

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.299 OF 2019

Shri Vivek s/o Vishwanath Kenge
Age: 52 Yrs. Occu. Vice President,
R/o Ashoka House, Ashoka Marg,
Ashok Nagar, Nasik. = PETITIONER

VERSUS

1) Vishwam Power & Buildcon Pvt.
Ltd., A company Incorporate
under the Provisions of
Companies Act, 1956, office
at 37, Ajinkya City, Ambejogai
Road, Latur, (Maharashtra)
Through Manager,
Mr.Manoj s/o Sopanrao Tonde,
Age: 30 Yrs., occu. Business.

2) The State of Maharashtra = ESPONDENTS

Mr.MM Patil-Beedkar, Advocate for Petitioner;
Mr.SJ Salunke, Advocate for Respondent No.1;
Mrs. PV Diggikar, APP for Respondent No.2-State.

CORAM : SMT.VIBHA KANKANWADI,J.

RESERVED ON: 11th DECEMBER,2019.

PRONOUNCED ON: 07th JANUARY,2020.

JUDGMENT

1) Rule. Rule made returnable forthwith and
the matter is heard finally at the stage of
admission.

2) Present petition has been filed by
original accused, challenging the order of issuance

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of process against him for the offence punishable under Section 406 and 420 of Indian Penal Code, by learned Judicial Magistrate First Class, Latur in R.C.C.No.459 of 2015 on 28-07-2017; which was confirmed in Criminal Revision Application No.19 of 2018 by learned Additional Sessions Judge- 1, Latur on 03-01-2019.

3) Heard learned Advocate Shri. M. M. Patil for petitioner, learned Advocate for respondent No. 1 and learned APP for respondent No. 2.

4) It has been vehemently submitted on behalf of petitioner that both the Courts below have not considered the contents of the complaint and the ingredients of the offences under which process has been issued. Contents of the complaint, verification, etc would show that complainant was harping upon the contract that had taken place between the Company and accused. The correspondence that was exchanged ought to have been considered. It has been alleged that the accused was not providing work as per the terms of contract. Some

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amount was paid by accused to the complainant, so also some material was also provided. If there would have been intention to cheat since inception, then these things would not have taken place. Complainant says that amount of Rs.10,00,430/- is due and payable from accused; but accused avoided on one or the other pretext. This is nothing but civil transaction, for which remedy under criminal law is not available. Both the Courts ought to have considered that criminal action was not warranted and ingredients of the offences punishable under Section 406 and 420 of Indian Penal Code were not made out. A cryptic order has been passed by learned Magistrate; whereas the learned Additional Sessions Judge, failed to correct the same in his revisional powers.

5) In order to buttress his submissions, learned Advocate for petitioner has relied on the decision in *Dalip Kaur v/s. Jagnar Singh and Anr.* [AIR 2009 SC 3191]; wherein it has been held that, "Fraudulent or dishonest intention at the time of making promise or representation is necessary to constitute offence of Criminal breach of trust or

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cheating. Pure and simple breach of sale does not constitute those offences". Further reliance was placed on the decision in ***Surendra Shivshanker Choudhari v/s. Vishwanath Shivshanker Choudhari and Another [2018 (3) Bom C.R. (Cri) 119]***; wherein on the facts of the case this Court at Principal seat held that there was nothing on record to suggest that there is an element of instituting proceedings.

6) Per contra, the learned Advocate for respondent No.1 supported the orders passed by both the Courts below and it was submitted that the accused had no intention to make payments since beginning. On the say of accused, the complainant had shifted its material to Parali, Ambajogai and Osmanabad. On the basis of representations made by the accused, work was done and even the labours were employed. Huge amount was due and payable by the accused to the complainant. Every time when the demand of the amount was made, it was avoided by accused on one or the other pretext. This amounts to cheating and criminal breach of trust. Though there was a contract between complainant and

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accused, accused had no intention to act as per the same. The said action has given rise to civil as well as criminal remedy. Learned Magistrate was justified in issuing process against accused for the offence punishable under Section 406 and 420 of Indian Penal Code. Learned Additional Sessions Judge correctly confirmed the said order.

7) At the outset, it can be seen from the contents of complaint that the complainant intended to rely on the terms of contract entered into between it and accused. Complainant contends that initially as per the said terms of contract, it has done the work and accused has given some amount to it. It has not been clarified but we can read between the lines that complainant had not suspected an act of cheating at that stage. The contents of complaint do not spell that there was element of cheating on the part of accused and it could be noticed since beginning. If there was such element, then accused might not have given payment to complainant as per contract. Complainant has not intentionally stated as to how much amount was given by the accused. In fact, no particulars have

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been given as to when complainant had asked accused to give further work order, material, remaining amount of the work already done etc. As per the contention in para No.5 of the complaint. It is then stated that complainant had shifted the material from Parali, Ambajogai and Osmanabad. Stone crusher was used by spending Rs.21,000/-. It is stated that workers of complainant were used for getting the work at Ambajogai, though the said work was not as per work order. Amount of Rs.10,00,430/- is stated to be outstanding. All these averments show that at any early point of time, complainant had not suspected an element of cheating or criminal breach of trust. On the contrary, the complainant has done that work also which was not as per work order. It could have been refused by it. The matter relates to civil dispute. It will not be out of place to refer to the observations by Hon'ble Supreme Court in **V.R. Dalal & Ors. vs Yougendra Naranji Thakkar & Anr [(2008) 15 SCC 625]**, which are as follows:

"It may be true that in the event the court finds that the dispute between the parties is civil in nature, it may not allow the criminal proceedings to

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go on. But, no law, in our opinion, as such can be laid down as in a given case both civil suit and criminal complaint would be maintainable although the cause of action for both the proceedings is the same".

8) Therefore, it is required to be seen as to whether ingredients of offence under Section 405 and 415 of Indian Penal Code have been made in this case or not for issuing process. Section 405 of Indian Penal Code prescribes, "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 willfully suffers any other person so to do, commits "criminal breach of trust". In above referred case it is further observed that,

"We may notice that as regards commission of an offence in terms of Section 405 of Indian Penal Code, this Court in Indian Oil Corpn v/s.

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NEPC India Ltd. And others [(2006) 6 SCC 736] held that where the first ingredient of criminal breach of trust, that is, entrustment is missing, the same would not constitute a criminal breach of trust".

9) The contents of the complaint in this case do not show any entrustment by the complainant to the accused. It is tried to be contended that the cheque which was given by the complainant as security has not been returned by the accused. However, there is no averment in the complaint that the said cheque has been converted by accused to his use or it has been used by accused with dishonest intention or it has been disposed of in violation of any direction of law prescribing the mode in which such trust is to be discharged.

10) Further as regards ingredients of Section 415 of Indian Penal Code as concerned it should show - "(i) Deception of any persons; ii) Fraudulently or dishonestly inducing any person to deliver any property; or (iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to

do anything which he would not do or omit."

11) Contents of the complaint, verification and documents in this case do not show what were those representations or dishonest inducement which were false or misleading. The details of the same have not been given. It appears that the alleged act was going on for months together. Then the question arises as to why complainant had not refused to do any further work. As aforesaid, even that work has been done for which there was no work order. That means in spite of knowledge the work has been done. This does not amount to fraudulent inducement. When the answer in the negative was in the hands of complainant, there is no scope of 'inducement'. Complainant has not come with a case that he went on to do the work as stated by accused in hope that he would pay for the due charges. He could not have demanded more than the contract between the two. If accused has avoided to make payment of the work done by the complainant, it may not have been only with a criminal intent. Complainant himself has stated that accused had made payments of certain work. Question further arises as to when the complainant felt that he has

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been cheated. Ingredients of offence of cheating should be present since inception or since beginning. Complainant could have repudiated the contract and could have sued accused for breach of terms of contract. Instead of doing that, it appears that further work is done. Therefore, complainant ought to have given all those details which made him to believe in the actions of accused. Those details are missing from the complaint, verification and documents. Certain portion in the complaint is handwritten. Obvious reading of the same, appears to be a lame attempt to bring certain ingredients within the complaint; however, details of those handwritten facts are not given. Only fulfilment of one or more ingredient will not be sufficient for even issuance of process. The facts in the complaint, even at prima facie stage of issuing process should show all the ingredients even in the complaint, verification and in supporting documents, if any.

12) Both the Courts below have failed to consider that all the ingredients of the offences have not been even made prima facie for issuing process. It would be an abuse of process of law to

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continue the prosecution against accused with such material. In **Hira Lal and Ors v/s. State of U. P. And Ors [2009 (5) SCALE 418]**, Hon'ble Supreme Court held :

"10. The parameters of interference with a criminal proceeding by the High Court in exercise of its jurisdiction under Section 482 of the Code are well known. One of the grounds on which such interference is permissible is that the allegations contained in the complaint petition even if given face value and taken to be correct in their entirety, commission of an offence is not disclosed. The High Court may also interfere where the action on the part of the complainant is mala fide."

13) In the case of **Mehmood UL Rehman vs. Khazir Mohammad Tunda [(2015) 12 SCC 420]**, the Supreme Court held that no reasoned, formal or speaking order is required. However, it should reflect the application of mind. The Magistrate must be satisfied that there is a material to issue process and if the complaint on the face of it does not disclose commission of the offence, then the Magistrate should refrain himself from taking cognizance. It further held that :

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"The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the court. No doubt, no formal order or a speaking order is required to be passed at that stage. The Code of Criminal Procedure requires speaking order to be passed under Section 203 therein. When the complaint is dismissed and that too the reasons need to be stated only briefly."

14) It has been clarified in that case by the Hon'ble Supreme Court that if non-application of mind is revealed and no offence is made out, then the High Court can invoke its powers under Section 482 of the Code in order to prevent abuse of the power of the Criminal Court. It is also observed that to be called to appear before the criminal court as an accused is a serious matter affecting one's dignity, self-respect and image in the society. Hence, the process of the criminal court shall not be made a weapon of harassment.

15) The learned Magistrate in this case failed to consider the ingredients of the offences alleged against accused and passed an order without

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application of mind. Learned Additional Sessions Judge also failed consider the same and did not consider that the order has been passed by learned Magistrate without application of mind. When both the Courts failed to consider the facts narrated and the ingredients of the offences and the order is passed without application of mind; case is made out for the exercise of inherent powers of this Court under Section 482 of the Code for quashing the proceedings as well as the order of issuing process passed against the accused. Writ Petition thus, stands allowed in terms of prayer clause 'C'. Rule is made absolute accordingly.

(SMT. VIBHA KANKANWADI,J.)

BDV
fldr 19.12.19