

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

CRIMINAL APPLICATION (APL) NO.423 OF 2018

APPLICANTS:

1. Venkadasamy Subburaj,
Age about : 61 years,
Occupation : Managing Director,
Subburaj Spinning Mill (P) Ltd.,
Office at Sankar Nagar,
Tirunelveli, Tamilnadu, R/o Door
No.32A, New Colony,
Perachiamman, Kovil Street,
Vannarapettai, Palayamkottai,
Tirunelveli, Tamilnadu.
2. Ramasamy Ragavan,
Age : 54 years,
Occupation : Director,
Subburaj Spinning Mill (P) Ltd.,
Office at Sankar Nagar,
Tirunelveli, Tamilnadu, R/o 637,
Ganapathy Mills Colony,
Sankar Nagar, Tirunelveli,
Tamilnadu.
3. Krishna Kumar Gurusamy,
Age about : 45 years,
Occupation : Business,
R/o Door No.32A,
New Colony, Perachiamman,
Kovil Street, Vannarapettai,
Palayamkottai, Tirunelveli,
Tamilnadu.
4. Arun Kumar Subbaiya,
Age : 45 years,
Occupation : Business,
R/o A3-15, TVH Eknta,
Masakkalipalayam Road, Near
G.V. Residency, Coimbatore
South, Coimbatore,
Uppilipalayam, Tamilnadu-15.

VERSUS

- NON-APPLICANTS :**
1. The State of Maharashtra,
Through Police Station Officer,
Tehasil, Nagpur.
 2. Pramod s/o Shivbhagavan Sabu,
Aged about : 57 years,
Occupation : Vice Chairman,
R/o Jagat Apts., 1st Floor,
Law Collage Square, Ambazari,
Nagpur.

Mrs. Sonali Saware - Gadhawe, Advocate for applicants.
Shri T. A. Mirza, APP for non-applicant No.1.
Shri H. D. Dangre, Advocate for non-applicant No.2.

CORAM: Z.A. HAQ & AMIT B. BORKAR, JJ.
DATED : 27/01/2021.

ORAL JUDGMENT : (PER : AMIT B. BORKAR, J.)

1. This is an application under Section 482 of the Code of Criminal Procedure challenging registration of First Information Report No.86/2018 with the non-applicant No.1 – Police Station dated 19/02/2018 for the offence punishable under Section 406 of the Indian Penal Code.

2. The First Information Report came to be registered against the applicants and others with the accusation that the cotton supplied by the non-applicant No.2 to the applicants was

converted into thread and as per the agreement dated 07/09/2013, in case of failure on the part of the applicants to repay the amount of cotton supplied by the non-applicant No.2 to the applicants, the applicants were prohibited from selling cotton yarn manufactured and supplied by the non-applicant No.2. With these accusations, it is alleged that the cotton entrusted by the non-applicant No.2 with the applicants had been dishonestly converted into own property by the applicants and have sold it in the market contrary to the agreement between the non-applicant No.2 and the applicants.

3. The applicants, therefore, have challenged registration of First Information Report by way of present criminal application. This Court on 07/06/2018 issued notice to the non-applicants. The non-applicant No.2 in pursuance of the notice issued by this Court, has filed reply. It is stated that the applicants had specifically agreed that they shall not sell cotton supplied by the non-applicant No.2 without written permission of the non-applicant No.2. It is further stated that various cheques which have been issued for repayment of the cotton supplied by the non-applicant No.2 to the applicants, have been dishonoured. There is civil suit for recovery of said amount filed before the Civil Judge

Senior Division, Nagpur bearing Special Civil Suit No.610/2017 which is pending. It is further stated in para 9 of the reply that the applicants are in-charge of day to day affairs of M/s. Subburaj Spinning Mills Pvt. Ltd. and have dishonestly used and disposed of cotton supplied by the non-applicant No.2. Therefore, prima facie, ingredients of the offence punishable under Section 406 of the Indian Penal Code are made out.

4. The non-applicant No.1 has also filed reply and it has been stated in the reply that the applicants had purchased cotton worth Rs.17,07,44,417/- and towards repayment of the said cotton, initially, the applicants had paid an amount of Rs.13,85,88,285/- to the non-applicant No.2. However, the applicants failed to repay balance amount of Rs.3,21,56,172/-. It is further stated that in pursuance of the contract between the applicants and the non-applicant No.2, the applicants were supposed to manufacture yarn out of cotton supplied by the non-applicant No.2 and pay amount to the applicants which the applicants have failed to repay the same. It is stated that the applicants had given false assurance to the non-applicant No.2 that they will manufacture yarn out of cotton supplied by the non-applicant No.2 and will refund the said amount to non-applicant

No. 2 but the applicants failed to repay the said amount to the non-applicant No.2.

5. We have carefully considered the contents of the First Information Report and the replies filed by the non-applicant No.1 and the non-applicant No.2. On meaningful reading of the First Information Report, it appears that the principal accusation of the non-applicant No.2 against the applicants is that the applicants were not supposed to sell the cotton yarn manufactured out of cotton supplied by the non-applicant No.2 without written permission from the non-applicant No.2. The allegation of the non-applicant No.2 is to the effect that the applicants have dishonestly converted cotton supplied by the non-applicant No.2 to the applicants and have sold it in the open market without written permission from the non-applicant No.2.

6. The scope and reach of the powers of this Court under Section 482 of the Code of Criminal Procedure in entertaining the prayer for quashing criminal proceeding is well defined. The fundamental test is to ascertain whether taking the allegations in the complaint to be true, without adding or subtracting anything at the stage of challenge to the

maintainability of the proceedings, *prima facie*, case for trial, had been made out. It is only on such examination, the answer has to be in the negative and, then an interference in exercise of power under Section 482 of the Code of Criminal Procedure, for quashing the said proceedings is called for. The High Court, at this juncture, is not called upon to invoke an exercise to inquire into the truth or otherwise of the allegations made. The limited scrutiny is, for being satisfied, whether the allegations made in FIR disclose cognizable offence or not.

7. The Apex Court has repeatedly sounded note of caution to the effect that the power of quashing criminal proceedings should be exercised very sparingly and with circumspection that too in the rarest of rare case. In emphatic words, it has been laid down that the Court would not be justified in embarking as an inquiry as to reliability, genuineness or otherwise of the allegations made in the First Information Report and that the inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. The power can be exercised only when the Court comes to the conclusion that there would be manifest injustice or there would be abuse of process of the Court and not otherwise. It is not open

for the Court in exercise of such powers to scrutinize the allegations by sifting the evidence or appreciate the same and come to the conclusion that no *prima facie* case is made out or whether the allegations are likely to be upheld in the trial.

8. On *prima facie* perusal of the allegation made in the First Information Report, we are satisfied that the accusations are required to be proved during trial by the prosecution. This is not a case where the prosecution can be thrown out at its threshold without giving opportunity to the prosecution to prove its case.

9. Mrs. Saware, learned Advocate appearing for the applicants relied upon the judgment of Hon'ble Apex Court in the case of **S. W. Palanitkar and others Vrs. State of Bihar and another**, reported in **(2002) 1 SCC 241**. She submitted that the dishonest intention at the inception is necessary before the accused faces trial for the offences punishable under Sections 420 and 406 of the Indian Penal Code. We have carefully considered the judgment of the Hon'ble Apex Court. In para 20 of the said judgment, the Hon'ble Apex Court has observed on facts of the said case that there was no material placed that the complainants in the said

case had entrusted any property to any of the appellants at all or the appellants had domain over any of the properties of the respondent No.2 in the said case which they dishonestly converted it to their own use, which is necessary ingredient of Section 406 of the Indian Penal Code. In the facts of the present case, it is specific case of the non-applicant No.2 that the non-applicant No.2 had supplied cotton to the applicants with the specific agreement that in case of failure on the part of applicants to pay the amount for the goods supplied by the non-applicant No.2, the applicants shall not sell the cotton yarn manufactured out of cotton supplied by the non-applicant No.2 in the open market without written permission of the non-applicant No.2. Therefore, the judgment in the case of S.W.Palanitkar (supra) is not applicable to the facts of the present case.

10. Learned advocate for the applicants replied upon another judgment of the Hon'ble Apex Court in the case of G. Sagar Suri and another Vrs. State of U.P. and others, reported in (2000) 2 SCC 636. In the said case, there were allegations against the applicants wherein details of the offence alleged against the accused therein have not been supplied. In the facts of the said case, the Hon'ble Apex Court in para 14 has observed that

there was attempt by the complainant to rope in all family members of the Company to whom the goods were supplied. Though, in the facts of the said case, the criminal complaint under Section 138 of the Negotiable Instruments Act, 1881 (for short "Act of 1881") was pending, in our opinion, the said fact of the pendency of the complaint under the provisions of the Act of 1881 is of less significance taking into consideration the allegations in the First Information Report. It appears that the Hon'ble Apex Court in the said case had exercised its powers mainly on the ground that the allegations in the First Information Report no details given as to how the complainant was duped by the accused persons. Therefore, the said judgment is distinguishable on facts of the present case.

11. The next judgment relied upon on behalf of the applicants is the case of **All Cargo Movers (India) Private Limited and others Vrs. Dhanesh Badarmal Jain and another, (2007) 14 Supreme Court Cases 776**), wherein the Hon'ble Apex Court held that mere breach of contract does not attract the ingredients of the offence under Sections 406 and 420 of the Indian Penal Code. In the facts of the said case, it has been held by Hon'ble Apex Court that even if the allegations in the First Information Report of the

said case are taken to be correct in their entirety, if it does not disclose an offence. In the facts of the present case, the offence which has been alleged against the applicants is under Section 406 of the Indian Penal Code. As stated above, there is specific agreement wherein the applicants had agreed not to sell the cotton yarn supplied by the non-applicant No.2 to the applicants. In the light of the above allegations, there is entrustment of cotton yarn to the applicants which had been dishonestly sold by the applicants in the open market without written permission from the non-applicant No.2. Therefore, the judgment of the Hon'ble Apex Court in the case of All Cargo Movers (India) Private Limited (supra) is not applicable to the facts of the present case.

12. Learned advocate for the applicants then relied upon the judgment of the Hon'ble Apex Court in the case of Inder Mohan Goswami and another Vrs. State of Uttaranchal and others, reported in AIR 2008 SC 251. In the facts of the said case, issue involved was under Sections 420 and 467 of the Indian Penal Code. In the facts of the present case, the offence which has been alleged against the applicants is under Section 406 of the Indian Penal Code and, therefore, the observations of the Hon'ble Apex Court in the said case would be of no help to the applicants.

13. Learned advocate for the applicants lastly relied upon the judgment of the Hon'ble Apex Court in the case of Sushil Sethi and another Vrs. State of Arunachal Pradesh and others, reported in (2020) 3 SCC 240. In the facts of the said case also, the offence was alleged against the accused under Section 420 of the Indian Penal Code. Therefore considerations which weighed Hon'ble Apex Court while setting aside First Information Report are totally different than the considerations of the present case wherein the offence alleged is only under Section 406 of the Indian Penal Code.

14. It is next submitted by the learned Advocate appearing for the applicants that the applicant No.4 had resigned from M/s. Subburaj Spinning Mills Pvt. Ltd. in the year 2011 and the applicant No.3 had resigned from the said Company in the year 2014. In support of her submission, she relied upon photostat copy of Form No.32. The Form No.32 which has been placed on record does not show acknowledgment of submission of said form to the Office of Registrar of Companies. The Board resolution which had been annexed alongwith the said Form has not been placed on record. There are no details given by the applicants as

to when such Form was submitted to the Office of Registrar of Companies. There are no details given as to when Board of M/s. Subburaj Spinning Mills Pvt. Ltd. had accepted the resignation of the applicant Nos.3 and 4. In absence of such details, at this stage, it is difficult to accept the contention of the applicants that the applicant Nos.3 and 4 have resigned from their Company. It is also required to be noted that it is alleged by the applicants that the applicant No.3 has resigned w.e.f. 07/10/2014. From the agreement which has been placed on record, it appears that the date of agreement is 07/09/2013. The date of alleged resignation of applicant No.3 is 07/10/2014, therefore it cannot be said that the applicant No.3 was not at all concerned with the affairs of the Company on the date of agreement. The said fact is required to be proved at the time of trial by the prosecution. It is for the applicants to prove, at the time of trial, that as a matter of fact, the applicants have resigned from the affairs of the Company before the transaction which is subject matter of present application. At the stage of quashing of First Information Report, at its threshold, it will be difficult to accept such contention in absence of unimpeachable proof produced by the applicants.

15. It is further submitted by the learned Advocate for the applicants that the applicants have already been declared as insolvent by the National Company Law Tribunal under the provisions of the Insolvency and Bankruptcy Code, 2016. We have given thoughtful consideration to the submission. In our opinion, if the applicants are declared as insolvent, there is no impediment in proceeding with the criminal complaint under Section 406 of Indian Penal Code 1860, which has been already filed against the applicants. In our opinion, the said fact insolvency would not entitle the applicants to raise challenge to the continuation of present proceedings.

16. Having considered the facts and circumstances of the present case and in particular, the allegations made in the First Information Report, we are satisfied that the applicants are required to face trial and it will be for the prosecution to prove his case during the trial. We are satisfied that this is not a case which can be thrown out at its threshold. We, therefore, find no merit in the present application and the same is dismissed.

CRIMINAL APPLICATION (APPP) NO.943 OF 2018

In view of disposal of Criminal Application (APL) No.423/2018, the application for dispensing with the filing of certified copy of FIR does not survive. It is disposed accordingly.

JUDGE**JUDGE**

Choulwar