respondent no.9 filed a Title Suit No.789 of 2013 seeking declaration and mandatory perpetual injunction declaring that the plaintiff has the absolute right and title over the two bank guarantees bearing no.(i) BG 19/2012 for Rs.35,00,000/- and (ii) BG 25/2012 for Rs.1,00,00,000/- and the same

be returned to the plaintiff and a further prayer was made to restrain the M/s Axon Construction Pvt. Ltd. and others from invoking the bank guarantees till the pendency of the suit.

11. It is submitted that the order dated 04.01.2014 passed by the learned Civil Judge, Patna was passed ignoring the fact that there is an arbitration agreement between the parties which was not brought to the notice of the leaned Sub-Judge by the informant. The order of 'status quo' passed by the learned Sub-Judge was challenged in this Hon'ble Court vide CWJC No.10572 of 2015 which was heard and dismissed vide order dated 08.12.2015 but when the matter went to the Hon'ble Supreme Court in S.L.P. (C) No.5430 of 2016, the Hon'ble Supreme Court vide its order dated 29.02.2016 disposed off the S.L.P. with a direction to the learned Sub-Judge-VI, Patna to dispose off the petition filed on behalf of the defendants under Section 8 of the Arbitration and Conciliation Act within a period of six weeks from the date of production/receipt of the copy of the order.

12. Learned counsel has relied upon the judgments of the Hon'ble Supreme Court in the case of **M/S Indian Oil Corporation Vs. NEPC India Ltd. and others reported in AIR 2006 SC 2780** to submit that there is a tendency to convert purely civil dispute into criminal cases and such tendency should be

deprecated. Further relying upon the judgment in the case of **Hridaya Ranjan Prasad Verma Vs. State of Bihar reported in 2000 Cri. LJ 2983 (para 6)** learned counsel submits that it has been held by the Hon'ble Apex Court that "To hold a person guilty of cheating, it is necessary to show he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep a promise subsequently, such a culpable intention right at the beginning i.e. when he made the promise cannot be presumed."

13. Further reliance has been placed on the judgment of the Hon'ble Apex Court in the case of **Hotline Teletubes and Component Ltd. Vs. State of Bihar reported in 2005 SCC (Cr,) 1515** to submit that in the offences of criminal breach of trust and cheating, it is essential requirement is that since the very inception of contract between the parties, there must be an intention to cheat. The Hon'ble Apex Court has held where the case appears to be a purely of civil nature and no criminal offence is disclosed the prosecution being gross abuse of process of law is liable to be quashed. Learned counsel has relied upon the judgments of the Hon'ble Supreme Court in the case of **Anil Mahajan Vs. Bhor Industries reported in 2006 1 SCC (Cr.). 746** and in the case of **State of Haryana and Ors. Vs. Bhajan Lal and others reported in 1992 Suppl. 1 SCC 335** wherein the Hon'ble Apex Court has laid down principles on which the Court can

quash the criminal proceeding. Relevant paragraph 102 has been referred to in course of hearing. Lastly learned counsel has relied upon the judgments of the Hon'ble Apex Court in the case of **Inder Mohan Goswami & Anr. Vs. State of Uttaranchal & Ors.** reported in **(2007) 12 SCC 1** and in the case of **Prashant Bharti Vs. State of NCT of Delhi** reported in **(2013) 9 SCC 293.**

14. It is also submitted that the F.I.R. was lodged maliciously by the informant just to escape from his liability which he owes towards M/S Axon Construction Pvt. Ltd. It is submitted that the disputes between the parties were subject to an on-going Arbitration Proceeding when the F.I.R. was lodged without disclosing the fact that an arbitration proceeding had already begun by that time. The petitioners also submit that they are not even remotely connected with M/S Axon Construction Pvt. Ltd. It is submitted that though the F.I.R. was lodged in the year 2014, but the petitioners have no knowledge about such lodgment of F.I.R. as they all reside in Chennai. It is only recently when the petitioners were taken by surprise finding that some police personnel had approached them for their arrest then they came to know about the present case. It is also submitted that the even though the F.I.R. was lodged in the year 2014, till date no charge-sheet has been filed.

15. Learned counsel for the petitioners has also pointed

out from the records of Cr.W.J.C. No.470 of 2016 that through supplementary affidavit filed on behalf of the petitioner it has been brought on record that dispute between the parties was referred to the sole Arbitrator namely Hon'ble Justice P. Shanmugam, a retired Judge of Madras High Court and the Arbitrator had decided the said issue between the parties and awarded a sum of Rs.3,14,89,868/- along with cost of Rs.4,87,683/- in favour of the petitioners and against the informant.

16. Referring to the judgment of this Hon'ble Court in CWJC No.2027 of 2011 (M/s Reliance Industries Ltd. Vs. Nilu Rai) learned counsel submits that in the said case this Court has held that if Arbitration Clause is there in the agreement and the dispute can be resolved through the mode of Arbitration and in case of petition under Section 8 of the Arbitration and Conciliation Act, 1996 is filed, it would be only the arbitration proceeding which would be maintainable. A complete copy of the award dated 07.09.2016 passed by the Hon'ble Mr. Justice (Retd.) P. Shanmugam has been brought on record.

17. From the materials available on the record particularly a copy of the order dated 19.10.2016 passed in Civil Miscellaneous Jurisdiction Case No.1156 of 2016 by the learned Single Judge of this Court which is attached as Annexure-C to the

counter affidavit of respondent no.9 in Cr.WJC No.470 of 2016 it has been pointed out that after disposal of S.L.P by the Hon'ble Supreme Court, the learned Sub-Judge, Patna passed an order dated 04.06.2016 directing the company of the informant to appear before the Arbitrator at Chennai, but the said order was challenged before this Court in the aforesaid Civil Miscellaneous Jurisdiction Case No.1156 of 2016 which was heard on 19.10.2016 and on that day while issuing notice to respondent nos.1 to 9 the operation of the order dated 04.06.2016 was stayed. It is submitted that the materials available on the record shows that even before 19.10.2016, the learned Arbitrator had already disposed of the arbitration case taking note of the non-appearance of the company of the informant despite opportunities granted to them to appear and contest the arbitration proceeding. The award of the learned Arbitrator also shows that due to failure of the company of the informant to complete the work new contractors were engaged on 14.06.2013, subsequently the company of the informant had filed two civil suits namely Title Suit No.789 of 2013 and Money Suit No.1171 of 2014 in February, 2014. In those two suits the company of these petitioners had filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 on 07.03.2014 and since there was no interim order against arbitration proceeding, by invoking clause 28 of the agreement, the matter was referred by the claimant to the

Arbitrator. The arbitration had commenced with notice to the parties dated 24.03.2014.

Submissions of the Informant

18. By filing a response the respondent no.9 has contested the present writ application. Learned senior counsel representing the respondent no.9 submits that the M/S Axon Construction Pvt. Ltd. and M/s R.K.M. Powergen Ltd. both are sister concern and so far as allegations contained in the F.I.R. are concerned same have been found true in course of investigation. In paragraph 4 of the counter affidavit filed on behalf of the respondent no.9 it is stated that presently Sri Kameshwar Sharma, Sub-Inspector Of police has been investigating the case. However, it is also stated that the Deputy Superintendent of Police has supervised the case and it has been found true and the same has been confirmed by the S.P., City, Patna. In course of argument, however it has been informed to this Court that the investigation of the case is still going on.

Stand of respondent nos.1 to 5

19. A counter affidavit has also been filed on behalf of the respondent nos.1 to 5 in which it is stated that after lodging of the F.I.R. matter was handed over to the named A.S.I., but after their transfer Sri Kameshwar Sharma was deputed for investigation of the case and he is the present investigating officer (I.O.). He had received

warrant of arrest against all the accused persons and had gone to Chennai to execute warrant of arrest where he had arrested the accused no. 1 in her office with the help of local police of Teynampet P.S. Chennai, but she was released by the police inspector of the local police station. In paragraph 11 of the counter affidavit it is stated that the police is taking steps to conclude the investigation of the case within a reasonable time.

CONSIDERATION

20. Having heard learned counsel for the parties and on perusal of the records, this Court finds that the entire written complaint giving rise to the present F.I.R. only shows that according to the informant he was carrying the contract work for which accused no.1 and 2 had entered into sub-contract agreement for construction work for the packages, four work orders were issued which are duly referred in the written complaint and what is apparent from the uncontroverted materials available on the record is that when the company of the informant was not able to match the construction work with the work schedule, M/S Axon Construction Pvt. Ltd. was pursuing with the company of the informant to complete the work. Annexure-‘2’ is a document which has been enclosed with the writ application and has not been controverted by the respondent no.9, therefore the contents of Annexure-‘2’ which is a letter written by and

on behalf of the company of the informant are noted herein for a ready reference:-

" To

The Deputy General Manager (e)

ACPL Uchpinda.

Sir,

As per present condition we agree that the progress of CWPH-I is not going as per schedule given due to labour scarcity in Holi Festival. Further I promise you that we will increase the labour strength to 150 (minimum) to catch the schedule and do the work within promished time. We will try to prepond the target date to 30th April as per your programme. Once again assure your office that we will complete all CWPH civil work with all specification as per drawing within May 5th 2013.

Thanking you *Yours Faithfully*

(M.N. Singh)

Sir,

As per above statement by Mr. M.N. Singh, it is understood that he given promise by this company that he will finish the complete work of CW Pump House by target deadline date of May 5th-2013".

21. This is the beginning of the dispute between the parties. The Company of the informant was allegedly not able to complete the work, dispute seems to have arisen and the company of the informant filed Title Suit bearing No.789 of 2013. The following reliefs were prayed in the title suit:-

"(a) A decree and order may kindly be passed in favour of the plaintiff declaring that the plaintiff has absolute right and good title on the Bank Guarantees details furnished in schedule-1(i) & (ii) of this plaint.

(b). An order may kindly be passed directing the defendants No-1 to 7 to refund or to close the Bank Guarantees, release and return back the Bank Guarantees to the plaintiff the details furnished in schedule-1 (i) & (ii) at the foot of this plaint.

(c). That pending the hearing and final disposal of the suit, defendants no-1 to 7 and their servants & agents may be restrained by an order of injunction of this Hon'ble Court from dealing with and invoking Bank Guarantees details furnished in schedule -1 (i) & (ii) of this suit and further defendant no.-10/bank be restrained by an order injunction from honoring the illegal invocation of the aforesaid Bank Guarantees in case /if it is invoked by the defendants no 1 to 7 illegally till the pendency of this suit here.

(d). Such other relief/reliefs may be granted to the plaintiff as the nature and circumstances of the case may require and as this Hon'ble court may deem fit and proper in the ends of justice.

(e). Attachment before judgment.

(f). Receiver may be appointed."

22. It is also an admitted position that interim order of status quo was passed on 04.01.2014 which was challenged up to the Hon'ble Apex Court wherein taking note of the submissions made on behalf of the present petitioners Hon'ble Apex Court directed the learned Sub-Judge-VI, Patna to decide the application made under Section 8 of the Arbitration Act in T.S.No.789 of 2013 and the injunction application on their respective merit in accordance with law after affording an opportunity to the parties preferably within six weeks from the date of production of the order.

23. During this period, the company of these petitioners had invoked clause 28 of the agreement and Hon'ble Justice P. Shanmugam (Retd.) of the Madras High Court had proceeded with the arbitration matter, notice was issued to the company of the informant, but the company of the informant wrote to the learned Arbitrator not to proceed with the arbitration matter, this Court finds that there was no order of restraint by any court of competent jurisdiction against initiation of Arbitration Proceeding. The learned Arbitrator took note of the fact that even after receipt of notice instead of putting appearance the informant had been asking the learned Arbitrator not to proceed with the matter. As the arbitration proceeding continued after considering Section 8 application under Arbitration and Conciliation Act, 1996, even the learned Sub-Judge-

VI, Patna passed an order directing the company of the informant to participate in the on-going arbitration proceeding. Once the learned Sub-Judge passed the order dated 04.06.2016 under Section 8 of the Arbitration and Conciliation Act, 1996, the company of the informant was obliged to participate in the arbitration proceeding, but instead of participating in the arbitration proceeding the informant allowed the arbitration to proceed and final award to be passed on 07.09.2016. Ultimately when Civil Miscellaneous Case No.1156 of 2016 filed by the company of the informant challenging the order dated 04.06.2016 was taken up for final disposal, the learned co-ordinate Bench of this Court dismissed the same with a cost of Rs.20,000/- to be paid by the company of the informant to M/S Axon Construction Pvt. Ltd. On the conduct of the company of the informant, the learned co-ordinate Bench in paragraph 28 of the judgment dated 21.06.2018 (wrongly shown as 20.06.2018) recorded as under:-

> *"28. Before I part with this judgment, I am constrained to comment upon the conduct of the petitioner. The petitioner asserted in his main application that the entire document of work order containing the arbitration agreement which bore the signature of the petitioner's authorized representative as produced by the respondent before the Court below was forged and fabricated. The plea has been taken on the basis of location of seals and*

signatures of the Notary Public at different places on the certified copy of the agreement. This plea has been deliberately taken to mislead this Court, since the petitioner, in Court's view, deliberately suppressed the fact that an FIR was registered by the company against the respondents, to which the said work orders were annexed as annexures. The suppression by the petitioner, in the Court's opinion, is deliberate. Further, the petitioner in his rejoinder to the application filed under Section 8(1) of the Act had not disputed the existence of Clause 28 of the work orders, rather a plea was taken that Clause 28 was for settlement of dispute between the parties and the same had no concern at all with the bank guarantee no.25/2012 for sum of Rs.1,00,00000/- and bank guarantee no.19/2012 for sum of Rs.35,00,000/-."

24. The arbitration award mentions that the contracts of the company of the informant were terminated vide letter dated 11.07.2013 for the alleged breach of term and of the contract and till then only Rupees twenty lacs were adjusted against the running account bills and, therefore, the company of the informant was liable to refund the mobilization advance amount. It is apparent from the materials available on the record which are uncontroverted materials that the arbitration proceeding had begun on 19.03.2014, the company

of the informant had raised its objection before the Arbitrator on 24.05.2014 and on 07.07.2014, but those objections were rejected by the learned Arbitrator vide order dated 26.07.2014. It is at this stage when the written complaint was lodged on 24.07.2014 when the objections of the company of the informant before the learned Arbitrator were being heard and disposed off.

25. This Court finds that whatever be the allegations and counter allegations and claims those are all with regard to the breach of terms and conditions of the contract and both the parties had come out with their case in the Title Suit and the arbitration proceeding which were going on from much before lodging of the present F.I.R. In the written complaint the informant has claimed that the entire mobilization advance has already been adjusted whereas it is the stand of M/s Axon Construction Pvt. Ltd that the informant's company had submitted a running bills of Rupees twenty lacs and, therefore, the bank guarantee was to be invoked in order to get back the mobilization advance after termination of contract. Without going into the merits of the contentions of the parties as regards their respective claims, this Court can easily come to a conclusion that the nature of the allegations are in the nature of a purely civil and commercial dispute and the same cannot be allowed to be converted in a criminal proceeding.

26. Further the allegation of the informant is that after the ‘status-quo’ order was passed on 04.01.2014 the accused persons attempted to invoke the bank guarantee in violation of the order of this Court, again this Court finds that there is a specific provision under the Code of Civil Procedure in terms of Order XXXIX Rule 2-A which is to be invoked for such allegations and those allegations may be tested by the Court which had granted the order of status quo after following the procedures established under law by allowing the parties to adduce their respective evidences. On this mere allegation, again the criminal proceeding cannot be launched.

27. This Court has noted hereinabove the various judgments on which reliance has been placed on behalf of the petitioners. Taking note of the ratio of those judgments and what has been held in the case of **Inder Mohan Goswami & Anr. Vs. State of Uttaranchal & Ors.** reported in **(2007) 12 SCC 1** in paragraph 23 and 37 which read 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 Cr.P.C. 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.

37. In Indian Oil Corpn. v. NEPC India Ltd., this court again cautioned about a growing tendency in business circles to convert purely civil disputes into criminal cases. The court noticed the prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. The court further observed that _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."

this Court finds that the ratio of those judgments would be fully applicable in the facts and circumstances of the present case. This Court sitting in its writ jurisdiction under Article 226 of the Constitution of India, at this stage, has only considered the contentions of the petitioners as to whether without adding or subtracting anything out of written complaint the F.I.R. may be sustained. This Court finds that no case at all is made out under Sections 406 and 420 of the Indian Penal Code. None of the ingredients of those Sections are present in the facts of this case.

28. For the reasons mentioned hereinabove, this Court is of the considered opinion that the present F.I.R. has been lodged at Patna against these petitioners only in order to harass them as they are

senior officers of the company M/S R.K.M. Powergen Private Limited and M/S Axon Construction Pvt. Ltd., the written complaint does not mention even remotely the act and omission of the accused persons-petitioners which may constitute a criminal offence. It is a purely civil and commercial disputes between the parties. In the opinion of this Court, the manner in which the investigating agency has proceeded to lodge the F.I.R. which does not disclose commission of a cognizable offence and in the name of investigation went up to Chennai to arrest the accused in the nature of the allegation compels this Court to say that the respondent no.9 being a local person got the F.I.R. lodged at Patna and have been able to pursue with the police authorities this matter so far to compel the petitioners to settle their purely civil claims and to get rid of his liabilities under the arbitration award which is nothing but sheer harassment to these petitioners. This Court would therefore have no hesitation in recording that on the face of the materials available on the record which are all uncontroverted materials and successfully passed the four steps test laid down by the Hon'ble Supreme Court in the case of **Prashant Bharti (supra)** and the ratio of the judgment of the Hon'ble Apex Court in the case of Inder Mohan Goswami (supra), Indian Oil Corporation (supra) and other judgments referred here-in-above , the present F.I.R. is liable to be quashed and this malafide prosecution has to be brought to an end to otherwise secure the ends of justice. The F.I.R. being Sri Krishnapuri P.S. Case No.263 of 2014 under Sections 406 and 420 of the Indian Penal Code is hereby quashed.

29. While parting with this brief, this court would make it clear that no part of the observations of this Court in the present order shall be construed as an opinion on merit of the claim of the parties and those shall not be considered in the civil disputes and in the matters arising out of arbitration proceeding between the parties.

30. Both the writ applications are allowed accordingly.

(Rajeev Ranjan Prasad, J)

Arvind/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	27.08.2018
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