IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Present :
The Hon'ble Justice Ajoy Kumar Mukherjee

CRR No. 869 of 2019
IA No.: CRAN 3 of 2021, CRAN 4 of 2021

Gannon Dunkerley & Co. Ltd. & Anr.
Vs.
The State of West Bengal & Anr.

For the petitioners	:	Mr. Sandipan Ganguly, Sr. Adv., Mr. Apolak Basu, Adv., Mr. Cedric Fernandez , Adv.
For the opposite Party	:	Mr. Soubhik Mitter, Adv.
Heard on	:	30.08.2022
Judgment on	:	01.09.2022

Ajoy Kumar Mukherjee, J.

1. Being dissatisfied and aggrieved with the proceeding, namely, Case No. C-94 of 2018 under Sections 420/406/120B of the Indian Penal Code pending before the Court of the Learned Judicial Magistrate, 5th Court, Sealdah, including the Order No. 1 (undated) and an order dated 12th November, 2018 passed in connection therewith, present application under Section 482 of the Code of Criminal Procedure has been preferred.

2. It is submitted on behalf of the petitioners that on or about 16th February, 2018, the opposite party no. 2 filed a complaint before the Court of the Learned Additional Chief Judicial Magistrate at Sealdah alleging commission of offence under Sections 406/420/120B of the Indian Penal Code against the petitioners on the allegation that the opposite party no. 2 was appointed as a Sub Contractor by the petitioners/company to execute several civil works for M/s. Bhushan Power & Steel Limited at the site of Thelkali, Orissa. Though the petitioners/Company paid the bill amount as raised by opposite party no. 2 for several civil works from 2003 till 2009, yet the petitioners/Company did not release 5 per cent of the bill amount being the security deposit amount which was kept with the petitioner No.1 /Company and it was agreed to be released after completion of the entire work. In the year 2009, when all works was completed, then despite repeated reminders by the opposite party no. 2, the said 5 per cent security deposit amounting to Rs. 65 lakhs, is still lying with the petitioners/Company.

3. It is submitted on behalf of the petitioners that opposite party no. 2 has not filed a single piece of document along with the complaint petition to show any such work was done during the period 2003 to 2009. The petitioners further state that vide Order No. 1 Learned Additional Chief Judicial Magistrate at Sealdah was pleased to take cognizance and transferred the case to the Court of the Learned Judicial Magistrate, 5th Court at Sealdah. After receipt of the record, vide Order dated 8th March, 2018 the Learned Magistrate was pleased to fix 9th March, 2018 for deposition of the opposite party no. 2 and in the deposition the opposite party no. 2 admitted that she has already received 95 per cent of the entire dues arising out of the work assigned to him. On 12th November, 2018 the Learned Trial Magistrate was pleased to issue process in the nature of summons against the petitioners.

4. Mr. Sandipan Ganguly, Learned Senior Advocate appearing on behalf of the petitioners submits that the order of taking cognizance by the concerned magistrate depicts complete non-application of mind and Learned Magistrate has erred in understanding that the act of taking cognizance is a judicial one and the same must be preceded by application of mind. Learned Magistrate was oblivious of the well-settled position of law that criminal law cannot be set into motion as a matter of course. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary to satisfy that there are sufficient grounds for proceeding but unfortunately in the present case the concerned Magistrate had acted like a post office.

5. Mr. Ganguly further submits that the petitioners are permanent residents of different States which fall outside the territorial jurisdiction of the Learned Trial Magistrate and the amended provision of Section 202 of the Code of Criminal Procedure stipulates, where the accused is residing at a place beyond the area in which he exercises his jurisdiction, Magistrate should postpone the issue of process against the accused and should inquire the case either by himself or he will direct an investigation to be made by a Police Officer or by some other person for the purpose of deciding whether or not there is sufficient ground for proceeding. From the perusal of the order impugned dated 12th November, 2018 it is clear that no such inquiry or investigation was made by the Magistrate or anybody else. Mr. Ganguly further submits that the allegations levelled in the complaint suffers from antagonistic contradiction and inherent absurdity. The allegations even if taken to be true do not make out any criminal offence either under Section 420 or under Section 406 of the Indian Penal Code.

6. Learned Counsel on behalf of the petitioners further submits that mere mentioning of relevant Sections and language of those Sections is not sufficient. Particulars of offence committed by each accused person and role played by them in committing that offence needs to be stated. In the instant case, the allegations and the complaint are vague in as much as the allegations do not constitute offence as alleged and the opposite party no. 2 has roped the petitioners in a criminal case without their specific role or participation in the alleged offence. The concept of vicarious liability is absolutely unknown to criminal law. Accordingly, he has prayed for quashing of the entire proceeding against the petitioners.

7. Mr. Souvik Mitter, Learned Counsel appearing on behalf of the opposite party submits that the allegation clearly attracts Sections 406 and 420 of the Indian Penal Code as admittedly the work completed in the year 2009 but the petitioners have intentionally withheld 5 per cent of the bill amount in order to cheat the opposite party. There was an entrustment upon the petitioners for depositing the said 5 per cent amount which is not a meager amount. As such

Learned Magistrate has not committed any wrong in taking cognizance upon the offence alleged nor Learned Magistrate has committed any error in respect of issuance of process, as it is a clear case of criminal breach of trust.

8. From the four corners of the allegations as levelled in the complaint and also from the submissions made on behalf of the parties, the admitted position is that in the year 2009-10 the opposite party completed all contractual jobs, which was allotted to him by issuing work order and he raised a total bill of Rs.13 Crores 42 Lakhs. It is admitted position that out of the said amount opposite party has received 95 per cent of the total bill amount. It is also not denied by the petitioners that 5 per cent of the total bill amount amounting to Rs.65 lakhs have not yet been paid by the petitioners to the opposite parties. Petitioners contended that as the work was not up to the mark and up to their satisfaction, so they have withheld 5 per cent amount which was lying deposited towards security amount.

9. Be that as it may, the real dispute lies between the parties is as to whether in terms of the contract arrived at by and between the parties and in terms of the completion of the work by the opposite party no. 2, whether petitioner is entitled to receive 5 per cent of the security deposit amounting to Rs. 65,000/-, which is purely a civil dispute.

10. Needless to say that *"mens rea"* from the very inception is the most vital ingredient which differentiates cheating from simplicitor breach of contract. For mere failure of a person to keep promise subsequently, a culpable intention, right at the beginning, i.e. when the promise is made cannot be presumed. A distinction between mere breach of contract and the offence of cheating is the intention of the accused at the time of inducement. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent dishonest intention for cheating unless fraudulent dishonest intention is shown at the beginning of the transaction.

11. In ***Hari Prasad Chamaria Vs. Bishun Kumar Surekha & others,*** reported in **AIR 1974 SC 301**, It was held that unless the complaint showed that the accused had dishonest or fraudulent intention at the time the complainant parted with the money, it would not amount to an offence under section 420 of IPC and it may only amount to breach of contract. In ***G.V. Rao Vs. L.H.V. Prasad & others,*** reported in **2000(3) SCC 693,** it was reiterated that guilty intention is an essential ingredient of the offence of cheating and therefore to secure conviction *'mens rea'* on the part of the accused must be established. It has been further held that in order to constitute offence of cheating the intention to deceive should be in existence at the time when the inducement was offered.

12. In the present case admittedly out of total bill amount raised by opposite party no. 2 at different phase of his work, petitioner paid 95% of the said amount phase by phase and accordingly it cannot be said that petitioner had any guilty mind of not paying the bill amount at the very beginning i.e. at the time of agreement to carry out the work. According to petitioner they withheld the amount as they are not satisfied with the quality of work and according to opposite party no. 2, petitioner has breached the terms of contract, which according to this court is a purely civil dispute. Similarly to attract see 406 read with 405 of the IPC, the law clearly recognizes a difference between simple payment/investment of money and entrustment of money or property. A mere breach of a promise, agreement or contract does not *ipso fact,* constitute the offence of the criminal breach of trust contained in section 405 IPC without there being a clear case of entrustment.

13. Many a times, complaints are filed Under Section 200 Cr.P.C. by the parties with ulterior motive to pressurize the accused to bring them to their own terms or to enforce the obligations arising out of breach of contract touching commercial transactions instead of approaching Civil Courts with a view to realize money at the earliest. Supreme Court in number of cases has cautioned against criminalizing civil dispute such as breach of contractual obligations. The legislature intended to criminalize only those breaches , which are accompanied by fraudulent, dishonest or deceptive inducements which resulted in involuntary and inefficient transfers under section 415 IPC.

14. In view of above, I find that this is a fit case where invoking power under Section 482 of the Code of Criminal Procedure present proceeding is required to be quashed otherwise, continuance of the present proceeding before a criminal Court of law would be simply an abuse of the process of the Court.

15. In view of above, CRR/869/2019 is allowed.

16. Let all further proceedings being Case No. C-94/2018 under Sections 420/406/120B of the Indian Penal Code pending before the Learned Judicial Magistrate, 5th Court at Sealdah is hereby quashed.

However there shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(AJOY KUMAR MUKHERJEE, J.)