IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (APL) NO.1341 OF 2021

Sandeep s/o Suresh Aggarwal
Vs.
Baburao s/o Sahebrao Deshmukh

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's orders

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Mr. A. B. Patil, Advocate for applicant.
Mr. S. G. Joshi, Advocate for non-applicant.

CORAM : AVINASH G. GHAROTE, J.
DATE : 11/03/2022

Mr. Patil, learned counsel for the applicant at the out set seeks to place the certificates of acceptance dated 4.8.2017 and 11.9.2017, as referred to in the application, on record, to which Mr. Joshi, learned counsel for the non-applicant has no objection, considering which the documents are taken on record.

2] Heard Mr. Patil, learned counsel for the applicant and Mr. Joshi, learned counsel for the non-applicant.

3] This application under Section 482 of the Cr. P. C., questions the order of issuance of process dated 18.8.2021 on the complaint under Section 420 of the IPC, contending that the issuance of process is gross abuse of the process of law in the facts of the case, which indicate that the transaction between the applicant and non-applicant was purely of a civil nature in respect of which proceedings are also pending in the Civil Court and there is no element of criminality involved. It is submitted that even if the entire complaint is taken at its face value there is nothing to indicate that there was an intention to cheat on behalf of the applicant. It is submitted that even on the face value, the ingredients necessary for demonstrating an offence under Section 418 and 420 are not made out. Reliance is placed upon ***Haridaya Ranjan Prasad Verma and others Vs. State of Bihar and another, (2000) 4 SCC 168*** (paras 14 and 15), ***Sharon Michael and others Vs. State of Tamil Nadu and another, (2009) 3 SCC 375*** (paras 12 to 18) and ***Sushil Sethi and another Vs. State of Arunachal Pradesh and others, (2020) 3 SCC 240*** (para 8.1). It is submitted that the transaction between the parties was purely a civil contract, and the colour of criminality cannot be attached to it, so as to drag the applicant to the criminal Courts. It is further stated that the order of issuance of process was directly challenged before the Hon'ble Apex Court in SLP (Cri.) No.8592 of 2021, whereby by order dated 18.11.2021, the Hon'ble Apex Court refused to entertain it by permitting the applicant to avail such other remedies as are available under the law, consequent to which, the present application has been filed.

4] Mr. Joshi, learned counsel for the non-applicant opposes the application and submits that on the basis of the facts pleaded in the complaint, a case of issuance of process is made out. He also submits that there is alternate remedy under Section 397 of the Cr. PC. to approach the learned Sessions Court by way of a revision and there is no reason whatsoever why the applicant should not be relegated to the said remedy. He places reliance upon ***State through Special Cell, New Delhi Vs. Navjot Sandhu alias Afshan Guru and others, (2003) 6 SCC 641*** (para 29) and **Hamida Vrs. Rashid @ Rasheed and others, (2008) 1 SCC 474**.

5] To appreciate the controversy in question, the narration of the fact position, which is not disputed by Mr. Joshi, learned counsel for the non-applicant, is necessary, which is as under:

A) The applicant is the Director of M/s FullDome Pro Pvt. Ltd., a company engaged in the business of sale and installation of Fulldome.pro sever and licensing software that operates equipment like projection system etc.

B) On 10.5.2017, there was a contract executed between the applicant and the non-applicant under which the applicant was to sale and install a projection system and license for the multi media software to the non-applicant at his premises at Garden Temple, Washim. The total consideration payable therefor was Rs.30,39,680/-. The said projection system was installed by the applicant by 17.07.2017 and a final invoice for the aforesaid sum was raised by the applicant upon the non-applicant on 17.07.2017.

C) After the installation work, the non-applicant on 4.8.2017 has issued a certificate of acceptance under his signature accepting the installation of the dome projection system, multimedia software and the equipment according to the list as described therein. There is however an endorsement below it regarding the non-functioning of the system. As on 4.8.2017, the balance amount payable by the non-applicant was Rs. 6,73,920/-.

D) On 11.9.2017, another certificate of acceptance has been given, which indicates acceptance of replacement of the Fulldome.pro DX4 Server with additional upgrade equipment as indicated therein and a satisfaction of proper installation and operationability in all respects, as of the date mentioned therein.

E) On 17.9.2017, a notice was issued by the non-applicant to the applicant contending that the Unit installed was not functioning properly and therefore the same should be rectified, failing which criminal prosecution would be launched.

F) On 4.1.2018, a complaint came to be filed by the non-applicant against the applicant (page 45) with Police Station Khadan, Akola. The same, however, was not taken forward.

G) On 6.3.2018, reply was given by the applicant to the legal notice dated 17.9.2017 controverting the allegations made therein.

H) On 30.5.2018, a consumer complaint came to be filed by the non-applicant before the State Consumer Dispute Redressal Commission, Maharashtra Circuit Bench at Nagpur, being CC No. RBT/CC/18/5 [which was dismissed for non-prosecution on 29.1.2020].

I) On 03.10.2018, the applicant filed Civil Suit No. 633/2018 for recovery of Rs. 6,73,920/- against the non-applicant, before the Civil Judge (Senior Division), Gautam Budh Nagar, U.P., in which the non-applicant is said to have received the summons.

J) On 17.1.2019, the non-applicant filed a criminal complaint being RCC No. 49/2019 before the JMFC Akola against the applicant for the offence punishable under Sections 415, 418, 420, 463, 465 read with Section 34 of the IPC.

K) On 10.8.2020 the non-applicant filed Special Civil Suit No. 53/2020 before the Civil Judge (Senior Division), Akola, summons of which is claimed to have been received by the applicant on 16.10.2020.

L) On 18.2.2021, the applicant has approached the Hon'ble Apex Court for transfer of Special Civil Suit No. 53/2020 at Akola to the Civil Judge (Senior Division) Gautam Budh Nagar, U.P., in which after issuing notices the further proceeding in SCS 53/2020 have been stayed by the Hon'ble Apex Court.

M) On 18.8.2021, the impugned order has been passed by the JMFC, Akola, issuing process under Sections 418 and 420 of the IPC against the applicant.

N) As the issuance of process was directly challenged by the applicant before the Hon'ble Apex Court in SLP (Cri) No. 8592/2021, by order dated 18.11.21, the Hon'ble Apex Court indicated that it was not inclined to entertain the proceedings and dismissed the same, keeping it open to the applicant to avail such remedy as are available under law. (page 98).

6] The above position would indicate that the genesis of the matter stems from the contract between the applicant and the non-applicant dated 10.5.2017, whereunder the applicant had installed the dome projection system and its accessories at the premises of the non-applicant, for a consideration to be paid by the non-applicant to the applicant. Though the initial installation in spite of the certificate of acceptance dated 4.8.2017 did not work out properly, however, the discrepancies appear to have been ironed out as is indicated by the certificate dated 11.9.2017 issued by the non-applicant. The consumer complaint filed by the non-applicant on 30.5.2018, indicated a mere case of deficiency in service, in respect of the installation of the dome projection system being claimed by the non-applicant. The filing of SCS No. 53/2020, indicates a claim (page 74) for recovery of a sum of Rs.43,24,228/- along with future interest on account of a deficiency on the part of the applicant to activate the projector system in a proper manner by providing licensed software and other equipment, as per the contract dated 10.5.2017 between the parties.

7] The basic ingredients of an offence under Section 418 of the IPC in so far as the present case is concerned, would be an intention to deceive the non-applicant fraudulently to deliver any property to any person or to consent that any person shall retain any property and such intention has to be there right from the beginning. A bare reading of the complaint (page 65) would indicate that there is no allegation made therein that since the inception i.e. from the beginning, which would mean the time of execution of the contract dated 10.5.2017, there was any intention on behalf of the applicant to deceive the non-applicant. What is narrated is the execution of contract and non functioning of the equipment installed by the applicant to the satisfaction of the non-applicant. It is therefore apparent that the basic ingredients required to plead and demonstrate even a prima facie existence of the offence under Section 418 of the IPC is absent in the present matter. In **Sushil Sethi** (supra), it has been categorically held by the Hon'ble Apex Court that where there are no specific allegations and averments in the complaint that the accused had fraudulent or dishonest intention at the time of entering into the contract, it could not be said that even a prima facie case for an offence could be made out, for permitting the setting up of the criminal law into motion.

In **Haridaya Ranjan Prasad Verma** (supra), while considering Section 415 of the IPC, it has been held thus;

> "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 to 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."

In **Sharon Michel and others** (supra), it has been held as under;

> "16. The First Information Report contains details of the terms of contract entered into by and between the parties as also the mode and manner in which they were implemented. Allegations have been made against the appellants in relation to execution of the contract. No case of criminal misconduct on their part has been made out before the formation of the contract. There is nothing to show that the appellants herein who hold different positions in the appellant Company made any representation in their personal capacities and, thus, they cannot be made vicariously liable only because they are employees of the company."

In **Vesa Holdings Pvt. Ltd and anr Vrs. State of Kerla and others, (2015) 8 SCC 293**, it has been held as under

> "12. From the decisions cited by the appellant, the settled proposition of law is that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In other words for the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Penal Code, 1860 can be said to have been made out.
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> 13. It is true that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil

> remedy may be available to the complainant that itself cannot be a ground to quash a criminal proceeding. <u>The real test is whether the allegations in the complaint disclose the criminal offence of cheating or not</u>. In the present case there is nothing to show that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 IPC. In our view the complaint does not disclose any criminal offence at all. The criminal proceedings should not be encouraged when it is found to be mala fide or otherwise an abuse of the process of the court. The superior courts while exercising this power should also strive to serve the ends of justice. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of court and the High Court committed an error in refusing to exercise the power under Section 482 of the Criminal Procedure Code to quash the proceedings."

8] It is thus apparent that even taking the averments in the complaint at their face value, the intention to deceive at the time of entering into the contract, dated 10.5.2017, is absent and there are no averments in this regard in the complaint, considering which the order of issuance of process cannot be sustained.

9] The contention by Mr. Joshi, leaned counsel for the non-applicant that the applicant ought to be relegated to the remedy of revision under Section 397 of the Cr.P.C. based up **Navjyot Sandhu** (supra) and **Hamida** (supra), in my considered opinion has to be considered in light of what has been stated in **Navjyot Sandhu** itself, wherein in para 29, it has been held that the inherent power under Section 482 of Cr.P.C. is to be used only in cases where there is an abuse of the process of the court or where interference is absolutely necessary for securing the ends of justice and the inherent power must be exercised very sparingly as cases which require interference would be few and far between and needs to be generally exercised where criminal proceedings are required to be quashed because they are initiated illegally, vexatiously or without jurisdiction.

10] Considering the conspectus of facts discussed above, it would be apparent that the continuance of the criminal proceeding as initiated by the non-applicant would be an abuse of the process of the court for the reason that what is claimed is a breach of contract and the ingredients of Section 418 of the IPC have not been spelt out. That apart, the filing of the consumer complaint itself indicated a claim for a deficiency in service, which claim was permitted to be dismissed for want of prosecution. The first complaint lodged on 4.1.2018 was also not pursued and it is only after the applicant filed proceedings for recovery with the CJSD Gautam Budh Nagar, U.P., on 3.10.2018, that the complaint viz. RCC No. 49/2019 came to be filed on 17.1.2019 before the JMFC, Akola and so also a counter suit namely SCS No. 53/2020 came to be filed on 10.8.2020. Even the complaint case bearing RCC No. 49/2019 was not prosecuted and it is for the first time that the process came to be issued on 18.8.2021. The impugned order dated 18.8.2021 also does not indicate that the learned JMFC has considered the factual position above, regarding the filing of the consumer complaint or the suit by the non-applicant and stay of further proceedings therein by the Hon'ble Supreme Court on 18.2.2021. It is thus apparent that permitting RCC No. 49/2019 to proceed ahead in the above factual background would clearly amount to a gross abuse of the process of the Court, which cannot be permitted to be done, as there is no criminality disclosed from the complaint itself. Support for this proposition can be found in **Dhariwal Tobacco Product Ltd vrs. State of Maharashtra, (2009) 2 SCC 370.**

11] In light of the above discussion , I consider the present matter to be a fit and proper one for exercise of my jurisdiction under Section 482 of Cr.P.C. to quash the complaint registered as RCC No. 49/2019 filed by the non-applicant. The application is therefore allowed in the above terms. Considering the circumstances, there shall be no order as to costs.

JUDGE

RVJalit