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IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 169 OF 2018.

SAHASRALINGESHWAR POWER PVT. LTD., THR. AUT. SIGN., RAKESH KUMAR AND 3 ORS., ... Petitioners.

Versus

MUKTHAR INFRA-STRUCTURE (INDIA) PVT. LTD., REP. THR. ITS AUT. REP., PRASHANT ...Respondents.

Mr. S. S.Kantak, Senior Advocate with Mr. P. Talaulikar and Mr. K. Simoes, Advocates *f*or the petitioners.
Ms. Vedanayaki Kiran D, Advocate for the respondents.

CORAM: MANISH PITALE, J.
DATED: 29th September, 2021.

ORAL ORDER.:

1. By this Writ Petition the petitioners (original accused) have challenged order dated 25.7.2017, passed by the court of Judicial Magistrate, First Class, Margao, whereby process has been issued against the petitioners for offences under Sections 420, 120-B and 406 of Indian Penal Code (IPC). The petitioners have invoked powers of this Court under Article 227 of the Constitution of India and Section 482 of Cr. P.C., while seeking quashing of the said order as well as the entire proceedings pending before the Magistrate.

2. The respondent (original complainant) filed a complaint under Section 200 of Cr.P.C. before the Magistrate on 13.12.2016, against the petitioners claiming that they had induced the respondent to enter into an agreement for the purpose of carrying out excavation works and construction work pertaining to a Hydel Project. The contents of the complaint show that even according to the respondent the petitioner no.1 company had invited tenders in connection with a Small Hydel Project to be constructed on Kumardhara River near Uppinangadi, Dakshina Kannada, Karnataka. The tender submitted by the respondent was accepted by the petitioner no.1 company leading to award of contract. An agreement was executed between the parties in pursuance thereof and as per terms of the agreement the respondent was required to submit a bank guarantee of 10% of the contract value in advance to the petitioner no.1. A perusal of the complaint would show that according to the respondent, the construction work could be undertaken only during the period of month of October of the previous year till the month of May in the next year and that in every such period after the contract was awarded to the respondent, the work was delayed allegedly due to the petitioners. Thereafter, it was stated that the construction work could not be completed as per the time schedule, entirely due to the petitioners and that the petitioners were aware that the construction project would not be completed in stipulated period of time and despite that they had induced the respondent to submit the bank guarantees. It was stated that one of the bank guarantees was allegedly illegally encashed and that such action on the part of the petitioner demonstrated malafide intention to cheat the respondent, right from the initiation of the interaction between the parties. It was alleged that therefore, offences as alleged against the petitioners under Sections 420, 120-B and 406 of IPC were made out.

3. The Magistrate recorded evidence of the witnesses of the respondent and after taking into consideration the complaint, such evidence and the documents on record, by the impugned order issued process against the petitioners for the said offences.

4. Aggrieved by the same, the petitioners filed the present Writ Petition, wherein notice was issued and the proceedings before the Magistrate were stayed.

5. Mr. S. S. Kantak, learned Senior Counsel appearing with Mr. P. Talaulikar, learned Counsel for the petitioners raised two grounds of challenge in support of the present Writ Petition. Firstly, it was submitted that even a bare perusal of the complaint and the material that came on record before the Magistrate, would show that no case was made out for issuance of process. It was submitted that the essential ingredients of the offences alleged against the petitioners were not made out by the material on record and that the dispute between the parties was purely of a civil and contractual nature. Yet the respondent was seeking to give it a colour of criminal liability, which as per settled law was impermissible. Secondly, it was contended that the concept of vicarious liability in criminal law is unknown, unless it is so provided specifically in a statue. It was submitted that a bare perusal of the complaint would show that all the allegations of malafide intention and the intention to cheat from the inception were leveled against the petitioner no.1 (original accused no.1), which is admittedly a body corporate. No specific allegations were made against the petitioner nos. 2 to 4, who are arrayed as managing director and directors of the petitioner no.1 company. Only a general statement was made in respect of petitioner nos.2 to 4 in the complaint. On this basis it was submitted that the complaint itself was defective and the Magistrate ought not to have issued process against the petitioners. The learned senior Counsel placed reliance on the judgments of the Hon'ble Supreme Court in the case of ***International Advanced research Centre for Power Metallurgy and New Materials(ARCI) and others Vs Nimra Cerglass Technics Private Limited and another, (2016) 1 SCC 348, Thermax Limited and others VS K. M. Johny and others, (2011) 13 SCC 412 and recent judgment of the Hon'ble Supreme Court in case of Ravindranatha Bajpe Vs Mangalore Special Economic Zone Ltd. & others etc. passed in Criminal Appeal Nos.1047-1048/2021 dated 27.9.2021.***

6. On the other hand, Ms. Vednayaki Kiran D, learned counsel appearing for the respondent (original complainant) submitted that there were sufficient averments made in the complaint to show that the ingredients of the alleged offences were made out against the petitioners. Specific emphasis was placed on paragraphs 13 to 17 of the complaint to demonstrate how the bank guarantee was illegally encashed and the manner in which the petitioners had induced the respondent to furnish such bank guarantees, knowing full well at the initial stage itself that the project in question could never be completed in the stipulated period of time. It was submitted that the emphasis of the respondent was more on the manner in which bank guarantee was illegally encashed by the petitioners. The learned counsel invited attention of this Court to the judgments of the Hon'ble Supreme Court in the case of **Nagawwa Vs. Veeranna Shivalingappa Konjalgi and others, (1976) SCC 736, Sau Kamal Shivaji Pokarnekar Vs The State of Maharashtra and others** judgment passed **in Criminal Appeal No. 255 of 2019**

dated 12.2.2019 and Iridium India Telecom Ltd Vs Motorola Incorporated and ors., AIR , 2011 SC 20, to contend that once the Magistrate had applied its mind and issued process, this Court could not substitute its discretion in the matter. By inviting attention to the judgment of Delhi High Court in the case of ***V. P. Wadhwa Vs C. S. Parasher, passed in Cri.M.C. No. 1502/2011 dated 10.5.2011***, it was contended that the petition filed in the present case, seeking to invoke Section 482 of Cr.P.C. was belated. Reliance was placed on judgment of the Hon'ble Supreme Court in the case of **State of Punjab Vs. Pritam Chand and Ors. (2009) 16 SCC 769,** to contend that merely because there was an arbitration clause in the agreement executed between the parties, it could not be said that a criminal proceeding could not be initiated.

7. Heard learned counsel for the rival parties and perused the material on record.

8. In order to examine the rival contentions raised on behalf of the parties, it would be appropriate to refer to the position of law brought to the notice of this Court. The two grounds specifically raised on behalf of the petitioners, as noted above, pertain to the questions as to whether the ingredients of the alleged offences are made out on the basis of the material placed on record and as to whether issuance of process against the petitioners in the present case would amount to foisting vicarious liability on petitioner nos.2 to 4, which is unknown in criminal law.

9. In the case of ***International Advanced research Centre for Power Metallurgy and New Materials(ARCI) and others***

Vs Nimra Cerglass Technics Private Limited and another*(supra),* the Hon'ble Supreme Court had an occasion to consider the question of criminal liability in similar circumstances. In the said case, the allegations of the complainant, in the context of offences under Sections 419 and 420 of the IPC, were that the accused had induced the complainant to spend huge amounts on a project in respect of which the accused knew from the inception that they did not have the capacity of commencing commercial production. In such facts, the Hon'ble Supreme Court considered the ingredients of the offence of Section 420 of IPC alleged against the accused and in that context, it was held as follows: -

> *15. The essential ingredients to attract Section 420 IPC are: (i) cheating; (ii) dishonest inducement to deliver property or to make, alter or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security and (iii) mens rea of the accused at the time of making the inducement. The making of a false representation is one of the essential ingredients to constitute the offence of cheating under Section 420 IPC. In order to bring a case for the offence of cheating, it is not merely sufficient to prove that a false representation had been made, but, it is further necessary to prove that the representation was false to the knowledge of the accused and was made in order to deceive the complainant.*
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> *16. Distinction between mere breach of contract and the cheating would depend upon the intention of the accused at the time of alleged inducement. If it is established that the intention of the accused was dishonest at the*

very time when he made a promise and entered into a transaction with the complainant to part with his property or money, then the liability is criminal and the accused is guilty of the offence of cheating. On the other hand, if all that is established that a representation made by the accused has subsequently not been kept, criminal liability cannot be foisted on the accused and the only right which the complainant acquires is the remedy for breach of contract in a civil court. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown at the beginning of the transaction. In S.W. Palanitkar & Ors. vs. State of Bihar & Anr. (2002) 1 SCC 241, this Court held as under:

"21 ……In order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating." The above view in Palanitkar's case was referred to and followed in Rashmi Jain vs. State of Uttar Pradesh & Anr. (2014) 13 SCC 553.

10. A reference was made to an earlier judgment of the Hon'ble Supreme Court in the case of ***Indian Oil Corporation Vs NEPC Ltd, (2006) 6 SCC 736*** and in paragraphs 23 and 25, the relevant portion was quoted which reads as follows: -

23. In M/s Indian Oil Corporation vs. NEPC India Ltd. & Ors., (2006) 6 SCC 736, this court observed that civil liability cannot be converted into criminal liability and held as under:- "13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable breakdown of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. 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. In G. Sagar Suri v. State of U.P. (2000) 2 SCC 636 this Court observed: (SCC p. 643, para 8)

8....."It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under Section 250 CrPC more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may."

25. The above decisions reiterate the well-settled principles that while exercising inherent jurisdiction under Section 482 Cr.P.C., it is not for the High Court to appreciate the evidence and its truthfulness or sufficiency inasmuch as it is the function of the trial court. High Court's inherent powers, be it, civil or criminal matters, is designed to achieve a salutary public purpose and that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. If the averments in the complaint do not constitute an offence, the court would be justified in quashing the proceedings in the interest of justice.

11. In this context it would be relevant to refer to the judgment relied upon by the learned counsel for the respondent, in the case of **Nagawwa Vs. Veeranna Shivalingappa Konjalgi and others (supra),** wherein the Hon'ble Supreme Court, while considering cases wherein orders issued by the Magistrate for issuing process could be quashed, has held as follows: -

> *5. Mr. Bhandare laid great stress on the words "the truth or falsehood of the complaint" and contended that in determining whether the complaint is false the Court can go into the question of the broad probabilities of the case or intrinsic infirmities appearing in the evidence. It is true that in coming to a decision as to whether a process should be issued the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant ill support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a prima facie case against him. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercise his discretion it is not for the High Court, or even this Court, to substitute its own discretion for. that of the Magistrate or to examine the case on merits with view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused.*
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> *These considerations, in our opinion, are totally foreign to the scope and ambit of an inquiry under s. 202 of the Code of Criminal Procedure which culminates into an order under s. 2042 of the Code. Thus it may be safely held that in the following cases an order*

> *of the Magistrate issuing process against the accused can be quashed or set aside:*
> *(1) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;*
> *(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;*
> *(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and*
> *(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.*

12. The first contention raised on behalf of the petitioners needs to be examined in the context of the above quoted position of law. In order to do so, it would be appropriate to refer to the complaint. A perusal of the same would show that the allegation levelled against the petitioners is that they from the very inception were aware about the fact that the construction project to be undertaken could never be completed in the stipulated period of time and yet they induced the respondent to offer its bid so that in terms of the agreement executed between the parties the bank guarantee for 10% of the project costs could be extracted from the respondent. It is then alleged that such bank guarantees, which the respondent was allegedly induced into giving were sought to be encashed in a malafide manner and that therefore, the petitioners committed offences under Sections 420, 120-B and 406 of IPC.

13. The respondent itself states that it submitted bid in response to an invitation from the petitioners, inviting such bids from interested parties in respect of the construction project. It is in pursuance of the bid of the respondent being accepted that the agreement was executed between the parties. It is not the case of the respondent in the complaint that the petitioners had suppressed the actual scope of the work which had resulted in the respondent being induced to make its offer. The contents of the complaint show that the agreement was executed between the parties and the bank guarantees were submitted in terms of the agreement, which was nothing but a purely civil and contractual interaction between the parties. The parties knew full well as to the relationship they were entering into, while executing the agreement in question, in pursuance of which the respondent submitted the bank guarantees. It is the contention of the respondent that the delay in execution of the project was entirely attributable to the petitioners, but this again is a dispute purely in the realm of the civil and contractual relationship between the parties. The contents of the paragraphs 13 to 17, upon which much emphasis was placed on behalf of the respondent, merely allege that the petitioners knew full well that the project would not be competed in the stipulated period of time and that despite knowledge of such a fact, they intentionally invited bids from the interested parties for execution of work. This court finds that said statement made in the complaint is absurd and it certainly does not disclose the ingredients of the offences alleged against the petitioners.

14. In this context the above quoted position of law laid down by the Hon'ble Supreme Court becomes relevant, wherein it is made clear that when an attempt is made to give a cloak of criminal offence to a dispute essentially civil in nature, the Court ought not to issue process to summon the accused persons. There can be doubt about the fact that the initiation of a criminal proceeding and asking the accused to face the summons is a serious matter and that such summons cannot be issued casually. Initiation of criminal proceedings can also not be used as an arm twisting tactic in order to bring the other party to the table for settling a dispute, which is essentially of a civil nature.

15. A perusal of the impugned order in this context would show that the Magistrate has recorded the submissions of the parties and thereafter in paragraph 10, it is simply stated that a perusal of the complaint, evidence of the complainant, witnesses and the documents produced along with the complaint prima facie show that the ingredients of the offences were made out and further that merely because there was an arbitration clause, the same would not absolve the petitioner of criminal liability. There is no application of mind on the part of the Magistrate to examine as to whether the material placed on record at all disclosed the ingredients of the offences alleged against the petitioners. It is found that the present case is covered under categories 1 and 2 identified by the Hon'ble Supreme Court in the case of **Nagawwa Vs. Veeranna Shivalingappa Konjalgi and others (supra).** On this count itself the impugned order is found to be unsustainable.

16. In so far as the second limb of the argument raised on behalf of the petitioners is concerned, it is laid down by the Hon'ble Supreme Court in the case of ***Thermax Limited and others Vs K. M. Johny and others (***supra) that the concept of vicarious liability is unknown to criminal law, except where it is so provided in specific statues. In the present case, the Magistrate was called upon to consider the allegations pertaining to offences under Sections 420, 120-B and 406 of the IPC. It was expected that the Magistrate would examine as to whether specific allegations were made against the individual directors and the managing director who were arrayed as accused persons. It was to be examined as to whether specific role was attributed to them to disclose an intention on their part from the very inception to cheat the respondent. A perusal of the complaint shows that even in paragraphs 13 to 17, reference is made only to petitioner no.1 and there is no attempt made to describe the role played by the petitioner nos.2 to 4 in order to attract criminal liability. A perusal of the impugned order would show that in paragraph 12, the Magistrate has simply recorded that the accused nos.1,2,3 and 4 are responsible for the business of the accused company and that therefore, there is sufficient ground to proceed against them. The question as to whether vicarious liability was sought to be foisted in the present case was not even discussed by the Magistrate. In this context, the aforesaid judgment of the Hon'ble Supreme Court in the case of ***Ravindranath Bajpe Vs. Mangalore Special Economic Zone Ltd. & others Etc. (supra)*** is relevant. The Hon'ble Supreme Court has referred to earlier judgments in the case of ***GHCL Employees Stock Option Trust Vs. India Infoline Limited, 2013 (4) SCC 505*** and ***Sunil Bharti Mittal V. Central Bureau of Investigation, (2015)4 SCC 609*** and thereafter, it has been held as follows:

> *8.3 As held by this Court in the case of India Infoline Limited (supra), in the order issuing summons, the learned Magistrate has to record his satisfaction about a prima facie case against the accused who are Managing Director, the Company Secretary and the Directors of the Company and the role played by them in their respective capacities which is sine qua non for initiating criminal proceedings against them. Looking to the averments and the allegations in the complaint, there are no specific allegations and/or averments with respect to role played by them in their capacity as Chairman, Managing Director, Executive Director, Deputy General Manager and Planner & Executor. Merely because they are Chairman, Managing Director/Executive Director and/or Deputy General Manager and/or Planner/Supervisor of A1 & A6, without any specific role attributed and the role played by them in their capacity, they cannot be arrayed as an accused, more particularly they cannot be held vicariously liable for the offences committed by A1 & A6.*

17. In this context reliance placed on behalf of the respondent on the judgment in the case of ***Iridium India Telecom Ltd Vs Motorola Incorporated and Ors.***(supra) particularly para 32 thereof, is misplaced for the reason that the Hon'ble Supreme Court in the said case was concerned with the question of immunity sought by a company from prosecution merely because prosecution was in respect of offences for which punishment prescribed was mandatory imprisonment. There could no quarrel with the said proposition, but the same would be irrelevant for the facts of the present case. The Magistrate in the present case was ignorant of the aspect of vicarious liability highlighted on behalf of the petitioners. In the present case the complaint falls well short of satisfying the requirements of law for issuance of process to the petitioners.

18. In so far as the question of delay in filing the present writ petition is concerned, the Delhi High Court in the case of ***V. P. Wadhwa Vs. C. S. Parasher***(supra), in the facts of the said case concluded that the petition filed under section 482 of Cr. P.C. after lapse of more than one year could be said to be hit by delay and laches. In the present case, the petition has been filed after about 6 months. This Court is convinced that the question of delay and laches would not arise and that if the exercise of jurisdiction by the Magistrate is found to be fundamentally flawed, this Court would certainly invoke its power under Section 482 of Cr. P.C. to quash such proceedings, to secure the ends of justice.

19. Since the petitioners have not contended that the criminal proceeding could not be initiated merely because there was an arbitration clause in the agreement, reliance placed on the judgment in the case of **State of Punjab Vs. Pritam Chand and Ors. (supra),** on behalf of the respondent, is wholly irrelevant.

20. In view of the above, this Court finds that the present writ petition deserves to be allowed as the impugned order passed by the Magistrate is found to be wholly unsustainable. In fact, the entire proceedings deserve to be quashed. Accordingly, the writ petition is allowed in terms of prayer clause (i) which reads as follows: -

Call for the entire records on the file of the Hon'ble the Court of the Judicial Magistrate First Class E Court at Margao Goa in Criminal Case No.336/P/2016/E and after examining the same, quash the entire proceedings pending on the file of the Hon'ble the Court of the Judicial Magistrate First Class E Court at Margao Goa in Criminal Case no. 336/P/2016/E.

21. Ordered accordingly.

MANISH PITALE, J.

VINITA VIKAS NAIK Digitally signed by VINITA VIKAS NAIK Date: 2021.10.01 15:40:29 +05'30'