IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
The Hon'ble Justice Ajoy Kumar Mukherjee

C.R.R. 2573 of 2019

Yashnand Engineers and Contractors Pvt. Ltd. & Ors.
-vs-
Bridge & Building Construction Co. Pvt. Ltd.

For the Petitioners : Mr. Sakabda Roy

Heard on : 02.08.2022

Judgment on : 10.08.2022

Ajoy Kumar Mukherjee, J.

1. Being aggrieved and dissatisfied with the proceeding being case No. C-3311 of 2019 under Section 406/420/120B of the Indian Penal Code pending before the court of learned 10^{th} Judicial Magistrate, Alipore South 24 Parganas, the present application has been preferred under Section 401/482 of the Code of Criminal Procedure.

2. The petitioners contended that petitioner no. 1 is a private limited company and petitioner nos. 2 to 4 are directors of the petitioner no. 1/ company. Earlier the business was carried on by registered partnership firm in the name and style of Yashnand Engineers and Contractors who were engaged in the business of civil construction. The opposite party desirous for effecting supplies of materials and construction services approached the said Yashnand Engineers and Contractors and the petitioners agreed to avail services and construction materials from the complainant/opposite party. The opposite party requested said Yashnand Engineers and Contractors to make certain advance payment in order to enable the complainant to make supplies and carry out such work. The complainant accordingly raised the invoice of Rs. 4,29, 33, 780/- on 1st March, 2016 and Rs. 97,59,609/- on 1.3.2016 and Rs. 75,38,017/- on 9.3.2016. on the assurance that opposite party/complainant would carry out the work for supply of building materials and will provide service for construction of the said building. Payments were advanced by RTGS by the petitioners. Even after an amount Rs. 1,20,39,845/- was paid to the complainant as advance payment, the complainant in complete disregard to the assurance given and in complete breach of trust, did not carry out any work at all. The petitioners made repeated requests to the complainant to carry out the work and make supplies in respect of the advances made to the complainant by the company but the complainant did not pay any heed to the said requests and was unwilling to carry out the work promised by them to the petitioners. The complainant/opposite party by way of purported letter dated 10th October, 2018 and 27.10.2018 made frivolous claims against the petitioner for alleged outstanding dues since 2015-16 and the petitioners having received such letter had given reply to the complainant/opposite party on 22.11.2018 and 12.11.2018 stating that alleged claims of the complainant are absolutely false, vague and unsubstantiated. Such frivolous claim was made by the complainant even when they failed to do any work for the petitioners. There are no outstanding dues payable to the complainant and the complainants right to move to the civil court for allegedly outstanding dues since the financial year 2015-16 had become time barred in the financial year 2018-19.

3. When the complainant failed to make any repayment of the advanced money, paid to the complainant by Yashnand Engineers and Contractors the petitioner no. 1 initiated a suit for recovery of money and other reliefs before the Commercial Court at Ahmedabad on 27th March, 2019 being case no. 53 of 2019 and the said suit is pending for adjudication.

4. As a counter blust and in order to make wrongful gains, the opposite party filed the present complaint case on 15th June, 2019 after a period of nearly three months from the date of institution of the civil suit against the opposite party by the petitioners, before the Commercial court at Ahmedabad.

5. The said complaint was registered as complaint case no. 3311 of 2019 and learned Chief Judicial Magistrate, Alipore was pleased to take cognizance of the offence vide order dated 15th June, 2019 and he transferred the same to the court of the learned 10th Judicial Magistrate, Alipore for trial and disposal. After receipt of the case record and on examination of the opposite party the learned Magistrate was pleased to record that a prima facie case under Section 406/420/120B of the Indian Penal Code has been established and issued summon against the accused persons.

6. Learned advocate for the petitioner Mr. Roy submits that the complaint has been filed by a power for Attorney holder but power of attorney holder can only sign and file a complaint on behalf of the complainant only when it is specifically brought on record that the power of attorney holder have witnessed the transaction as an agent of complainant or possess due knowledge regarding the incident leading to alleged commission of crime and subsequently filed a complaint in court. Nowhere in the four corners, it can be found that the power of attorney holder namely Ajit Kumar Jindal had any personal knowledge or had witnessed the incident as mentioned in complaint at any stage. He further contended that this being the position, the learned Magistrate ought not to have entertained the complaint, and he should have dismissed the complaint in limine. He further contended that complaint is liable to be quashed since the transaction between the parties are absolutely civil in nature and have been initiated by the complainant only to maliciously prosecute the petitioners.

7. Mr. Sakabda Roy, Learned advocate for the petitioner further submits that the petitioners are not residing within the jurisdiction of learned Magistrate but without complying the mandatory provision of Section 202 of the Code of Criminal Procedure, the Magistrate took cognizance and issued process against the petitioners. Learned Chief Judicial Magistrate ought not to have issued process without complying mandatory provision as laid down in Section 202 of the Code of Criminal Procedure. Learned Magistrate has mechanically recorded that the allegations under Section 406/420/120B of the Indian Penal Code have been prima facie established against the accused persons, without making any enquiry and such perfunctory recording of statement of complainant and her witness under Section 200 of the Code of Criminal Procedure demonstrated that a mechanical process has been adopted by the learned court without application of mind. He has also not recorded any reason in writing indicating what is the material and what is the finding on the basis of which he took cognizance or prima facie case was made out.

8. He further submits that no criminal culpability of the petitioners has been made out in the complaint. There is no specific allegation, satisfying the requirements of Section 406/420/120B of the Indian Penal Code with regard to the role of the petitioners. The impugned complaint is merely an afterthought and an arm-twisting tactic by the complainant to coerce payment of the outstanding amount from accused no. 1 to 4. He further submits that the contractor or Managing Director cannot be vicariously liable for any offence under Section 406/420/120B of the Indian Penal Code. It is settled position of law, unless a specific act is attributed to the Contractor or any other person in control and management of the company such person cannot be vicariously liable in the absence of any statutory provision to that effect. Nowhere it has been stated even in the complaint that at the very inception of the business transaction in 2015 between the parties there was any intention of the petitioners to cheat which is a condition precedent for an offence under Section 420 of the Indian Penal Code. The complainant has also not alleged that there was any inducement or any false representation on the part of the petitioners for any transaction between the parties. On the contrary, petitioners made advance payment amounting to Rs. 1, 20,39,845/- which clearly demonstrates that the intention of the petitioners was not to cheat the opposite party but a *bone fide* intention to honour the contract. The ingredients of criminal breach of trust have also not been made out in the complaint. The materials as produced by the defence before the court are of sterling nature and perusal of the same will clearly overrule the veracity of the allegations contained in the acquisitions levelled by the complainant.

9. Learned advocate for the petitioner further contended that the instant case is liable to be quashed since the complainant has not disclosed in his complaint how and when the work was carried out at the sight and details of the work exactly carried out by them for which the alleged amount of Rs. 5,31,17,359/- is outstanding against the petitioner and the complainant has not placed any document in respect of such allegation.

10. Mr. Roy further contended that any effort to settle civil dispute and claim, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged since it causes gross abuse of the judicial process. As such court must ensure that criminal prosecution be not used as an instrument or harassment or for seeking private vendetta or with an ulterior motive to pressurize the accused. Proceeding which is initiated on the basis of a false and malicious complaint, should not be allowed to mature into a trial inasmuch as the same would only result in wastage of public time and money. Where malice is coupled with absence of basic ingredients to constitute the offence in the institution of a particular proceeding, such a proceeding is liable to be quashed.

Before going to further details, the contents of the complaint being C 3311 of 2019 may be summarized as follows:

i) In the year 2015, the complainant came in contract with the accused no. 2 who visited the office of the complainant and represented himself as one of the partners of M/s. Yashnand Engineers and Contractors and further represented that his firm being the accused no. 1 has obtained a job of huge project and further the accused no. 2 induced the complainant to perform such constructional job on behalf of his firm at different places in the State of Madhya Pradesh and Gujarat.

ii) Thereafter, a meeting held and in the said meeting in between the complainant and the accused persons, the rate of various proposed constructional jobs were settled and finalized.

iii) In the said meeting the accused no. 2 to 5 represented, has assured the complainant that time to time, as per progress of constructional job performed by the complainant on behalf of the accused persons, the accused persons would pay and clear the bills of the complainant as per satisfaction of the complainant.

iv) That believing upon such inducements and assurances and representations made by the accused persons, the complainant on good faith agreed to perform various types of constructional job.

v) Thereafter during the period of 2016-17, as per direction, specifications of the order placed time to time by the accused persons, complainant performed such constructional job for and on behalf of the accused persons.

vi) Time to time as per representation and assurances given by the accused persons, the complainant as per progress of the job raised bills thereof at the agreed rate and submitted the same to the accused persons and the complainant for such work and job, raised bills to the tune of Rs. 6,01,97,206/-.

vii) Thereafter time to time on three occasions the accused persons sometime in the year 2016-17 by way of RTGS paid a total sum of Rs. 70,39,847/- out of the total billing amount of Rs.6,01,97,206/-.

viii) The accused persons represented and assured the complainant that in due course of time they would pay the entire due amount being a sum of Rs. 5,31,57,369/- to the complainant.

ix) Thereafter time to time complainant asked the accused persons for the payment of the due amount being a sum of Rs.5,31,57,359/- but on every occasion, on some pretext or the other accused persons took time and complainant on good faith allowed and provided time to the accused. Thereafter the complainant started neglecting to receive the calls of the complainant and finding no other alternative the complainant vide its letter dated 27.10.2018 asked the accused persons to pay and clear the entire due amount but accused persons vide their letter dated 12.12.2018 flatly refused to pay any single penny to the complainant and clearly stated that the demand made by the complainant are vague, false and unsubstantial. Accused no. 2 to 5 also threatened the complainant with dire consequences if further demand is made to that effect.

x) Thereafter the complainant through his advocate sent demand notice on 27.2.2019 and realized that the complainant has been cheated by the accused persons in pre-planned manner and the accused persons had very deceitful and dishonest intention from the very beginning in order to cheat the complainant to the tune of Rs. 5,31,57,359/-. Had the complainant any knowledge regarding such fraudulent dishonest and deceitful intention of the accused persons, the complainant would not have performed the constructional job and work of the accused persons.

11. From the annexure it appears that the complainant by its letter dated 10.10.2018 and 27.10.2018 claimed that a huge amount is to be paid to the complainant by the petitioners since 2015-16 and therefore requested them to clear the dues immediately.

12. Said Yashnand Engineers and Contractors gave reply on 22.11.2018 and 12.12.2018 stating that the contents of the letter dated 10.10.2018 and 27.10.2018 regarding outstanding dues since financial year 2015-16 as mentioned in the letters are not only vague, and unsubstantiated but also false to their knowledge. Since there is no outstanding dues, the petitioners are not required to make any payment to the opposite party no. 2. The petitioners have also filed a copy of plaint in connection with commercial suit no. 53 of 2019 and it appears from the prayer portion of the said suit that the suit has been filed with a prayer to pass money decree directing the defendant/ opposite party herein to pay a sum of Rs.1,20, 39,845/- to the plaintiff /Yashnand Engineers and Contractors private limited by the defendant/ opposite party herein.

13. In view of the above backdrop it is quite clear that their exist a serious civil dispute between the two firms and according to the petitioners, they are entitled to get a payment of Rs. 1,20, 39,845/- from the opposite party no. 2 and for which they have also filed the aforesaid commercial civil suit being no. 53 of 2019. On the contrary the contention of the opposite party no. 2 in his written complaint is that as per the order placed by the petitioners, he had executed constructional work and out of total billing amount of Rs. 6,01,97,206/- the petitioners have only paid Rs. 70,39,847/- by way of RTGS in 2016-17 but the petitioners have failed to make payment of Rs. 5,31,57,359/-. This is also clear from the written complaint that initially there was meeting between the parties and both the parties agreed about constructional work.

14. The dispute between the parties is purely a civil dispute and non payment or no payment of amount for the constructional work does not by itself amount to commission of offence of cheating or criminal breach of trust. It has also been established in catena of the judgments that there is distinction between mere breach of contract and the offence of cheating. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right from the beginning of the prosecution that is the time when the offence is said to have been committed and in order to prove the case of cheating the prosecution must show that the accused had a fraudulent or dishonest intention at the time of making the promise. Mere failure on the part of the accused/petitioners to keep up promise subsequently, a culpable intention right at the beginning, that is when he made a promise, cannot be presumed. Here no allegation has also been levelled in the complaint that the petitioners had an intention to cheat the respondents from the very inception. In this context, the reliance can be placed upon the case of ***Vir Prakash Sharma Vs. Anil Kumar Agarwal and another*** reported in **(2007) 7 SCC 373,** in Para 7 & 8.

> ***"7.*** *The principle underlying exercise of jurisdiction by the High Court under Section 482 of the Code of Criminal Procedure is now well settled viz. that the allegations contained in the complaint petition even if given face value and taken to be correct in its entirety do not disclose an offence or not is the question."*
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> ***"8.****The dispute between the parties herein is essentially a civil dispute. Non-payment or underpayment of the price of the goods by itself does not amount to commission of an offence of cheating or criminal breach of trust. No offence, having regard to the definition of criminal breach of trust contained in Section 405 of the Penal Code can be said to have been made out in the instant case. Section 405 of the Penal Code reads, thus:*
> *"405. Criminal breach of trust.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any*

direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'."

Neither any allegation has been made to show existence of the ingredients of the aforementioned provision nor any statement in that behalf has been made."

15. In ***Hridaya Ranjan Prasad Verma and others Vs. State of Bihar*** **and another** reported in **(2000) 4 SCC 168,** the apex court held in Para 14 and 15.

> **"*14.*** *On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest."*
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> *"**15.** In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."*

16. Here the main offence alleged by the opposite party no. 2 is an offence of criminal breach of trust and that the petitioners have cheated him by not paying certain due amount and induced him to make some constructional work. To deceive is to induce a man to believe that a thing is true which is false and which the person practicing the deceit knows or believes to be false.

17. In this context it can be said that it must be shown that there exist a fraudulent and dishonest intention at the time of commission of offence. There is no allegation in the complaint that the respondent made any willful misrepresentation. On the contrary, according to the complaint, parties entered into a valid agreement but the grievance of the complainant is that the petitioner failed to discharge their contractual obligation. It is a matter of common sense and an honest person entering into a contract is deemed to represent that he has the present intention of carrying it out but having accepted the pecuniary advantage involved in the transaction, he failed to pay the arrear amount, he does not necessarily evade the payment by deception. In the present case, the opposite party no. 2 alleged that major amount has not been paid by the petitioners, but a portion of the total outstanding amount has been paid by the petitioners.

18. It may also be noted that there is nothing either in the complaint or in the annexure, pointing to the fact that any property was entrusted to the petitioners at all which they converted for their own house, so as to satisfy the ingredients of Section 405 punishable under Section 406 of the Indian Penal Code.

19. In ***Indian Oil Corporation Vs. NEPC India Ltd. and others*** reported in **(2006) 6 SCC 736,** it was observed in Para 13 and 14

> ***"13.*** *While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable breakdown of marriages/families.*

There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. 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. In G. Sagar Suri v. State of U.P. [(2000) 2 SCC 636 : 2000 SCC (Cri) 513] this Court observed: (SCC p. 643, para 8)

"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."

***"14.** While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under Section 250 CrPC more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may."*

20. In ***Randheer Singh Vs. State of U.P.* and others** a case decided on 02.09.2021 in criminal appeal no. 932 of 2021 the apex court observed as follows:.

***"33.** In this case, it appears that criminal proceedings are being taken recourse to as a weapon of harassment against a purchaser. It is reiterated at the cost of repetition that the FIR does not disclose any offence so far as the Appellant is concerned. There is no whisper of how and in what manner, this Appellant is involved in any criminal offence and the charge sheet, the relevant part whereof has been extracted above, is absolutely vague. There can be no doubt that jurisdiction under Section 482 of the Cr.P.C. should be used sparingly for the purpose of preventing abuse of the process of any court or otherwise to secure the ends of justice. Whether a complaint discloses criminal offence or not depends on the nature of the allegation and whether the essential ingredients of a criminal offence are present or not has to be judged by the High Court. There can be no doubt that a complaint disclosing civil transactions may also have a criminal texture. The High Court has,*

> *however, to see whether the dispute of a civil nature has been given colour of criminal offence. In such a situation, the High Court should not hesitate to quash the criminal proceedings as held by this Court in Paramjeet Batra (supra) extracted above."*

21. In the present case, complainant/opposite party alleged that an amount of Rs. 70,39,847/- has been paid by the petitioners therefore it is not his case, no that payment has been made against the conclusion of job but admittedly it is his case that part payment has been made. The allegation that there was initial dishonest intention in the mind of petitioners is merely an inference drawn by the complainant from subsequent failure of the accused to keep his promise by not making payment of the balance amount even though according to the petitioners, no amount is lying outstanding. Basic fact constituting initial deception by way of false representation on the part of the accused at the outset of transaction, is neither been expressly stated nor otherwise suggested in the complaint and when a part payment has been allegedly paid against total bill, it cannot be said that the accused had no intention to pay right from the beginning of the transaction. Thus initial deception which is the basic ingredient of cheating is conspicuously absent in the case. The case is bereft of the basic ingredients of offence of cheating for want of initial deception.

22. In ***G. Sagar Suri and another Vs. State of U.P. & others*** reported in **(2000) 2 SCC 636,** it was held by Apex Court in Paragraph 8.

> ***"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."

23. In view of above, it is quite clear that the Magistrate had taken cognizance without considering the position of law. Furthermore, it appears that petitioners admittedly do not reside within his jurisdiction but even then he did not feel it necessary to comply the mandatory provision as laid down in Section 202 of the Code and also did not feel it necessary to make inquiry or to direct investigation. By a cryptic order, Magistrate observed that *prima facie* case under Section 406/420/120B of the Indian Penal Code has been well established against the petitioners.

24. In view of the aforesaid discussion and also following principles as laid down in the case of ***State of Haryana Vs. Bhajan Lal,*** reported in **1992 Supp (1) SCC 335**, I find that even if the contents of the complaint is taken to be true, it does not disclose any offence of cheating or criminal breach of trust and as such the proceeding is liable to be quashed.

25. In view of the above, complaint case no. C-3311 of 2019 under Section 420/406/120B of the Indian Penal Code pending before the court of learned 10^{th} Chief Judicial Magistrate, South 24 Parganas, is hereby quashed.

26. Accordingly, CRR 2573 of 2019 is allowed.

However, there will 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.)