IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

205

CRM-M-28168-2021 (O&M)
Decided on : 05.10.2021

Mohd. Hashim

. . . Petitioner

Versus

State of Haryana

. . . Respondent

CORAM: HON'BLE MR. JUSTICE VIKAS BAHL

(Through Video Conferencing)

PRESENT: Mr. R. S. Rai, Senior Advocate with
Mr. Deepender Singh, Advocate
for the petitioner.

Mr. Manish Dadwal, AAG, Haryana.

****

VIKAS BAHL, J. (Oral)

The present petition has been filed under Section 438 of the Code of Criminal Procedure for grant of anticipatory bail to the petitioner in case bearing FIR No. 353 dated 10.10.2020 under Section 120-B, 406, 420, 467, 468, 471 and 506 IPC, registered at Police Station Sector-50, District Gurugram.

The present FIR has been registered on the complaint of Parivartan Singh, who is stated to be the ex-director of Parivartan Buildtech Private Limited (hereinafter referred to as 'PBPL'). Briefly put, the allegations made in the complaint are to the effect that in the year 2017, the complainant was informed by Balraj Kundu and Shiv Raj Kundu (non-petitioners/co-accused) that they have to execute some road projects in Madhya Pradesh which are very profitable and in case, the

Complainant works with them, he would earn substantial profits. The complainant, believing their statement, took one road project in which three roads were required to be built. Accordingly, an Agreement dated 26.09.2017 was entered into after which, as per the complainant, the work was started on the site. Initially, the work was running smoothly but subsequently there was a disruption in the work on site regarding which, the complainant sent about 8-10 mails to the accused persons but the issue was not resolved. In the month of December 2018, a letter was written by the complainant, but as per his allegations, instead of resolving the issue, a notice was given by the accused persons to the complainant, to which the complainant replied and stated that the allegations made by the accused persons in the said notice were false. Subsequently, on 16.2.2019, the company PBPL issued a notice of termination to KCC Buildcon Private Limited (hereinafter referred to as "KCC Company", of which the present Petitioner is an employee) and terminated the agreement. Thereafter, the petitioner and Shivraj Kundu asked the complainant to start the work, failing which, the balance amount would not be paid to him and thus, the complainant resumed the work and in February, 2019, the company-PBPL (of which the Complainant was a Director) was paid around 2 crores by the accused persons and the balance amount was also promised to be paid. In the last days of March 2019, the petitioner along with few persons came to the site and threatened the complainant and took possession of the machines, materials, ac, computer etc. When the complainant talked to Shivraj Kundu and Balraj Kundu, they served a notice for termination of contract on 28.03.2019. Some of the machines which were taken in possession by the accused persons, were loaned by HDFC Bank and when the bank came to know about the same, the bank took possession of the said machines and sold them to Gawar Construction Ltd. In May, 2019, the complainant was called to the KCC Office at Golf Course Road, Gurugram, where the Complainant demanded money from Shivraj Kundu, V. K. Lamba and Balraj Kundu (co-accused/non-petitioners) and there the settlement took place. As per the complainant, out of the amount of 40-41 crores, the company KCC had paid around 27-28 crores to the company PBPL. A settlement paper was prepared and as per the complainant, his signatures were taken on 2-3 blank letter head of PBPL company and 4-5 cheques for 12-13 crores were prepared and the complainant was informed that he could take the settlement paper and the cheques in the coming 2-3 days. When the complainant visited the office after 2-3 days, then Shivraj Kundu and V. K. Lamba (co-accused/non-petitioners) threatened the complainant and did not give any cheque or settlement copy and told the complaint that if he demands money then, they will kill him. Further, as per the complainant, false signatures of the complainant were taken by fraud and it was, thus, prayed by the complainant, that action be taken against the petitioner and three other accused persons i.e., Shiv Raj Kundu, Balraj Kundu and Vijay Kumar Lamba (Directors of KCC Company).

Learned Senior Counsel for the Petitioner has argued that this is a classic case in which a purely civil dispute has been given a criminal color and the FIR has been registered only to exert pressure on the petitioner and the other accused and has further highlighted the chronological events to buttress the said argument. It is submitted that on 26.9.2017, an agreement was entered into, between the company-PBPL (wherein, the complainant-Parivartan Singh is stated to be the director of PBPL) and KCC Company [wherein, Vijay Kumar Lamba, co-accused is stated to be the Director (technical)]. It is argued that the petitioner is only an employee of the company KCC and that the said agreement pertains to a work order for roadwork namely Pali-Peerghat-Khimlasa-Kanjiya Road in Madhya Pradesh on sub-contract basis. It is further submitted that there was a commercial transaction between the company PBPL, of which the complainant was a Director and the company KCC, of which the petitioner was an employee and that vide order dated 17.08.2020 (Annexure P-12), PBPL was ordered to be liquidated by a detailed order passed by National Company Law Tribunal, New Delhi, Bench (Court-II) in company petition No. (IB)-299(ND)2019 titled as M/s Banyan Tree Developers Pvt. Ltd. Vs. M/s Parivartan Buildtech Pvt. Ltd. The relevant portion of the said order as highlighted, is reproduced hereinbelow:-

> "*11. In sequel to the above, the Application is allowed, ordering Liquidation of the Corporate Debtor, M/s Parivartan Buildtech Pvt. Ltd. in the manner as laid down in the Chapter III of Part II of the Insolvency and Bankruptcy Code, 2016 and in accordance with the relevant Rules and Regulations along with the following directions:*
>
> *a. Ms. Deepika Bhugra Prasad, having IBBI Registration No. IBBI/IPA-003/IP-N000110/2017-18/11186, is appointed as Liquidator, who has given her*

written consent to act as Liquidator in terms of Section 34(1) of IBC 2016;

b. The Liquidator, is directed to issue public announcement clearly stating that the Corporate Debtor is under Liquidation in terms of Regulation 12 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016;

c. The Order of Moratorium passed under Section 14 of the Insolvency and Bankruptcy Code, 2016 shall cease to have its effect from the date of pronouncement of this order and a fresh Moratorium under Section 33(5) of the Insolvency and Bankruptcy Code shall commence:

d. This order shall be deemed to be a notice of discharge to the officers, employees and the workmen of the corporate debtor as per Section 33(7) of the Insolvency and Bankruptcy Code, 2016;

e. Liquidator shall follow up and continue to investigate the financial affairs of the Corporate Debtor to determine the undervalued and preferential transactions etc., if any.

f. The Liquidator shall submit a Preliminary Report to the Adjudicating Authority within seventy-five (75) days form the liquidation commencement date as per Regulation 13 of the Insolvency and Bankruptcy (Liquidation Process) Regulations, 2016.

g. The Registry is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor and Liquidator Ms. Deepika Bhugra Prasad at the earliest but not later than seven days from today.

h. A copy of this order be also sent to the ROC concerned. On receiving the copy of this order, the ROC concerned will update the Master Data. After updating the Master Data, ROC shall send compliance report to the Registrar, NCLT within a period of 30 days.

i. The Registrar is directed to communicate this

Order to the Registrar of Companies, NCT of Delhi & Haryana and to the Insolvency and Bankruptcy Board of India;

12. I.A. 638/CII/ND/2020 filed in IB-299(ND)2019 is disposed of in the aforesaid terms."

The learned Senior counsel for the petitioner has pointed out that since, there was a claim by KCC Company against PBPL, thus, a claim application was filed in the said proceedings which fact is apparent from the email dated 16.12.2020 (Annexure P-10). The liquidator in the matter had noted the fact that the claim of KCC company had been received and on verification, it has been found that an amount of Rs.2,35,79,840/- stands provisionally admitted. It is, thus, highlighted that even as per the email dated 16.12.2020, it was the company wherein the petitioner is an employee, which had to recover/take money from the company in which the complainant was a director. It is submitted that the complainant first approached the Police Station Shivaji Nagar and after having failed to get an FIR registered in the said police station, a complaint was filed under Section 156(3) CrPC in the court of the Chief Judicial Magistrate, Gurugram and on 10.07.2019, the following order was passed:

"Present: Complainant in person with counsel, Ms. Manju Phogat.

Complaint presented before me being Illaqa Magistrate. It be checked and registered. Now to come up on 25.11.2019 for preliminary evidence of complainant.

(Pardeep Choudhry)
CJM,Gurugram.
UID No. HR0268

Date of Order: 10.7.2019"

It has been submitted that the said application is still pending and no order has been passed for registration of the said FIR. However, the complainant, thereafter, got the present FIR registered on 10.10.2020 in Police Station Sector- 50, Gurugram on the basis of the same set of allegations, without disclosing the abovesaid Order/Proceedings. Learned Senior counsel has pointed out that, in fact, since the winding up order has been passed prior to the registration of the said FIR, thus, Parivartan Singh- complainant, did not have any *locus standi* to represent the company or to institute any proceedings on behalf of the company. It is further submitted that even a perusal of the FIR would show that the entire dispute is a civil dispute and the proceedings are pending before the competent Court and the same are to be adjudicated by the said court, however, despite the same, the Police Station Sector-50, Gurugram has chosen to register the FIR in question. It is argued that even if the allegations in the FIR are taken on face value, it is apparent that the claim raised by the complainant is for recovery of money and the Hon'ble Supreme Court of India has repeatedly observed that any effort to settle civil disputes by filing criminal cases should be deprecated and discouraged. It is further submitted that there are no allegations in the FIR to the effect that the accused persons had a fraudulent intention right from the beginning of the Agreement and it was further highlighted that the company KCC has not even been made an accused and the Petitioner, who is only an employee of the said company, cannot be held vicariously liable, moreso, in the absence of the company being made an accused. It is further highlighted that in the Agreement dated 26.09.2017, there is an Arbitration Clause i.e., Clause 14 and thus, the registration of the FIR on the said account also, is only a pressure tactic.

Learned Senior counsel has also pointed out that in fact, a detailed order, dated 27.10.2020 (Annexure P-6), was passed by the Sessions Judge, Gurugram while granting anticipatory bail to Balraj Kundu, Shiv Raj Kundu and Vijay Kumar Lamba, who are the Directors of KCC company in which, the petitioner is only an employee. The relevant part of the said order is reproduced hereinbelow:-

> *"6. If there was a contract/agreement between the complainant and petitioners-accused but it was not honoured by the petitioners, this in itself would not lead to commission of offence of cheating or breach of trust and the proper remedy in this regard is to invoke arbitration clause mentioned in the agreement itself or in the alternate to seek the specific performance of the contract. The remedy under the criminal law is out of question. If the proposition advanced by the learned Assistant Public Prosecutor which was the sum and substance of his arguments and the stance of the complaint, is to hold the field then in every case in which in a commercial or contractual transaction, one party owes a sum to another and the same remains unpaid, it would be a case of cheating punishable under section 420 of the Indian Penal Code, 1860. Unfortunately for the complainant, this is not the legal proposition. Law does not permit conversion of a civil dispute in a criminal prosecution.*

7. Sections 406 and 420 of the Indian Penal Code, 1860, are antithesis to each other and in respect of one transaction, both cannot be committed simultaneously. Learned Assistant Public Prosecutor failed to point out as to what valuable security was forged by the petitioners and how the alleged offence punishable under section 467 of the Indian Penal Code, 1860, was made out against the accused. Insofar as the story propounded by the complainant with regard to three letterheads, settlement paper and cheques being not there in the previous complaint, it shows that it was done as an exercise in afterthought with a view to exaggerating the gravity of the offences and the same prima-facie appears to be untrue.

xxx—xxx--xxx

10. There was hardly any valid explanation for the various arguments advanced by the learned counsel for the petitioners from the side of the learned Assistant Public Prosecutor and in a nut shell, this Court has no hesitation in prima-facie reaching the conclusion that a design on the part of the complainant to turn the civil litigation into a criminal litigation with a view to exerting pressure upon the petitioners, was there and unfortunately, the police have not displayed expected objectivity while dealing with the case. This Court is not oblivious of its limitations while deciding an application for bail but at the same time, this Court is of the considered opinion that calling 'a spade, a spade' is the first and foremost pious duty of a Judge and he cannot be expected to be a mute spectator feeling helpless in recording something the omission of which would come in the way of discharging the obligations enjoined upon the Court. This Court is further of the considered opinion that the complainant cannot be allowed to succeed in his design as it appears to be a case of high handedness of the police in troubling the petitioners. The sequence of events unfolded in this case is not a happy countenance.

Without commenting upon merits of the case and having

> *regard to the totality of the facts and circumstances of the case, this Court deems it a fit case to grant the concession of anticipatory bail to the petitioners. So order dated 21.10.2020, granting interim anticipatory bail to petitioners, is hereby made absolute. Petitioners-accused would be released by the Arresting Officer/learned Area Magistrate subject to their furnishing the personal bonds to the tune of ₹1,00,000/- each with one surety each in the like amount subject to the satisfaction of the Arresting Officer/learned Area Magistrate. Petitioners-accused shall not tamper with the evidence of the prosecution or leave the country without prior permission of the Court. Copy of order be sent to the learned Area Magistrate and the S.H.O. concerned.*
>
> *11. A copy of this order be also sent to the Home Secretary, Government of Haryana, Chandigarh, for information and necessary action.*
>
> *Pronounced in open Court."*

Learned Senior counsel for the petitioner has contended that although, the Directors have been granted anticipatory bail and in fact, a copy of the said order was also ordered to be sent to the Home Secretary, Government of Haryana, for information and necessary action, but the anticipatory bail application of the petitioner has been rejected in spite of the fact that he is only an employee of the company. It is submitted that in fact, it is the complainant's company which owes money to KCC company, in which the Petitioner is an employee. It is further submitted that the petitioner has already joined the investigation and thus, the present petition may kindly be allowed.

Learned State counsel has submitted that the petitioner has joined the investigation twice earlier and has also joined on 24.9.2021 but has opposed the bail application.

This Court has heard the learned counsel for the parties and has perused the record.

At the outset, it is relevant to refer to the judgment of the Hon'ble Supreme Court, titled as "**Inder Mohan Goswami and Another v. State of Uttaranchal and Others**", reported as ***2007 (12) SCC 1.*** Relevant paragraphs of the said judgment are reproduced hereinbelow:

> "*12. Having committed breach of his contractual obligations, respondent No. 3 filed a criminal complaint to the SHO of Raiwala, Rishikesh police station on 23.4.2003 against the appellants and three other persons alleging that he had been cheated by the appellants in connivance with other persons by selling a portion of his land to a third party and by cancelling the General Power of Attorney. After examining the matter, the SHO arrived at the conclusion that no cognizable offence had been committed and the dispute in question was of civil nature for which the civil remedy is available in law.*
>
> *13. Respondent No. 3 filed another complaint on the same day, i.e. 23.4.2003, to the Senior Superintendent of Police, Dehradun and got the FIR registered against the appellant and three other persons. The allegation of respondent No. 3 was that the appellants in connivance with other persons had sold the part of land situated in Old Khasra No. 140 and new Khasra No. 89 which had been transferred to them by way of General Power of Attorney. The FIR was registered on 23.4.2003 as Case No. 26 of 2003 under sections 420, 467 and 120B Indian Penal Code.*

xxx—xx—xxx

17. The High Court by order dated 16.7.2004 dismissed the petition under Section 482 Criminal Procedure Code filed by the appellants on the ground that the records show that the allegations in the FIR constitute an offence as alleged by the complainant. The said order is challenged in this appeal by special leave.

xxx—xx—xxx

*34. In **Indian Oil Corporation v. NEPC India Ltd. & Others, 2006(3) RCR (Criminal) 740 : (2006)6 SCC 736**, this court again cautioned about a growing tendency in business circles to convert purely civil disputes into criminal cases. The court noticed the prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. The court further observed that "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."*

xxx—xx—xxx

42. The court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressure the accused.......

xxx--xx--xx

56. Reverting to the facts of this case, we are of the considered view that the impugned judgment of the High Court in declining to exercise its inherent power has led to grave miscarriage of justice. Consequently, we set aside the impugned judgment and in order to prevent abuse of the process of the court and to otherwise secure

> *the ends of the justice we direct that all the proceedings emanating from the FIR shall stand quashed. The appeal is disposed of accordingly. In the facts and circumstances of this case, we direct the parties to bear their own costs."*

A perusal of the above judgment would show that the Hon'ble Supreme Court had observed that any effort to settle disputes and claims by applying pressure through criminal prosecution should be deprecated and discouraged and the Court must ensure that criminal prosecution is not used as an instrument of harassment or with an ulterior motive to pressurize the accused. From the facts of the present case, it is apparent that there was an agreement, dated 26.09.2017, between PBPL, of which the complainant was the Director, and KCC company, of which the petitioner is an employee. The same was for carrying out work order for roadwork in the State of Madhya Pradesh namely Pali-Peerghat- Khimlasa-Kanjiya Road, on a sub contract basis. Apparently, there were some issues that cropped up while executing the said work contract. The complainant's company PBPL went into liquidation, as is apparent from the order dated 17.8.2020 (Annexure P-12), passed by the National Company Law Tribunal, New Delhi, Bench (Court-II) in company petition No. (IB)-299(ND) 2019 titled as M/s Banyan Tree Developers Pvt. Ltd. Vs. M/s Parivartan Buildtech Pvt. Ltd. The relevant portion of the said order has already been reproduced hereinabove. It would also be relevant to note that in fact, the Interim Resolution Professional was appointed on 14.5.2019 and the claim raised by the company KCC, of which the petitioner is an employee, to the extent of Rs. 2,35,79,840/- was provisionally admitted, as is apparent from the email dated 16.12.2020 (Annexure P-10), sent on behalf of the liquidator in the matter. The said matter is pending and would be finally adjudicated upon by the competent Court. However, the complainant had, in order to exert pressure on the petitioner and the co-accused, made two attempts to get an FIR registered. The first attempt was made to get an FIR registered at police station Shivaji Nagar and in furtherance of that attempt, when the Police Station Shivaji Nagar did not register the FIR, complaint under Section 156(3) was filed (Annexure P-13) and on 10.07.2019, the Learned Chief Judicial Magistrate, Gurugram had adjourned the matter to 25-11-2019 for preliminary evidence of the complainant and no order was passed thereafter for the registration of an FIR. Having failed in the first attempt to get an FIR registered, the second attempt was made by the complainant at Police Station Sector-50, Gurugram and in the second attempt, the complainant was successful, in as much as the present FIR dated 10.10.2020 was registered. Parivartan Singh-complainant had got the FIR registered by making an active concealment of the proceedings which had taken place before the National Company Law Tribunal, New Delhi as well as the factum of the filing of petition/complaint under Section 156(3) before the Chief Judicial Magistrate, Gurugram. Moreover, in the present case, there is an arbitration clause in the Agreement dated 26.09.2017 (Annexure P-8) between the two companies. Clause 14 i.e., the Arbitration Clause, in the said Agreement is reproduced hereinbelow:

*" 14. **DISPUTES & GOVERNING LAW:***

*14.1 In case of any dispute between **KCC** or **PBPL** on one side and the **Authority** on the other side, arise out of any reason such as claims, interpretation of the Contract Agreement, escalation etc., same shall be resolved in accordance with the provision of Contract Agreement. The cost of dispute proceedings including advocate fee, expenses etc. and including any liability arise out of finalization of dispute shall be incurred and paid solely by **PBPL**. **PBPL** shall indemnify **KCC** and keep **KCC** harmless of any liability arise out of such dispute with the **Authority**.*

*14.2 In case of any legal disputes between the parties arising out of or in connection with this Sub-Contract Work Order shall be resolved mutually, and if no solution is reached within thirty (30) days of the dispute being communicated in writing by one party to the other, the same may be referred to Arbitration under the Arbitration & Conciliation Act, 1996 as amended time to time, to be held in GURUGRAM (Haryana). The dispute shall be referred to arbitral tribunal consisting of one and sole Arbitrator who shall be exclusively appointed by **KCC**. The expenses of such dispute shall be incurred and paid by **PBPL**. The decision of the arbitral tribunal shall be final and binding on the parties.*

14.3 The courts at Gurugram shall have exclusive jurisdiction on all litigation between the parties that arise out of this Sub-Contract Work Order."

A perusal of the above would show that in case there were any claims of the company PBPL, of which the Complainant was a director, then the Complainant-company should have invoked the said Arbitration Clause instead of getting the present FIR registered.

The Sessions judge, Gurugram, in his order dated 27.10.2020, which has been reproduced hereinabove, has very aptly observed that the Section 406 and Section 420 of the IPC, 1860 are anti-thesis to each other and in respect of one transaction, both cannot be committed simultaneously and that there was no hesitation in *prima facie* observing that registration of the present FIR was a design on the part of the Complainant to turn the civil litigation into a criminal litigation with a view to exert pressure on the accused persons and after considering all the aspects, granted anticipatory bail to the directors of the company and even, ordered the circulation of the said Order to the Home Secretary, Government of Haryana, Chandigarh. The petitioner, who is an employee of the company KCC, in a case where the contract is between the two companies and the financial transactions are also between the said two companies, cannot *prima facie* be personally held liable for any amount being outstanding from one company to the other, moreso, in the absence of the company having been made an accused. On the said aspect, reference can be made to the judgment of the Hon'ble Supreme Court titled as "**R. Kalyani vs. Janak C. Mehta**" reported as ***2009 (1) SCC 516***. The relevant portion of the said judgment is reproduced hereinbelow:

> *"……….Allegations contained in the FIR are for commission of offences under a general statute . A vicarious liability can be fastened only by reason of a provision of a statute and not otherwise. For the said purpose, a legal fiction has to be created. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in-charge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled. A legal fiction must be confined to the object and purport*

for which it has been created. In Sham Sunder & Ors. v. State of Haryana[(1989) 4 SCC630], this Court held :

"9. But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not."

xxx—xx—xxx

In Hira Lal Hari Lal Bhagwati v. CBI, New Delhi [(2003) 5 SCC 257], it has been held :

"32. Likewise the ingredients of Section 420 of the Indian Penal Code are also not made out. There is no reason as to why the appellants must be made to undergo the agony of a criminal trial as has been held by this Court in the case of G. Sagar Suri and Anr. v. State of U.P. and Ors. [(2000) 2 SCC636]. In this, this Court held that.

"Jurisdiction under section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. 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."

39. It is settled law, by catena of decisions, that for establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise of representation. From his making failure to keep up promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed."

xxx–xx–xxx

27. If a person, thus, has to be proceeded with as being vicariously liable for the acts of the company, the company must be made an

> *accused. In any event, it would be a fair thing to do so, as legal fiction is raised both against the Companyas well as the person responsible for the acts of the Company."*

Moreover, the petitioner has already joined the investigation and since, the present case is based on documentary evidence, the custodial interrogation of the petitioner would not be required and thus, the present petition for anticipatory bail is allowed and the interim order dated 20.07.2021 is made absolute.

However, nothing stated above shall be construed as an expression of opinion on the merits of the case and the trial would proceed independently of the observations made in the present case which are only for the purpose of adjudicating the present bail application.

Since the main petition has been disposed of, pending Miscellaneous Applications, if any, also stand disposed of.

(VIKAS BAHL)
JUDGE

05.10.2021
Mehak

Whether reasoned/speaking? Yes/No
Whether reportable? Yes/No