BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON	11.03.2021
DELIVERED ON	19.04.2021

CORAM

THE HONOURABLE MR.JUSTICE G.ILANGOVAN

Crl.O.P.(MD)Nos.16539 and 16540 of 2017
and
Crl.MP(MD)Nos.10941 and 10942 of 2017
and 9145 and 9146 of 2019

B.Safeer Babu .. Petitioner in both petitions

vs.

1.State Represented by
The Inspector of Police,
District Crime Branch,
DCB Police Station,
Thoothukudi,
Thoothukudi District. .. 1st Respondent in both petitions

2.Prasant Kumar Sahoo,
S/o. Sri Durodhan Sahoo,
Proprietor of Sriram Casew,
Resident of Ray Bahadur Lal Puri,
Odisha-752 001. .. 2nd Respondent in Crl.O.P.(MD)No.16539 of 2017

3.Arun Paul,
Director of Vareli Tecnac Private Limited,
Plot No.1127, Kabadabazar Post,
Khetrajpur, Sambalpur,
Odisha-768 003. .. 2nd Respondent in Crl.O.P.(MD)No.16540 of 2017

Common Prayer: Criminal Original Petitions filed under Section 482 of the Code of Criminal Procedure, to call for the records pertaining to the First Information Report in Crime Nos.26 of 2017 and 27 of 2017, dated 24.05.2017 respectively on the file of the first respondent and quash the same as illegal as against the petitioner.

For Petitioner (in both petitions) : Mr.T.Lajapathi Roy
For R1 (in both petitions) : Mr.M.Ganesan Government Advocate (Crl. side)
For R2 (in both petitions) : M/s.Nithyaeshnatraj

COMMON ORDER

These petitions are filed seeking to quash the First Information Report in Crime Nos.26 of 2017 and 27 of 2017, dated 24.05.2017 respectively on the file of the first respondent.

2.The facts in, Crl.O.P.(MD)No.16539 of 2017, in brief are as follows:-

2.1.The de-facto complainant, who is the the respondent herein, is the Proprietor of Sriram Cashew. He purchased 10 containers of raw cashew nuts in two numbers, viz., bill of lading No.95734771C for a consignment of 81.050 metric tones worth Rs.76,87,593/- and the second bill of lading No. 95734771 B for a consignment of 80.380 metric tons being 950 bags for Rs.76,24,043/- from the petitioner enterprises.

2.2.The containers reached the Tuticorin Port on 04.10.2016. After the de-facto complaint came to know from the Department of Customs that there is some problem with regard to the cargo containers, the de-facto complainant filed their documents for clearing the goods and they called for a joint survey of the containers in the presence of them along with CFS representatives, the liner, independent international surveyor, the petitioner and de-facto the complainant were accordingly informed.

2.3.All the accused did not come for joint survey. During the survey, the de-facto complainant company came to know that there was heavy shortage in cargo at the time of weighment. From the joint verification, it is seen that in the first bill of lading, there was a shortage of 75.380 metric tons and in the second bill of lading, there was a shortage of 75.090 metric ton. Totally, it came around 150.47 worth metric ton. So, according to the de-facto complainant, the petitioner cheated him wilfully and also evaded to follow the rules and regulations for loading the containers.

3.The facts in, Crl.O.P.(MD)No.16540 of 2017, in brief, are as follows:-

3.1.The de-facto complainant herein is the Director of M/s.Vareli TECHNAC Private Limited, which was incorporated under the Companies Act, 1956 and they are having the principal business place in Odisha. The company entered into an agreement in respect of dried raw cashew nuts in shell with the petitioner Company, on 03.08.2016, for a consignment of 80.800 metric tons, for which, a total amount of Rs.76,63,880/- was paid to the petitioner, under the bill of lading No.MAEU 957347712, dated 29.07.2016. The next agreement is, dated 03.08.2013 for a consignment of 80.450 metric tons, for which, a total amount of 76,30,683/- was paid to the petitioner under the second bill of lading No.95734771 A, dated 29.07.2016.

3.2.Similarly, on 01.09.2016, for a consignment of 89.950 metric tons, it was valued at total amount of Rs.85,00,275/- under bill of lading MAEU No.957437656, dated 25.08.2016. The containers arrived Tuticorin Port in between 04.10.2016 and 16.10.2016. After arrival of the said goods, they were informed that there are certain problems with regard to the cargo in the containers. Upon receiving the information, all necessary papers and documents of imports were filed before the Department of Customs and the Department of Customs called for a joint survey of containers in the presence Trans World CFS ,CWC, CFS representatives, the Liner Maersk Line, Independent International Surveyors RBS, the high sea seller and the de-fact complainant, who is the High Seas Buyer. On 24.10.2016 and 25.10.2016, the complainant was present and the representatives, the accused intentionally avoided the Survey. Upon the survey, it was found that there was a heavy shortage of cargo at the time of weighment. The surveyor had thereafter, surveyed the containers and had given a report. The Liner Maersk and the accused herein along with his Director and Authorised Person have committed criminal breach of trust and have cheated the de-facto complainant for a sum of Rs. 1,67,33,209/-.

4.Based upon the complaint given by the de-facto complainants, cases in crime Nos.26 of 2017 and 27 of 2017 were registered on the file of the first respondent herein. Pending investigation, the first accused has filed these petitions seeking quashment of the First Information Report mainly on the ground that he is also a victim under the transaction which was entered into between the second accused and himself and there was no intentional cheating and moreover, it is a business transaction, for which, only civil remedy will lie as per the terms and conditions set out between the parties and criminal complaint is an abuse of the process of the court.

5.Heard the learned counsel on either side.

6.In both the petitions, the petitioner is one and the same and the first accused in both the crime numbers pending on the file of the first respondent and the de-facto complainant as mentioned earlier are different. But the cause of action as well as the facts and question of law involved in both the petitions are one and the same. Both the petitioners were heard together and common orders are passed.

7.It is not in dispute that the de-facto complainant in both the cases placed purchase orders for purchasing cashew nuts from the third accused situated in Africa-Gana and the agreement was entered into between the first accused and the de-facto complainants in both the cases for purchasing the cashew nuts. It is also not in dispute that when the containers reached Tuticorin Port on 04.10.2017, it was found that there was some problem in the contents of the containers. So, a joint survey was undertaken in the presence of the custom officials as well as the authorities, who are mentioned in the complaint. The survey was done on 25.10.2016. During the survey, the representatives of the first accused, namely, AVS Enterprises, Kollam as well as the representatives of the second accused, namely, Johney Motha, Maersk Line, Thoothukudi, were not present. It is also not in dispute that in both the consignments, when weighment was undertaken, there were deficiencies/shortage of cargo as mentioned in the complaint. It is also not in dispute that based upon the shortage of cargo found on 24.10.2016, An agreement was made between the first accused herein and the de-facto complainant in both the cases to make food the loss by way of supplying the deficit quantity of the cashew nuts.

8.In Crl.O.P.(MD)No.16540 of 2017, it is mentioned that the seller agreed to supply year 2017 crop of cashew nuts in two tranches, each consignment being 170 matric tons. The first tranches was agreed to arranged on 25.02.2017 and second one will be on 25.03.2017. It was also agreed that time, is was the essence of the settlement and so, also payments. It was also agreed that modification will not be valid. Similarly, in Crl.O.P.(MD)No.16539 of 2017, it was agreed that the year 2017, crop of cashew nuts in two tranches will be supplied and first one was agreed on 25.02.2017 and second one was agreed to be on 25.03.2017.

9.According to the de-facto complainant, in spite of this specific undertaking and agreement between the parties as well as the undertaking given before the respondent police, the same was not kept by the petitioner herein, in both the cases and only after the default committed by the petitioner in both the cases, the First Information Report came to be registered on 24.05.2017. The reason for breach of undertaking given by the petitioner, dated 24.01.2017, is a matter for investigation by the first respondent during the course of investigation and no explanation was also forthcoming from the petitioner in both the cases.

10.Now, according to the petitioner, no offence under Section 420 IPC is attracted even on the face of the allegation mentioned in the First Information Report in both the cases. According to the learned counsel for the petitioner, if at all, only a civil liability under the breach of contract will lie and no breach of trust is also involved and in respect of breach of condition of any terms of the agreement or breach of the contract, only the arbitration proceedings can be initiated and it is the further contention that as per the arbitration agreement, the seat of Arbitration was fixed at Kollam. Moreover, he is also victim of the breach of contract by the third accused. The next contention is that as per Section 188 of the Code of Criminal Procedure, prior sanction of the Central Government is required for making any enquiry considering the offences are said to have taken place out of the territorial limits of India. According to the learned counsel for the petitioner, since the offences said to have taken place outside India, sanction is required even for making investigation into the offence alleged. It is also contended that since the arbitration proceedings are also pending, simultaneously criminal prosecution cannot be permitted. The final contention is that the de-facto complainants are trying to give a criminal colour to the commercial transactions with an ulterior intention and motive. The learned counsel for the petitioner would rely upon the judgments of the Hon'ble Supreme Court of India in support of his contentions in the case of ***Kailash Verma Vs. Punjab State Civil Supplies*** reported in ***JT 2005 (2) SC 420*** and in the case of ***International Advanced Research Centre for Powder Metallurgy and New Materials (ARCI) and Ors Nimra Cerglass Technics (P) Limited*** in Criminal Appeal No.2128 of 2011, dated 22.09.2015.

11.Per contra, it is the contention of the learned counsel for the de-facto complainants in both the cases that the intention to cheat and loss running to several crores, is evident from the conduct of the petitioner and even though civil liability is also involved in the transaction, the criminal proceedings can be initiated and for that proposition, he would rely upon the following judgments:-

(i) ***Rupan Deol Bajaj (MRS) Vs. Kanwar Pal Signh Gill and another*** reported in ***1995 (6) SCC 194.***

(ii) ***Rajesh Bajaj Vs. State NCT of Delhi and others*** reported in ***1999 (3) SCC 259.***

(iii)***Medchl Chemicals and Pharma (P) Limited Vs. Biological E. Limited and others*** reported in ***2000 (3) SCC 269.***

(iv)***Arun Bhandari Vs. State of Uttar Pradesh and others*** reported in ***2013 (2) SCC 801.***

(v)***Dr.Lakshman Vs. State of Karnataka and Others*** reported in ***2019 (9) SCC 677.***

12.Now, the simple question which arises for consideration is, whether the First Information Report registered based upon the complaint given by the de-facto complainant in both the cases are liable to be quashed on the grounds mentioned by the petitioner?

13.No doubt, it is a commercial transaction, which involves a foreign company a shipment company as well as seller in India. According to the petitioner, as mentioned earlier, Section 188 of the Code of Criminal Procedure will bar the enquiry. But from the records produced before the Court as well as from the admitted facts, it is seen that the consequence enured only in India. The first accused, who is the petitioner herein, is located in India and he is the seller of the cargo and shortage was also founded only at the time of joint survey in Tuticorin Port. Shortage was also admitted by the petitioner in India. They also made an agreement to make good the loss in two installments as stated above. So, when the consequence ensued in India, the argument on the side of the petitioner that investigation requires the sanction under Section 188 of the Code of Criminal Procedure, cannot be accepted and so, this ground is liable to fail.

14.The second ground is that it is purely a civil liability and no criminality is involved. But the de-facto complainant would heavily rely upon the subsequent conduct of the petitioner to show that the ingredients of Section 420 IPC are attracted. Moreover, the quashment of the criminal complaint at the First Information Report stage itself is not encouraged.

15.When the petitioner and the second accused moved an anticipatory bail application before this Court, they were dismissed by order dated 16.11.2017 in both the cases. Both the petitions were dismissed, against which, the second accused, namely, Johney Motha filed a Special Leave Petition before the Hon'ble Supreme Court of India in Crl.A.Nos.9813 to 9814 of 2017, by an order dated 03.04.2018, the Hon'ble Supreme Court of India, has made an observation to the effect that " the only documents at this stage, which the petitioner can make available, and states to have made available though disputed by learned counsel for the third respondent is the screenshot from the website of the VGM certificate uploaded by the Shipper. The same be handed over within seven days."

16.Now, according to the de-facto complainant, the VGM certificate, is the document, which will show the correct tonnage of the consignment at the time of loading cargo. But, the accused has not made available the VGM certificate. According to the de-facto complainant, it shows the guilty mind of the accused. But, I am not going into those factual aspects, which are required to be investigated and proved before the trial Court at the time of trial. Whether the petitioner entertained the deceit mind, even at the time of entering into the contract, is a matter for investigation and trial as mentioned earlier. It is the settled law that a civil transaction will also involve criminality. Simply because a civil action will lie or is pending, criminal action cannot be dropped or stayed. The Hon'ble Supreme Court of India in the Judgment cited by the petitioner in ***International Advanced Research Centre for Powder Metallurgy and New Materials (ARCI) and Ors Vs. Nimra Cerglass Technics (P) Limited*** (*cited supra*) has observed that:

> "...14...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 shows at the beginning of the transaction. In S.W.Palanitkar and Ors Vs. State of Bihar and Another (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 fradulent 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 and Another. (2014) 13 SCC 553."

Further, in paragraph No.20, it has been observed that:

"...20.By analysis of terms and conditions of the agreement between the parties, the dispute between the parties appears to be purely of civil nature. It is settled legal proposition that criminal liability should not be imposed in disputes of civil nature. In Anil Mahajan Vs. Bhor Industries Limited and another (2005) 10 SCC 228, this Court held as under:- "6....A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot be give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the transaction."

17.The learned counsel for the de-facto complainants would rely upon the Judgment of the Hon'ble Supreme Court of India reported in ***1995 (6) SCC 194*** mentioned *supra* for the purpose of argument that the First Information Report cannot be quashed and this Court is not justified in embarking upon an enquiry as to the probability, reliability or genuineness of the allegations. According to them, a reading of the First Information Report shows that there are sufficient grounds for making some accusation. The allegations are not absurd and inherently improbable. He would further rely upon the Judgment of Hon'ble Supreme of India reported in ***1999 (3) SCC 259*** mentioned *supra* for the purpose of argument that if the factual foundation for the offence has been laid in the complaint, the Court should not quash the criminal proceedings during the investigation stage, simply because one or two ingredients of the offences are not mentioned in the First Information Report. In ***2000 (3) SCC 269*** (cited supra), the availability of a civil remedy will not remove the criminal liability. As mentioned earlier, it is the settled law that both the remedies can be pursued simultaneously, if sufficient grounds are available. In ***2019 (9) SCC 677*** *(cited supra)*, the High Court cannot get into the disputed facts, simply because, the suits were filed for enforcing the civil liability.

18.It is also the settled law that quashing of First Information Report will amount to killing an unborn child. So, this is the basic principle, which guides the Courts, while deciding quashing the First Information Report. So, looking the case of the parties from all angles, there was a breach of contract and breach of subsequent undertaking. According to the de-facto complainants, writs large by subsequent contract. Specific allegation has been made in the complaint to the effect that the petitioner herein along with the third accused and the second accused were hand in glove in committing the theft of dry raw cashew nuts in shell and they have jointly and severally misappropriated the goods.

19.In the light of this specific allegation, I am of the considered view that it is not a fit case for this Court to exercise the jurisdiction under Section 482 Cr.P.C to quash the investigation. So, for the reasons stated above, I am of the considered view that the investigation must be taken to its logical conclusion and so, both the petitions deserves to be dismissed and accordingly, there are dismissed. Consequently, the connected miscellaneous petitions are also closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

sji

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

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To

1.The Inspector of Police,
District Crime Branch,
DCB Police Station,
Thoothukudi,
Thoothukudi District.

2.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+2 CC to M/s.T.LAJAPATHI ROY, Advocate (SR-16607[F] dated 20/04/2021)

Crl.O.P.(MD)Nos.16539 and 16540 of 2017
19.04.2021

KUN(CO)
KB(29.04.2021) 8P 5C