IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
The Hon'ble Justice Ajoy Kumar Mukherjee

C.R.R. 628 of 2020
M/s. Pawan Kumar Sethia & Ors.
-vs-
The State of West Bengal & Anr.

For the Petitioners	:	Mr. Anirban Dutta Mr. Biswanath Patra Ms. Priyanka Mukherjee Mr. Aditya Roy Mr. Sayantan Sinha
For the O.P. No. 2	:	Md. Karim Warsi Ms. Arpita Mondal Md. Rahim Waris
For the State	:	Mr. Ranabir Roy Chowdhury Mr. Sandip Chakraborty Mr. Mainak Gupta

Heard on	: 9.6.2022
Judgment on	: 26.07.2022

Ajoy Kumar Mukherjee, J.

Judgment referred on behalf of petitioners

a) *Alpic Finance Limited Vs. P. Sadasivan and another (2001) 3 SCC 513.*

b) *S.K. Alagh Vs. State of U.P. & others (2008) 5 SCC 662.*

c) *Sushil Sethi and another Vs. State of Arunachal Pradesh & others (2020) 3 SCC 240.*

d) *V.Y. Jose & another Vs. State of Gujarat & another (2009) 3SCC 78.*

e) *Sharad Kumar Sanghi Vs. Sangita Rane (2015) 12 SCC 781.*

f) *Pepsi Food Ltd. & another Vs. Special Judicial Magistrate & others (1998) 5SCC 749.*

g) *Masand Saiyed Vs. State of Gujarat & Others (2008) 5 SCC 668.*

h) *G. Sagar Suri & another Vs. State of U.P. & others (2000) 2 SCC 636.*

i) *M.S. Banga Vs. State of W.B. & another (2004) SCC OnLine Cal 443.*

j) *Satish Chandra Ratanlal Shah Vs. State of Gujarat & another (2019) 9 SCC 148.*

Judgments referred on behalf of opposite Party No. 2

a) *Ramveer Upadhyay & another Vs. State of U.P. & another (special Leave Petition (Cri) No. 2953 of 2022.*

b) *Hamida Vs. Rashid (appeal (cri) 632 of 2007).*

c) *Jagmohan Singh Vs. Vimlesh Kumar & others (Criminal Appeal No. 741/2022 arising out of SLP (cri) No. 9339 of 2021).*

d) *Md. Allauddin Khan Vs. The State of Bihar & others.(criminal Appeal No. 675/2019 arising out of SLP (Cri) No. 1151 of 2018).*

1. The present revisional application has been preferred for quashing of the proceeding including charge-sheet no. 115 of 2018 dated 21.7.2018 in connection with Beniapukur Police Station RI-III/13 dated 1.4.2013 under Sections 406/420/471/468/504/506(ii)/120B of the Indian Penal Code corresponding to GR case no. 1123 of 2013 pending before the court of learned Additional Chief Judicial Magistrate, Sealdah.

2. The allegations levelled by opposite party no. 2 namely, Narayan Prasad Saraff against the present petitioners in the written complain dated 04.03.2013 may be summarized as follows:-

(I) the petitioners induced the opposite party no. 2 to manage look after the building construction work at their firm at Malda on monthly remuneration of Rs. 25 thousand per month and on being induced, the opposite party no. 2 agreed to manage and look after the said work and for that purpose, on 6.1.2000 the petitioners executed a power of attorney in his favour in respect of said construction work at Malda and further they executed another registered power of attorney on 19.7.2001.

(II) In the early part of the year 2003 the petitioners requested him to give the financial assistance of Rs. 4 lakhs and on goof faith he gave a sum of Rs. 4 lakhs and they undertook that they will pay said amont of Rs. 4 lakhs along with substantial interest to opposite party no. 2 within a year.

(III) As per power of attorney dated 6.1.2000 followed by registered power of attorney dated 19.1.2001, the opposite party no. 2 looked after and manage, control and performed the works in respect of said Malda property but the petitioner did not pay a single rupee to him as remuneration.

(IV) Sometime in middle part of 2004, when opposite party no. 2 demanded the return of loan amount of Rs. 4 lakhs along with interest as well as remuneration of Rs. 25 thousand per month since January 2001, the petitioners only to pacify him made a settlement whereby agreed and undertook to pay the loan amount of Rs. 4 lakhs along with substantial interest thereon and monthly remuneration of Rs. 25 thousand per month since January, 2001 till March, 2004 within 31.3.2005 and settlement was held on 27.8.2004.

(V) The petitioners also requested him to continue the work as per power of attorney and considering the relation, the opposite party no. 2 continued the construction work. The petitioners with fraudulent *mala fide* and dishonest intention of cheating and misappropriation for achieving their wrongful gain, they adopted dilatory tactics. Due to prolonged wait for almost three years and sensing something wrong, firstly on 2.1.2008, the opposite party went to their office and demanded Rs. 4 lakhs along with Rs. 25 thousand per month remuneration since January 2000 to January 2008 totaling to the tune of Rs. 25 lakhs (Rs. 4 lakhs as loan amount and Rs. 21 lakhs as remuneration) along with substantial interest.

(VI) When the opposite party no. 2 clarified that he will not continue as their attorney-holder the petitioners issued another written undertaking on 2.1.2008 to pay entire amount of Rs. 25 lakhs along with interest within six months from the date and considering such undertaking dated 2.1.2008 the opposite party no. 2 again got duped and agreed to wait till June 2008.

(VII) Suddenly on 22nd March, 2008 the petitioners demanded from him Rs. 20 lakhs as consideration amount received by opposite party no. 2 for Malda property and after receiving such letter he was asked and traumatized and gave reply by a letter dated 1.4.2008 to show the documents and papers in support of their illegal demand.

(VIII) After knowing ill motive and breach of trust, the opposite party no. 2/complainant made a paper publication on 21.04.2008 about his voluntary decision of surrender of attorney. The opposite party no. 2 again received a letter on 10.4.2008 issued by the petitioners wherein they again tried to levy an allegation against him and opposite party no. 2 once again by a letter dated 8.5.2008 called upon to pay his legitimate claim and tender apology for making baseless allegations. Petitioners after receiving such reply on 8.5.2008 came to his place and requested him not to take legal steps and prayed to give them some more time to pay Rs. 25 Lakhs along with substantial interest thereon within July, 2009. Opposite party no. 2 decided to wait but nothing materialized from the petitioners and since then, several times opposite party no. 2 went to the office of the petitioners and tried to contact with him but the petitioners avoided. Ultimately he could contact on 13.10.2012 when once again he was assured to pay after Durga Puja 2012. Opposite party No.2 then realized that the petitioners in collusion with each other has defrauded the opposite party no. 2 taking undue advantage of the trust reposed on them by rendering services and giving loan to them and he has been deceived by them and the petitioners are not willing to pay his legitimate claim intentionally and they are delaying the matter with ill motive.

(IX) Opposite party no. 2 sent advocate's letter dated 19.11.2012 whereby he called upon the petitioners to pay entire dues to the tune of Rs. 27 Lakhs (25 lakhs dues and 2 lakhs as damages including interest) which was duly received by the above persons but in spite of that the petitioners did not pay a single paisa to the opposite party and now started threatening him with dire consequences.

3. Mr. Anirban Dutta, learned counsel on behalf of petitioners submits that as per development agreement, it was agreed by opposite party no. 2 that an amount of Rs. 50 lakhs will be paid to the petitioners as owner thereof together with entire 4th floor be handed over to the petitioners apart from other terms as settled with regard to the construction work. Accordingly, the power of attorney was executed in favour of the opposite party no. 2 by the petitioners to perform the aforesaid work towards completion of the said project and there was no specific term for monthly remuneration of opposite party no. 2. The assignment was entrusted upon the opposite party no. 2 being trusted person to the petitioners family based on just half and half profit and loss share basis for either of the side towards project excluding aforesaid payment of Rs. 50 lakhs and handing over the entire 4th floor of the new building apart from the expenses of the project.

4. Mr. Dutta, learned Advocate further submitted that project of the new building was completed in compliance of all the formalities and the sale of residential flats were made by opposite party no. 2 by executing deeds and all the consideration money were received by the opposite party no. 2 but even after repeated request on several occasions, the amount of Rs. 50 lakhs being the land cost of the project including the entire 4th floor of new building was not given by the opposite party no. 2 to the petitioners. The petitioner no. 1 had filed complain vide GR 731 of 2008 before the learned 13th Metropolitan Magistrate, Kolkata on the ground of misappropriation to the tune of Rs. 24.30 lakhs by the opposite party no. 2 with regard to the development and sale of shop rooms as well as Malda property. During the course of trial, the opposite party no. 2 filed an application under Section 239 of the Code of Criminal Procedure with a prayer for discharge which was heard and learned Magistrate was pleased to reject the prayer. Being aggrieved by and dissatisfied with the order, the opposite party no. 2 preferred a revisional application before the High Court, Calcutta being CRR 3536 of 2012 but the Hon'ble High Court also turned down the prayer on 18.10.2012 and the matter remanded to the trial court to decide all the issues on the basis of evidence on record.

5. Mr. Dutta, contended that as a counter blast and also to avoid payment of Rs. 50 lakhs and in order to avoid handing over the 4th floor of the new building and also to get rid of the trial in connection with aforesaid criminal case being GR 731 of 2008 filed by the present petitioners, the opposite party no. 2, had filed a complaint case being no. C/4635 of 2009 before the learned Chief Judicial Magistrate at Alipore , which was dismissed by the court.

6. Here the opposite party no. 2 has come up with new story that monthly remuneration of Rs. 25 thousand for the work of the project as alleged is due and payable by the petitioners though nowhere it has been mentioned that the opposite party no. 2 is entitled to get any amount of remuneration for the aforesaid construction work. The opposite party no. 2 further created a story that once upon a time, the petitioner asked the opposite party no. 2 for advancing loan of Rs. 4 lakhs for recovery from their hard days and financial crisis and the opposite party no. 2 paid the said amount of Rs. 4 lakhs but the fact remains that the amount of Rs. 4 lakhs and an additional amount of Rs. 1 lakh had already been received by opposite party no. 2 himself by issuing several cheques in his favour as he was entrusted for handling over the bank affairs during construction work. The petitioner demanded the amount of Rs. 1 lakh that had been taken by the opposite party no. 2 with interest since 2005.

7. It has been further contended on behalf of petitioners that the opposite party no. 2 lodged the false and fabricated first information report with the Beniapukur police station by creating jurisdiction, which is baseless, unauthorized and upon taking cognizance of the first information report, police authorities issued a number of notices upon all the petitioners and the petitioners attended the police station and stated the truth before the police.

8. The petitioners submitted that in view of the First Information Report, the opposite party no. 2 lodged a complaint case being 253 of 2013 before the learned Additional Chief Judicial Magistrate at Sealdah for taking cognizance of the offence under Sections 406/420/471/468/504/506(ii)/120B of the Indian Penal Code and after getting notice sent by the court, the petitioners appeared before the learned court and took steps time to time.

9. In spite of taking all the steps before the police authorities and the learned court as well as the dismissal of the false and fabricated case of the opposite party no. 2, no order passed by the learned court to that effect. On the other hand, the police authorities filed a charge-sheet on 21.7.2018 and learned court has taken cognizance upon charge-sheet mentioned offences against petitioners which is unwarranted, unlawful having no iota of truth.

10. Mr. Dutta strenuously argued that to facilitate day to day work and smooth operation of business a separate Bank A/C was opened to which opposite party No. 2 was a signatory and cheque book was given to opposite party No.2. In 2005, opposite party No. 2 sold part of property valued at Rs, 4, 30, 000/- by virtue of four agreements on 05.08.2005 but had not deposited the amount to petitioner's firm's Bank A/C. Thereafter opposite party No. 2 had drawn five cheques in his favour of an amount of Rs, 5,00,000/- which were cleared and credited to his account. After prolonged persuasion when the opposite party no. 2 did not pay the amount received by him as proceeds from the sale, the petitioner thereafter cancelled the said power of attorney and to that effect a letter dated 17.2.2006 was sent to the Sub-Registrar for the purpose of cancellation. Even after cancellation of the power of attorney the opposite party no. 2 fraudulently tried to sell portion of the property of the petitioners by preparing six agreements dated 24.04.2007 and misappropriated an amount of Rs. 20 lakhs. The opposite party no. 2 also forged signature of the petitioners to issue cheques and the petitioner were shocked to receive notice under Section 138 of the Negotiable Instrument Act. By a letter dated 23.3.2008 a demand was made to the opposite party no. 2 about the sale proceeds totaling to Rs. 20, 30,000/- which has been misappropriated by him and opposite party no. 2 gave a reply on 1.4.2008 stating that he is under no obligation to pay the amount quoted. The petitioners filed an application under Section 156 (3) of the Code of Criminal Procedure which was registered as GR 731 of 2008 and upon direction to Posta Police Station case no. 58 dated 16.5. 2008 under Sections 120B/406/420/467/468 of the Indian Penal Code was started and after completion of investigation, charge-sheet also submitted on 18.4.2009.

11. Petitioners further argued that all the agreements were made with petitioner No.1 M/S Pawan Kumar Sethia, a partnership firm, and allegations leveled against said partnership firm, but the firm has not been made a party and there is no specific allegation against any particular partner of the firm. Accordingly petitioners contended when firm has not been arrayed as a party no proceeding can be initiated against the other petitioners and they cannot be fastened with vicarious liability.

12. I have gone through the written complain along with the statements recorded under Section 161 Cr.P.C. It appears from the statements that the main dispute relates to non-payment of remuneration to the extent of Rs. 25,000/- per month and also for non-payment of Rs. 4 lakhs which the complainant/opposite party has paid to the company on 03.03.2003.

13. Learned counsel appearing on behalf of the petitioners submits that from the power of attorney it is clear that there was no agreement of payment of any remuneration of Rs. 25,000/- per month for making the construction work as alleged. It is further submitted on behalf of the petitioners that out of loan amount of Rs. 4 lakhs they have already paid the complainant/opposite party no. 2 to the tune of Rs. 5 lakhs.

14. Learned counsel on behalf of the opposite party no. 2 has pointed out the settlement dated 27.08.2004 and contended that it was settled that payment of Sri Saraff @ Rs. 25,000/- per month for looking after the Malda project as remuneration will be considered, finalised and payable within March, 2005.

15. Learned counsel on behalf of the petitioners by showing a letter which was received by Beniapukur P.S. on 22nd April, 2016 contended that vide cheque No. 652805 to 652808 and 652816 on different dates, Rs. 5 lakhs was paid to the opposite party no. 2 and as such no amount is due towards the aforesaid loan amount. On the basis of direction made by this court on April, 29th, 2022 the investigating officer has expressed his opinion that letter dated 22.04.2016 (as above) has got no connection with the instance case and Narayan Prosad Saraff is still entitled to get Rs. Four Lakhs from the said firm. So the report of investigating officer also makes it clear that dispute relates to payment of money, which one party claimed to have paid while denied by the other.

16. The allegation against the petitioner is that petitioner No.1/firm and other petitioners have cheated opposite party No.2 and thereby dishonesty induced him to do contain acts. There is no allegation that the petitioners made any wilful misrepresentation . Even according to FIR, initially opposite party No.2 had admittedly good relationship with the partners/petitioners and considering relationship he agreed to mange , look after the work of accused person's firm and for which they entered into an agreement and the petitioners executed two power of attorney in his favour but the grievance of the opposite party no.2 is that the petitioners failed to discharge their contractual obligations i.e. payment of monthly salary of Rs, 25,000/- and repayment of loan of Rs, 4,00,000/- though such allegations were denied by petitioners herein. A purely civil dispute has been brought to criminal court by the opposite party No.2 against present petitioners and neither the FIR nor the materials in case diary discloses any prima facie material to show how each petitioner under their individual or collective capacity has committed offence under sections 406/420/471/468/504/506/120B of I.P.C. The civil dispute on the issue of alleged breach of contract has been given a cloak of criminal offence by the opposite party no. 2 as a sort cut of other remedies available in law. A mere breach of promises relating to payment of monthly salary or repayment of loan with interest within a stipulated period does not *ipso facto* constitute the offence of criminal breach of trust contained in section 405 of I.P.C. without there being a clear case of entrustment. Fraudulent or dishonest representation to cheat from the very beginning of the transaction is completely absent in the present case since there is a serious dispute between the parties over the issue as to whether it was at all agreed to give opposite party no.2 monthly remuneration and also whether the loan has been paid from the asset of partnership firm or not.

17. It is well settled from various decisions that the court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta to pressurise other side. The FIR also does not disclose what role was played by each petitioner i.e. petitioner no. 2 & 3 who are house wives and partner of petitioner no.1/firm with regard to offence of forgery of valuable security for the purpose of cheating . No forged document has been seized by police during investigation. The charge-sheet discloses contractual obligation and breach thereof, for which remedy is available in civil court. There is no prima facie material that the present petitioners committed offence under sections 406/420/471/468/504/506/120B I.P.C. The partnership firm has not been made accused in this case. The concept of vicarious liability is also not found under the I.P.C. Accordingly the continuation of criminal proceeding will be sheer abuse of the process of the court.

18. In this context the observation made by Apex Court in ***SatishChandra Ratanlal Shah vs. State of Gujarat and another*** *reported in* **(2019) 9 SCC 148,** may be quoted:-

> *"**12.** In this context, we may note that there is nothing either in the complaint or in any material before us, pointing to the fact that any property was entrusted to the appellant at all which he dishonestly converted for his own use so as to satisfy the ingredients of Section 405 punishable under Section 406 IPC. Hence the learned Magistrate committed a serious error in issuing process against the appellant for the said offence. Unfortunately, the High Court also failed to correct this manifest error."*
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> ***"13.** Now coming to the charge under Section 415 punishable under Section 420 IPC. In the context of contracts, the distinction between mere breach of contract and cheating would depend upon the fraudulent inducement and mens rea. (See Hridaya Ranjan Prasad Verma v. State of Bihar [Hridaya Ranjan Prasad Verma v. State of Bihar, (2000) 4 SCC 168 : 2000 SCC (Cri) 786] .) In the case before us, admittedly the appellant was trapped in economic crisis and therefore, he had approached Respondent 2 to ameliorate the situation of crisis. Further, in order to recover the aforesaid amount, Respondent 2 had instituted a summary civil suit seeking recovery of the loan amount which is still pending adjudication. The mere inability of the appellant to return the loan amount cannot give rise to a criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, as it is this mens rea which is the crux of the offence. Even if all the facts in the complaint and material are taken on their face value, no such dishonest representation or inducement could be found or inferred."*
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> ***"14.** Moreover, this Court in a number of cases has usually cautioned against criminalising civil disputes, such as breach of contractual obligations (refer to Gian Singh v. State of Punjab [Gian Singh v. State of Punjab, (2012) 10 SCC 303 : (2012) 4 SCC (Civ) 1188 : (2013) 1 SCC (Cri) 160 : (2012) 2 SCC (L&S) 988]). The legislature intended to criminalise only those breaches which are accompanied by fraudulent, dishonest or deceptive inducements, which resulted in involuntary and inefficient transfers, under Section 415 IPC."*

19. Similarly in ***G. Sagar Suri and another vs. State of U.P. and others*** it was observed by Apex Court:-

> ***"8.*** *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. 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."*

20. The case laws as cited by opposite party No. 2 as above has got no connection in the present context as there is no disagreement in the well settled proposition of law that while dealing with an application under section 482 of Cr.P.C. High Court has no jurisdiction to appreciate the evidence in the proceeding or to embank upon an enquiry into whether there is reliable evidence or not but only to confine itself as to whether allegations levelled in the FIR prima facie discloses cognizable offence or not.

21. From the aforesaid facts and circumstances of the case, it is clear that dispute between the parties is purely civil in nature and neither the contents of FIR nor materials in case diary prima facie discloses cognizable offence against the accused persons.

22. In view of the aforesaid facts and circumstances of the case, I find that this is a fit case where invoking power under Section 482 of the Code of Criminal Procedure the present proceeding is required to be quashed.

23. In view of the above, all further proceeding being Beniapukur P.S. Case No. RI-111/13 dated 01.04.2013 under Sections 406/420/471/468/504/506(ii)/120B of the Indian Penal Code corresponding to GR Case No. 1123 of 2013 is hereby quashed and CRR No. 628 of 2020 is thus allowed. Connected application is accordingly disposed of.

Urgent certified photo copy of this order, if applied for, be supplied to the parties expeditiously on compliance of usual legal formalities.

(AJOY KUMAR MUKHERJEE, J.)