

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.04.2019

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

CRL.O.P.No. 6860 of 2019
and
Crl.M.P.No.3774 of 2019

Saifuddin Bharmal

S/o. Lukmanji Yusuf Ali,

Rep by its Managing Director,

M/s.Lookman Electroplast Industries Limited,

Having Office at No.15, Old No.9,

1st floor, 2nd Street Extn.,

CIT Nagar West, Chennai - 35.

Presently residing at

No.12, 3rd Main Road,

Seethammal Colony,

Alwarpet Ganesh Avenue,

Chennai - 18

... Petitioner

Vs.

1. The Inspector of Police,
Central Crime Branch,
Team-I, Vepery,
Chennai - 7.

2. Chandran
The Additional Deputy Commissioner
of Police,
Traffic Planning,
Greater Chennai Police,
Vepery, Chennai - 7.

3. The Joint Commissioner of Police,
Traffic South, Chennai.

4. The Superintendent of Police,
CBCID, Egmore, Chennai.
(4th respondent impleaded as per order
in Crl.M.P.3987 OF 2019 in Crl.O.P.
6860 of 2019 dt. 18.03.2019)

... Respondents

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C. praying to call for the records in Crime No.70 of 2019, on the file of the Inspector of Police CCB Team-I, quash the same.

For Petitioner : Mr. ARL.Sundaresan
Senior Counsel
For Mr.P.Solomon Trancis

For Respondents: Mr.Aravind Pandian
Additional Advocate General
Assisted by Mr.Mohamed Riyaz
Additional Public Prosecutor.

O R D E R

This petition has been filed to quash the FIR registered in Crime No.17 of 2019 registered for the offences under Section 406 and 420 of IPC, on the file of the first respondent.

2. The case of the prosecution is that a tender was floated by the second respondent for installation of CCTVs at 40 locations across the entire Chennai City. The petitioner's company M/s. Lookman Electroplast Industries Limited was declared as L1 and by a purchase order dated 12.01.2010, the work was awarded to the petitioner's company and an agreement was entered between them. As per the terms and conditions of the agreement, the work has to be completed within a period of 12 weeks. It also has various clauses for rectification of defects and payment to various authorities. Thereafter by a communication dated 05.03.2010, the police department requested the petitioner not to proceed with the work and later by communication dated 25.01.2011, directed to execute the work. Further alleged that even after the passage of 9 years, not even a few CCTVs are working. The petitioner obtained 90% of the tender value viz., Rs.2,69,80,740/-. When the Deputy Commissioner asked to commence the work, the petitioner raised various frivolous questions and not proceeded further. Further alleged that the petitioner's company is attributing the floods and cyclone Vardha as the reason for non-execution of the work. In this regard, the third respondent convened a meeting and decided to issue show cause notice to the petitioner. On receipt of show cause notice dated 31.01.2018, the petitioner replied with some frivolous reasons on 09.02.2019. Therefore, the petitioner caused loss to the public exchequer to the tune of Rs.2,69,80,740/-. Hence the complaint.

3. The learned Senior Counsel appearing for the petitioner submitted that the petitioner involved in manufacture, sale and

installation of security devices that includes cameras and CCTVs. The petitioner is the pioneer in the field having experience of over 30 years. They have been awarded the work to install CCTVs at 40 locations around Chennai City, as per the agreement dated 29.01.2010. When the petitioner stated the work, the second respondent instructed to stop work, by the communication dated 05.03.2010 and later requested to commence the work by the communication dated 21.01.2011. Once again the second respondent asked the petitioner to stop the work as the project of installation of cameras at 40 locations were to be merged with the Integrated Traffic Management System. As such the work again stopped, since the Integrated Traffic Management System would not come out, again commenced the work by letter dated 04.01.2013. The second respondent also suggested to install CCTVs in three new locations.

3.1. After several communications between them, the petitioner's company intimated the second respondent about the completion of entire work by communication dated 26.07.2014 and requested for release of payment. In the mean while due to floods in the month of December 2015, some of the equipments were damaged. Therefore, the petitioner's company technicians were called to assess the damage. Again due to Vartha cyclone more equipments were damaged and at the request of the Joint Commissioner of Police inspection made and assessed the damage. When the petitioner was waiting for balance payment, received show cause notice dated 31.01.2019, from the second respondent and it was properly replied by the reply notice dated 09.02.2019. The petitioner categorically stated that the entire work has been completed and that if at all any damages caused, it was not due to the petitioner's fault. In spite of the reply, the second respondent being a police, registered a case for the offences under Sections 406 and 420 of IPC. He further submitted that the action of the second respondent is arbitrary and contrary to the facts and materials available on records. In fact the petitioner completed the entire work as entrusted by the second respondent and it is completely civil in nature and if any dispute between them, it is completely civil in nature.

3.2. He further submitted that in the agreement there is an Arbitration clause. Accordingly, any dispute arises between them, it has to go before Arbitration. At any cost the offence would not attract as against the petitioner, as such the learned Senior Counsel sought for quashment of FIR. He also relied upon the following judgments.

- i. Hon'ble Supreme Court of India - Appeal (Crl.) 1072 of 2001 dated 18.10.2001 - S.W.Palanitkar and ors Vs. State of Bihar and Anr
- ii. Madras High Court - Crl.O.P.No. 20184 of 2015 dated 04.03.2016 - Suresh babu Vs. The Inspector of Police

iii.Hon'ble Supreme Court of India - Appeal (Crl.) 1443 of 2007 dated 12.10.2007 - All Cargo Movers(I) Pvt. Ltd., & others

iv.(2018)13 SCC 374 - Medmeme, LLC and others Vs. Ihorse BPO Solutions Pvt. Ltd.

4. Per contra the learned Additional Advocate General appearing on behalf of the respondents submitted that the case has been registered as against the petitioner for the offence under Section 406 and 420 of IPC. The petitioner is having entered into agreement for a work contract to install CCTV at 40 locations across Chennai City and thereafter he failed to even commence the work to install CCTV cameras. Even after receipt of Rs.2,69,80,740/-, the petitioner did even commence the work and did not even install any CCTV as agreed by them, thereby they committed offence and as such the second respondent rightly registered the case for the offences under Sections 406 and 420 of IPC.

4.1. He further submitted that as per the agreement dated 29.01.2010, the petitioner undertakes to perform the installation of CCTV within a period of 12 weeks from the date of delivery of materials from the purchasers. Further the supplier shall extend a warranty for the goods supplied, for a period of not more than three years from the date of commissioning, against all manufacturing defects. Even after completion of warranty period of three years, the supplier agreed to extend the maintenance for installed systems for the further period of two years based upon an Annual Maintenance Contract.

4.2. The learned Additional Advocate General further submitted that by the communication dated 30.08.2012, the second respondent stated that the installation process and commissioning of 40 CCTVs is pending as this project has to be incorporated with Integrated Traffic Management System and further pointed out that some discrepancies have been noticed in the equipments supplied on hand and there is shortfall in some monitor and some excess in other items. Therefore, the installation has not been done and the most of the expenditure would not have taken place and requested the petitioner to handover the equipments, which are shortfall. Again by communication dated 04.01.2013, the second respondent requested the petitioner to install the above 40 CCTVs system for other three places instead of 40 junctions as already proposed in the tender as well as the agreement.

4.3. He further submitted that by communication dated 26.06.2013, the second respondent again requested the petitioner to submit completion report with regard to 40 CCTVs systems functioning at 40 junctions. Further informed that the time has

to be expired and requested to submit the completion report. At last, on 27.07.2013, the second respondent sent communication that the petitioner did not abide to the terms and conditions of the tender agreement and issued final notice, thereby complete the work within a period of one month from the date of the receipt of that notice, failing which appropriate legal and criminal action will be initiated as against the petitioner. Finally the second respondent issued show cause notice dated 30.01.2019 call upon the petitioner as to why legal action should not be initiated as against the petitioner, for the reason that the petitioner acted with a malicious and criminal intent to cheat the public exchequer and never really intend to honour the agreement that they willfully entered into. Therefore, the petitioner committed the offences under Sections 406 and 420 of IPC. Further he submitted that it is only a FIR and it cannot be quashed on its threshold. The investigation may go on to unearth and grab the offence committed by the petitioner. Therefore, he prayed for dismissal of the quash petition.

5. Heard Mr.ARL.Sundaresan, learned Senior Counsel appearing for the petitioner, Mr.Aravind Pandian, learned Additional Advocate General appearing for the respondent.

6. The petitioner is the sole accused and the case has been registered in Crime No.70 of 2019, for the offences under Sections 406 and 420 of IPC. The crux of the allegation is that the petitioner was awarded with work contract to install CCTVs on 40 locations in and around Chennai City. The work has to be completed within a period of 12 weeks from the date of receiving delivered materials from the purchaser. Even after receipt of 90% of tender value of Rs.2,69,80,740/-, the petitioner failed to install the CCTVs as agreed by them, thereby the petitioner caused loss to the public exchequer to the said tune.

7. Admittedly, there is an agreement between the petitioner and the second respondent dated 29.01.2010 for installation of CCTVs at 40 locations across Chennai City. As per the agreement, the petitioner undertakes to perform the installation of all the delivered items within a period of 12 weeks from the date of receiving the delivered materials from the second respondent. If any dispute between the petitioner and the second respondent, it shall be settled by Arbitration in accordance with the provisions of the Indian Arbitration Act 1996. For convenience, the relevant clause extracted here under :-

"27. All disputes, difference and/or claims arising of this agreement whether during its subsistence or thereafter shall be settled by the Aribitration in

accordance with the provisions of the Indian Arbitration Act 1996 or any statutory amendments thereof and shall be referred to the Sole Arbitration of an Arbitration nominated by the Addl. Commissioner of Police. The award given by such Arbitration shall be final and binding on all parties to this agreement. It is a term of this agreement that in the event of such an arbitration to whom the matter has been referred to originally dies or being unable or unwilling to act for any reason, Addl. Commissioner of Police at the time of such death of the arbitrator or his inability or unwillingness to act as arbitrator, shall appoint another person to act as arbitrator. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. The venue of arbitration proceedings shall be Chennai, office of the Addl. Commissioner of Police."

8. On perusal of documents produced by the petitioner, it is seen that on 12.01.2010, the purchase order passed in favour of the petitioner and agreement executed on 29.01.2010. The communication dated 05.03.2010, from the second respondent, shows that the petitioner was requested to stop further proceedings of the tender for the supply, installation, commissioning and maintenance of 40 CCTVs systems in Chennai City until further orders. By communication dated 25.01.2011, the second respondent requested the petitioner to supply the equipments and commence the installation process of the 40 CCTV system. It is also seen from the letter of the petitioner dated 10.09.2012, the request of the second respondent to hand over certain items to Traffic Inspector for ITMS project, is not as per the scope of work either as per the tender or PO or their agreement.

9. It is also seen from the communication of the second respondent dated 30.08.2012, that "Some discrepancies have been noticed in the equipments supplied on hand is given in the enclosed list, there is shortfall in certain items like monitor and there is some excess in other items." It shows that the petitioner supplied equipments pertaining to 40 CCTVs systems to install CCTVs at 40 junctions. By communication dated 04.01.2013, the second respondent requested the petitioner to install CCTV at three other places instead of 40 junctions as already proposed in the tender as well as the agreement. By

another communication dated 26.06.2013, the second respondent requested the petitioner to submit completion report with regard to installation of CCTVs at 40 junctions. It shows that the petitioner have started installation of 40 CCTVs at 40 junctions.

10. There are so many communication between the second respondent and the petitioner with regard to the installation of CCTVs in and around Chennai. It is seen from the communication dated 13.08.2013, the petitioner supplied equipments pertaining to the installation of 40 CCTVs and received a sum of Rs.2,69,80,740/- equivalent to 90% of the value against the total contract value. It is also evident from the memorandum dated 29.11.2017, requested the Deputy Commissioner of Police to send the inspection report of the 40 CCTV cameras existing in the 40 various junctions installed by the petitioner and send the estimation cost due to damage caused by force majeure issues Chennai flood on 1st December 2015 and Vardah Cyclone on 12th December 2016. It shows that the petitioner completed their installation of CCTV cameras at the traffic junctions and thereafter due to cyclone, some of the instruments were damaged. Even then, the second respondent caused show cause notice to the petitioner on 31.01.2019 and same was properly replied by the petitioner by the reply notice dated 09.02.2019. Therefore, the offences under Sections 406 of 420 of IPC would not attract as against the petitioner. There is no ingredients to attract the offence as against the petitioner.

11. That apart, even assuming that the petitioner did not execute the work as agreed by them, that too after receipt of 90% of the contract amount, there is a specific clause in the agreement as stated supra, the dispute shall be settled by the Arbitration in accordance with the provisions of the Indian Arbitration Act 1996. It is seen that there are some dispute in respect of installation of CCTV Camera at 40 junctions in and around the Chennai City, between the petitioner and the second respondent. It is also seen that the petitioner installed 40 CCTVs at various places and thereafter, due to cyclone, it got damaged for which, the second respondent also called for cost of the damages. It is also seen from the photographs produced by the petitioner in all over Chennai City, the CCTV cameras installed by the petitioner and all are in good condition.

12. Further, in respect of another work allotted to the petitioner, the performance report issued by the Deputy Inspector General of Police (Technical Services) dated 16.08.2018 to the petitioner, in respect of the installation of CCTV cameras in Police Stations shows that satisfactory performance of the petitioner and it is evidenced by the said communication. The said work was completed by the petitioner

from March 2017 to July 2018. Therefore this Court finds no reason to lodge the present impugned complaint as against the petitioner, since the same petitioner awarded contract to install CCTVs in 308 Police Stations by the same police official. The petitioner is also appreciated with satisfactory report by the same Police. Therefore, the present impugned FIR is nothing but clear abuse of process of law and it cannot be sustained as against the petitioner.

13. The learned Senior Counsel cited the judgment reported in (2018) 13 SCC 374 in the case of Medmeme, LLC and others Vs. Ihorse BPO Solutions Pvt. Ltd., as follows :-

9. Coming to the case at hand, a perusal of the judgment of the High Court would show that the High Court formulated the following three questions for determination:

(i) Whether the complaint is liable to be quashed on the ground that the allegations made in the complaint do not constitute any offence Under Section 420 Indian Penal Code?

(ii) Whether the criminal law can be set in motion in this case, since the agreement comprises a provision for arbitration?

(iii) Whether the Magistrate has conducted the enquiry Under Section 202 Code of Criminal Procedure, since the Petitioners are residing outside the jurisdiction of the Court?

10. The High Court was of the view that the allegations contained in the complaint filed by the Respondent, particularly in paragraph 7 thereto, satisfy the ingredients of the offences for which the Appellants are implicated. But the High Court further observed that merely because arbitration proceedings were pending between the parties, it would not preclude the Respondent from launching criminal prosecution when prima facie criminal case was also made out against the Appellants. In the three question formulated, the High Court took the view that the Magistrate had conducted a proper inquiry Under Section 202 of the Code of Criminal Procedure before proceeding against the Appellants.

11. The moot question before us revolves around Question No. 1 which was formulated by the High Court and it is to be seen as to whether dispute between the parties is essentially of a civil nature or any case is made out against the Appellants for launching criminal prosecution under the aforesaid Sections.

.....
14. On the basis of it, we find that it cannot be said that at the time of entering into the agreement, either the first agreement or even the second agreement, there was any intention on the part of the Appellants to cheat the Respondent. No suspicion of any nature was shown or even alleged. It is also not the allegation of the Respondent in the complaint that the agreement was entered into with fraudulent or dishonest intention on the part of the Appellants in inducing the Respondent to enter into such a contract. At best, the dispute between the parties is of a civil nature, proceedings in respect of which are pending before the learned Arbitrator."

14. The learned Additional Advocate General appearing for the respondents cited the judgment reported in (1999)8 SCC 686 in the case of Trisuns Chemical Industry vs. Rajesh Agarwal and Ors., which reads as follows :-

6. On the first count learned single judge pointed out that there was a specific clause in the Memorandum of Understanding arrived between the parties that disputes, if any, arising between them in respect of any transaction can be resolved through arbitration. High Court made the following observations:

Besides supplies of processed soyabean were received by the complainant company without any objection and the same have been exported by the complainant-company. The question whether the complainant-Company did suffer the loss as alleged by it are the matters to be adjudicated by the Civil Court and cannot be the subject matter of criminal prosecution.

7. 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 v. Bhajan Lal (AIR1992SC81) and Rajesh Bajaj v. State NCT of Delhi (1999CriLJ1833).

8. 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."

15. Though the Hon'ble Supreme Court of India held in so many catena of judgments about the quashment of FIR that the High Court should be limited to very extreme exceptions. In the case of hand, it is clear abuse of process of law and the issues are related to civil in nature. As such the judgment cited by the learned Additional Advocate General is not helpful to the case of the respondent.

16. The Hon'ble Supreme Court held that while entering into the agreement, there must be intention to cheat the other party. In the case on hand, while entering the work agreement by the petitioner, there is absolutely no intention to cheat the second respondent, since the petitioner even according to the second respondent installed 40 CCTV cameras in 40 junctions in and around Chennai City and thereafter it got damaged due to cyclone. Therefore this Court finds that there is no intention or inducement while entering into the agreement to cheat the second respondent. The prosecution never alleged that the petitioner entered to the agreement with fraudulent or dishonest intention inducing the second respondent to enter into the work agreement. At the very best, the dispute between the parties are civil in nature and as per the arbitration clause in the agreement, the second respondent can very well approach the Arbitrator for their dispute. At any cost, the offence as

alleged by the second respondent are not made out as against the petitioner and the FIR is liable to be quashed.

18. The second respondent has alleged in the complaint that the petitioner has committed offences under Sections 406 and 420 of IPC. It would thus be necessary to examine the ingredients of the above offences and whether the allegations made in the complaint, read on their face, attract those offences under the Penal Code. Section 405 of Penal Code reads thus:-

405. Criminal breach of trust –
Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

A careful reading of Section 405 of IPC shows that the ingredients of a criminal breach of trust are as follows:-

- (i) A person should have been entrusted with property, or entrusted with dominion over property;
- (ii) That person should dishonestly misappropriate or convert to their own use that property, or dishonestly use or dispose of that property or willfully suffer any other person to do so; and
- (iii) That such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.

Entrustment is an essential ingredient of the offence. A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is liable for a criminal breach of trust and is punished under Section 406 of the Penal Code.

19. Section 420 of the Penal Code reads thus :-

420. Cheating and dishonestly inducing delivery of property – Whoever

cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

The ingredients to constitute an offence under Section 420 of IPC are as follows :-

(i) A person must commit the offence of cheating under Section 415 and

(ii) The person cheated must be dishonestly induced to (a) deliver property to any person or (b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security.

Cheating is an essential ingredient for an act to constitute an offence under Section 420.

20. Admittedly, the petitioner entered into a work contract to install CCTVs in 40 junctions in and around Chennai City and also received a sum of Rs.2,69,80,740/- equivalent to 90% of the total contract value. The condition necessary for an act to constitute an offence under Section 405 of the Penal Code is that the accused was entrusted with some property or has dominion over property. There is on the face of the complaint, no entrustment of the petitioner with any property. The condition necessary for an act to constitute an offence under Section 415 of the Penal Code is that there was dishonest inducement by the accused. No act on part of the petitioner has been alleged that discloses an intention to induce the delivery of any property to the petitioner by the second respondent. There is thus nothing on the face of the complaint to indicate that the petitioner dishonestly induced the second respondent to deliver any property to them. Cheating is an essential ingredient to an offence under Section 420 of the Penal Code. The ingredient necessary to constitute the offence of cheating is not made out from the fact of the complaint and consequently, no offence under Section 420 of IPC is made out.

21. It has to be seen that, whether a matter which is essentially of a civil nature has been given a cloak of a criminal offence. Where the ingredients required to constitute a criminal offence are not made out from a bare reading of the complaint, the continuation of the criminal proceeding will constitute an abuse of the process of the Court. In the present

case, the averments in the complaint, read on its face, do not disclose the ingredients necessary to constitute offences under the Penal Code. An attempt has been made by the second respondent to cloak a civil dispute with a criminal nature despite the absence of the ingredients necessary to constitute a criminal offence. The complaint filed by the second respondent against the petitioner constitutes an abuse of process of Court and is liable to be quashed.

22. Accordingly, this Criminal Original Petition stands allowed and the FIR in Crime No.17 of 2019, on the file of the first respondent is hereby quashed. Consequently connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

rts

To

1. The Inspector of Police,
Central Crime Branch,
Team-I, Vepery,
Chennai - 7.
2. The Additional Deputy Commissioner
of Police,
Traffic Planning,
Greater Chennai Police,
Vepery, Chennai - 7.
3. The Joint Commissioner of Police,
Traffic South, Chennai.
4. The Superintendent of Police,
CBCID, Egmore, Chennai.
5. The Public Prosecutor,
High Court of Madras, Chennai.

+1 cc to Mr.P.Solomon Francis, Advocate SR.No.32155

CRL.O.P.No. 6860 of 2019
and Crl.M.P.No.3774 of 2019

AD(CO)
CSL/10.04.2019