IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No. 2790 of 2015

Arising Out of Complaint Case No.-3314 (C) Year-2011 Thana- PATNA COMPLAINT CASE District- Patna

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M/s Xerox India Limited, a company duly incorporated under the Companies Act, 1956 and having its registered office at 5th Floor, Vatika Business Park, Block One, Sector -49, Sahna Road, P.S. Sadar Gurgaon, Haryana and having one of its office at Modipur, Barilly Road, Rampur - 244901 (U.P.) Formely known as M/s Modi Xerox Ltd. Modipur, P.S. Shahzad Nagar, Rampur – 244901 (U.P.) through its Managing Director Mr. Rajat Jain.

... ... Petitioner/s

Versus

1. The State of Bihar
2. Bihar State Minorities Financial Corporation Ltd. at Haj Bhawan 34, Harding Road, P.S- Sachiwalay, District- Patna through its authorized staff namely Md. Tanveer Son of Late Md. Sayeed, Legal Assistant of the Corporation.

... ... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Chitranjan Kumar Sinha, Sr. Advocate with Ms. Soni Srivastava, Advocate

For the State : Mr. Rana Randhir Singh, APP

For the OP No. 2 : Mr. Deepak Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH

ORAL JUDGMENT

Date : 17-04-2019

Heard learned counsel for the petitioner; learned APP for the State and learned counsel for the opposite party no. 2.

2. The petitioner has moved the Court under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code') for the following relief:

> *"That this is an application filed on behalf of the petitioner seeking quashing of order dated 31.01.2013 whereby and whereunder cognizance has been taken against the petitioners u/s 406, 420/34 IPC by Sri Ashutosh Khetan, Judicial Magistrate, Ist Class, Patna arising out of Protest cum complaint case no. 3314 (C) 2011."*

3. The allegation against the petitioner is that despite having taken the entire money as full and final payment for 37 photocopying machines, only 24 were delivered and the rest 13 remained undelivered. Thus, the amount of Rs. 11,70,000/-, which the petitioner company had retained, was neither returned to the opposite party no. 2 nor the machines delivered.

4. Learned counsel for the petitioner submitted that it is a commercial transaction for which there should not be any criminal prosecution. It was further submitted that non-delivery of the machines was on account of some technical complication and, thus, the petitioner solely cannot be held responsible. However, on a direct query of the Court, as to how public money amounting to Rs. 11,70,000/- could be retained by the petitioner company and if

for any reason, it was not in a position to deliver, the only way out was to return the money which was lying with the petitioner company for delivery of the machines, which admittedly has not been done, learned counsel could not give any reply. Learned counsel while assailing the order impugned submitted that in the same, the Court has relied upon the materials produced during investigation in the initial FIR lodged by the opposite party no. 2 and the chargesheet submitted against one of the co-accused while taking cognizance on the Protest-cum-Complaint Petition filed by the opposite party no. 2. It was submitted that the same is not permissible in view of the decision of a Bench of this Court in **Ramkumar Pandey Vs. State** reported as **1979 BBCJ 293**, the relevant being at paragraphs no. 5 and 6.

5. Learned APP and learned counsel for the opposite party no. 2 submitted that the money was from public exchequer and admittedly when the machines have not been given, the petitioner company could not have retained the amount which clearly shows their *mala fide* and criminal intent to cause undue loss to the opposite party no. 2 and undue advantage to the petitioner, which is a purely criminal offence. It was submitted that by retaining such huge amount, the petitioner company obviously used it for its own business interest and on the one hand

has gained from that whereas on the other hand, the opposite party no. 2, which was requiring the machines had not only suffered monetary loss but its work, which was welfare-oriented and in public interest, also suffered due to non-delivery of the machines by the petitioner company.

6. Having considered the facts and circumstances of the case and submissions of learned counsel for the parties, the Court finds no merit in the present application.

7. The contention of learned counsel for the petitioner with regard to the issue being civil in nature as it is relates to commercial transaction, at first instance, appears to be attractive. However, on deeper scrutiny, it transpires that such stand is totally erroneous in the present facts and circumstances of the case.

8. The Court would observe that based on a particular set of facts there may be both civil and criminal remedies available to the person aggrieved. Only because there may be civil remedy available, no criminal proceeding would lie, is an incorrect proposition of law. In this context, the Court would refer to the judgment of the Hon'ble Supreme Court in **Vijayander Kumar v. State of Rajasthan** reported as **(2014) 3 SCC 389**, where at paragraphs no. 10, 11 and 12, it has been held as under:

> *"10. Contra the submission advanced on behalf of the appellants, the learned counsel for*

respondent 2 has submitted that there is no merit in the contention advanced on behalf of the appellants that the FIR discloses only a civil case or that there is no allegation or averment making out a criminal offence. For that purpose he relied upon the judgment of the High Court rendered in the facts of this very case Vijayander Kumar v. State of Rajasthan, already noted earlier.

11. No doubt, the views of the High Court in respect of averments and allegations in the FIR were in the context of a prayer to quash the FIR itself but in the facts of this case those findings and observations are still relevant and they do not support the contentions on behalf of the appellants. At the present stage when the informant and witnesses have supported the allegations made in the FIR, it would not be proper for this Court to evaluate the merit of the allegations on the basis of documents annexed with the memo of appeal. Such materials can be produced by the appellants in their defence in accordance with law for due consideration at appropriate stage.

12. The learned counsel for the respondents is correct in contending that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may also be available to the informant/complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint disclose a criminal offence or not. This proposition is supported by several judgments of this Court as noted in para 16 of the judgment in Ravindra Kumar Madhanlal Goenka v. Rugmini Ram Raghav Spinners (P) Ltd."

9. With regard to reliance placed by learned counsel for the petitioner on the judgment in **Ramkumar Pandey** (*supra*), the Court would only indicate that on facts, the case is distinguishable. In **Ramkumar Pandey** (*supra*), the Court below

had taken cognizance referring to and relying upon the statement of the witnesses in the police investigation while dealing with the complaint. In the present case, perusal of the order impugned clearly demonstrates that only the background of the case has been mentioned, inasmuch as, it has been stated what had transpired earlier, that is, lodging of an FIR on which after investigation, the police submitted final form against co-accused, including the petitioner and chargesheet only against one co-accused Sanjay Nand Keolyar, and in that background, it was written by the Court in the order regarding materials on record, including the original FIR and chargesheet of the other case, SA of complainant, deposition of Shankar Prasad besides various documents. Therefore, in the next paragraph, it has been recorded that on the basis of materials produced, *prima facie*, case was made out against all named four persons under various sections of the Indian Penal Code. It is obvious that only for the purpose of recording the background, the FIR of the criminal case and the investigation done by the police have been mentioned, but not a single portion of the police investigation has been mentioned in the order, which clearly indicates that the SA of the complainant and deposition of the witnesses as well as documents which have been annexed along with the complaint case, have formed the basis for the Court below to take cognizance against the petitioner and other co-accused. Thus, in the considered opinion of the Court, mere reference to the FIR of the police case and the report submitted by the police in the said case would not amount to the Court having relied upon those materials while passing the impugned order. At the cost of repetition, the Court finds that there was SA of the complainant, deposition of a witness and various documents which were annexed to the complaint petition and those were the materials on which cognizance has been taken and mere reference to the background/sequence of facts leading to filing of the complaint would not prove fatal, either for the prosecution or for the order impugned by which cognizance has been taken. Thus, the principle laid down in **Ramkumar Pandey** (*supra*) cannot be applied to the facts and circumstances of the present case by taking an extremely narrow view without appreciating the essence of the order impugned.

10. As has rightly been submitted by learned APP and learned counsel for the opposite party no. 2, the money came from public exchequer. Further, it was meant for the purpose of supply of machines which were required in the work of the opposite party no. 2. Thus, by such act of the petitioner company, both public money as well as public cause suffered, for neither the money has

been returned nor the machines supplied. The matter becomes worse, since for the last more than 20 years, the petitioner company has not bothered to even return the principal amount, what to talk about the interest for the period.

11. At this juncture, on a specific query of the Court to learned counsel for the petitioner company as to whether it was ready to return the amount with fair/reasonable interest, the stand is that they are ready to return the principal. This further confirms the doubt of the Court of the petitioner company lacking *bona fide* as the intention from the beginning was to cheat and after more than 20 years, the stand is that they are ready to pay only the principal amount which in any view of the matter, it is bound to pay, and not having supplied the machines, it cannot take the stand that it would not pay interest, for the reason that the money was lying with it and it has earned profit from that money, but when it comes to returning the money, which rightfully belongs to the opposite party no. 2, it wants to return only the principal and not compensate the delay of more than 20 years in returning the money, which was used by the petitioner company for deriving benefit and profit, is nothing short of fraud and cheating on the part of the petitioner company.

12. For reasons aforesaid, the application stands dismissed.

13. Further, in exercise of power under Section 482 of the Code, for securing the ends of justice, the Court below is directed to expedite trial and conclude the same within 6 months.

(Ahsanuddin Amanullah, J.)

P. Kumar

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