

THE HONOURABLE Dr. JUSTICE B. SIVA SANKARA RAO

CRIMINAL PETITION No.13910 of 2014

ORDER :

The petitioners, ten in number, are A1 to A10 in C.C.No.995 of 2014 on the file of X Additional Chief Metropolitan Magistrate, Secunderabad. The 2nd respondent is the complainant. In all there are 14 accused in the calendar case that was taken cognizance by the learned Magistrate for the offences punishable under Sections 420 and 409 IPC.

The 1st petitioner is M/s Mukund Limited, Maharashtra represented by Niraj Bajaj, the 2nd petitioner as its Chairman and Managing Director and among the other accused, A3 to A.10 shows as Directors of A1 company. According to them, they are ceased to be Directors from 18.05.2010, 31.05.2010 and 30.09.2014 respectively as evidenced by Form 32 and subsequently in August, 2010 A.4 to A.7 and A.9 continuing as Directors of A1 entity not in dispute.

The complainant entity represented by Mr Y.Bixapathy as authorized representative with registered office at Tarnaka, Secunderabad maintained the private complaint on 17.09.2014 against the fourteen accused including petitioners 1 to 10 as A1 to A10 supra and others i.e. A11-M/s Kalyani Steels Limited, Pune, A12-B.N.Kalyani, its Chairman, Pune, A13-S.M.Kheny, its Director and A.14 – B.B.Hattarki, another Director, Pune.

The sum and substance of the accusation in the private complaint is that the complainant is one of the leading Rail Road Consultants registered with Indian Railways for Survey and Construction of Private Railway sidings and Operation and

Management of Railway Infrastructure facilities across the country, having registered corporate office at Tarnaka, Secunderabad, that A2 to A10 are active Directors of A1 and A12 to A14 are active Directors of A11, A1 placed letter of intent on 25.09.2006 for construction of private railway siding at Ginigera Station of South Western Railway for A11 company and complainant has been doing the civil works and on 25.10.2007 A1 issued purchase order for installation of signaling and telecommunication systems at the said Railway siding for A11 company. A2 to A10 and A12 to A14 are the respective Directors of A1 and A11 company being responsible for day to day affairs and also liable on behalf of A.1 and A.11, since letter of intents were issued and JV's also signed by A1 and A11 and that they have under taken the project works and raised invoices from time to time thereon and that arrears are liable to be paid by A1, to which A2 to A10 are directors and for A.11, A12 to A14 are the Directors and responsible for the payment. On 04.02.2009, M/s KICON has given letter stating that the work is completed and complainant performed its part of contract and requested for payment of outstanding sums, but the accused persons failed to pay. The complainant got issued legal notice on 09.09.2010 to the accused for clearing all the outstanding work of Rs.57,08,979/- under S & T work, A1 failed to pay due amount of Rs.32,43,273/- under the civil works inspite of repeated requests. A1 sent a vague reply dated 18.10.2010 with an intent to deceive the complainant by sending inductive reply stating that it will verify the facts and figures and will issue a final reply. A.11 also sent reply dated 09.10.2010 and 02.11.2010

denying liability stating that A.1 is a separate and distinct legal entity. Whereas record speaks that it is a joint venture of both accused company under the name of Hospet Steels to make all liable. The complainant sent balance confirmation letters to A1 on 29.03.2012, 23.03.2013, 26.03.2013, but A1 failed to confirm the liability under civil and S& T. A1 to A14 deliberately with a view to evade the legitimate dues and to dupe the complainant failed to respond to the letters and thereby committed criminal breach of trust with an oblique motive to cheat and to wrongful gain and they misappropriated the complainant's material worth rupees in lakhs. A1 being public limited company has not shown the out standings payable to the complainant in the audited balance sheets. This implies that the amounts are siphoned off, thereby cheated shareholders and general public besides the complainant. The accused never shown the source, where the monies have been paid and the balance sheets never reflect the drawn and due statement, which shows accused siphoned off the money, thereby they are liable for prosecution for the offences committed by them.

Along with the complainant, there are 13 enclosures i.e. work order dated 27.10.2006 issued by A1 company, purchase order dated 25.10.2007 issued by A1, legal notice dated 09.09.2010 sent by the complainant, reply notices sent by A.11, balance confirmation letters dated 29.03.2011, 23.03.2012 and 26.03.2013 respectively, statement of account, certificate of incorporation dated 18.05.1994, board resolution of 2014 and A.1 JV endorsement in website.

Learned Magistrate recorded the sworn statement of the Legal Executive-cum-legal representative of the complainant entity of M/s United Rail Road Consultants Pvt. Ltd., the complainant entity by name Y.Bixapathy on 17.09.2014 i.e. on the date of filing of the very complaint and passed the docket order taking cognizance on the even date stating that the complainant is present, his sworn statement is recorded, heard learned advocate for complainant, perused the allegations and also contents of the sworn statement of the complainant, the allegations are well founded and cognizance was taken against A1 to A14 for the offences punishable under Sections 420 and 409 IPC by registration of the calendar case and issued summons to them. The same is the subject matter of impugment in the present quash petition.

So far as the sworn statement of the said Y.Bixapathy representing by the complainant entity, it is the even great to what is stated in the private complaint for nothing knew to repeat.

The contentions in the quash petition in the factual background supra in impugning the cognizance order of the learned Magistrate supra are that A1- Mukand Limited and A11 – Kalyani Steels Ltd. as partners in a joint venture and jointly operate and manage manufacturing plants as an integrated steel plant at Ginegera and their desire to put up a private railway siding for meeting the logistic requirement of the said steel plant and decided to make joint investment for constructing private railway siding as a part of their strategic alliance and consequent to such strategic alliance for constructing the private railway siding at Ginigera

Station on South Western Railway by inviting offers and A1 received preliminary offer on 07.03.2006 and second offer on 26.07.2006 from the 2nd respondent and after negotiations and discussions in July and August, 2006 finalization of the final commercial terms, the 2nd respondent issued final offer on 22.08.2006 and later A1 issued letter of intent dated 25.09.2006 detailing the terms and conditions that would regulate the 2nd respondent during execution of the work and in compliance with the terms A1 issued a detailed purchase order on 23.10.2006 and in order to supervise the work on day to day basis on behalf of A1, it had appointed KICONS (Kirloskar Consultants Limited) as its supervisor. As per Clause 8 of purchase order dated 23.10.2006, the complainant is obligated to complete the construction work and made ready within ten months from the date of letter of intent and in the case of failure A1 is eligible to levy penalty for each week of delay within the prescribed limit and A1 made payments to complainant without delay or demur. Pursuant to the terms of letter of intent and the purchase order supra, complainant had caused delay in initiating the work and failed to complete the work within the prescribed time and also did not continue the work from 01.03.2007 to 12.04.2007 for 42 days due to disputes between the complainant and its sub-contractors. A1 by letter dated 23.03.2007 and also its supervisor KICONS by letter dated 14.03.2007 questioned the act of suspension of the total work by the complainant and requested to complete the work within the prescribed time as the work is important and to be completed simultaneously including signals and telecommunications. The

slow progress of work even letter contrary to letter of intent and purchase order 1 supra noted and there was a meeting convened on 27.07.2007 with the complainant by A1 and the complainant submitted of not in a position to do the work and sought for extension of time that was fixed to complete by November, 2007 end to commission and handover by end of December, 2007 and even within the extended time limit it was not completed, which made A1 to secure alternative arrangements to complete the work. A1 issued another purchase order dated 02.10.2007 to the complainant for installation of signaling and telecommunication system at railway siding at Ginigera works on turnkey basis and the complainant is obligated to complete the work within 120 days excluding weekly holidays and public holidays and also failed to complete the work within the time schedule covered by letter dated 20.03.2008, A1 issued letter dated 30.04.2008 pointing out the delay caused by the complainant in execution and completion of works and complainant choosing to avoid responding even to the phone calls made by A1 or to attend to the meeting by fixing the date of meeting dated 04.05.2008, but the complainant failed to attend and failed to intimate any inability to attend and with no other go, by letter dated 10.05.2008 asked to complete the work by 30.06.2008. A1 already made payment of Rs.10,59,21,202/- as against the invoices raised for a value of Rs.11,43,91,703/-, which is representing 92.60% of the value of the invoices raised and payments made. It indicates that there is no breach of trust or cheating on the part of the accused, but for failure of the complainant in completion of the works and if any including from

such a request of A1 to the complainant dated 24.06.2008 and letter of its supervisor KICONS, dated 04.02.2009. Even it was officially inaugurated on 05.11.2008 there were works not completed and pending as referred supra as mentioned in the letter dated 04.02.2009, the complainant is supposed to complete for getting final payment. There was meeting held and A1 and the complainant on 28.03.2009 in this regard and the complainant issued letter dated 06.04.2009 claiming that it had successfully completed the works and the traffic was commissioned on 16.10.2009 and claimed Rs.23,42,832/- by also mentioning to get the pending works as listed therein be completed through other contractors (third parties) and deduct the amount incurred for that and subsequently A1 issued letter dated 22.04.2009 to the complainant informing about the total estimated cost of Rs.67,37,620/- of the incomplete jobs at railway siding and earth work that were to be completed by the complainant and that to be paid by the complainant to A1 excluding penalty payable for the enormous delay caused as referred supra. It is having kept quite suddenly after lapse of one year from the date of removing of P-way material, the complainant through its counsel caused to issue legal notice to A1 to A10 on 09.09.2010 claiming as if Rs.57,08,979/- with accrued interest thereon due, which is contrary to the letter of the complainant dated 06.04.2009 supra, wherein he claimed only Rs.23,42,832/-, which squarely proves the complaint filed is only with malice and to harass for no offence attracts in the civil dispute out come of purely contractual obligations besides bar of limitation, thereby, the proceedings are liable to be quashed.

Even notice sent to the 2nd respondent/complainant failed to attend, proof regarding the registered post letter delivered to the addressee issued by the postal department filed, taken as sufficient service and taken as heard the 2nd respondent. Heard learned counsel for the petitioners, who reiterated the above contentions and also heard learned Public Prosecutor representing the 1st respondent State and perused the entire material.

From what is referred supra, the dispute is purely a civil nature out come of the contractual obligation, there is nothing to show from the correspondence between the complainant and A1 entity for the delay in completion of works by undertaking to complete work or letters of complainant any element of cheating, which requires dishonest intention from the inception of entering the contract to cheat and in the absence of which attracting of the offence under Section 420 IPC does not arise and there is no entrustment much less to any agent or manager etc to attract the offence under Section 409 IPC for the complainant to invoke against any of the 14 accused including the petitioners/A1 to A10 leave about none of A3 to A10 shown how actively involved in the affairs of A1 entity in day to day work, but for if at all by virtue of the status for A2 in representing A1 as its Managing Director and Chairman not even otherwise personally in his individual capacity. Leave about A12 to A14, the so called Directors of A11 for main correspondence to complainant is only with A.1 as referred supra.

Having regard to the above, the very face value of the complaint averments and sworn statement no way makes out any offences for any of the penal provisions under IPC, taken

cognizance by the learned Magistrate without proper application of mind though otherwise reasons are not necessary had it been application of mind and as such the very cognizance order in issuing summons is liable to be quashed as per settled expressions of the Apex Court to subserve the ends of justice to prevent abuse of process of law.

Accordingly, and in the result, the criminal petition is allowed quashing the Calendar Case No.995 of 2014 on the file of X Additional Chief Metropolitan Magistrate, Secunderabad not only against the petitioners/A1 to A.10, but also against non petitioners/A11 to A14 to subserve the ends of justice.

Miscellaneous petitions pending, if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

18.03.2019.
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