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

CRIMINAL APPLICATION (APL) NO.1286/2019

APPLICANTS :

1. Nikhil S/o Ashokkumar Bakliwal,
age 38 years, Occ. Business.

2. Rahul S/o Ashokkumar Bakliwal,
age 43 years, Occ. Business,

Both R/o 2001, Mayur Towers,
Chandavarkar Road, Boriwali (W),
Mumbai – 400092.

3. Shailesh s/o Amilal Desai,
aged about 65 years, Occ. Director of
Shlogam Agro. Pvt. Ltd.,
R/o Office at 335, Raghuleela Mali,
First Floor, Kandivali (W), Mumbai.

4. Rajan s/o Ganeshprasad Agrawal,
aged about 54 years, Occ. Manager of
Slogam Agro. Pvt. Ltd.,
R/o Office at 336, Raghuleela Mali,
First Floor, Kandivali (W) Mumbai.

...VERSUS...

RESPONDENTS :

1. State of Maharashtra,
Through P.S.O. City Kotwali,
Akola, Tq. & Dist. Akola.

2. M/s. Narmada Solvex Pvt. Ltd.
Through its Director
Shivprakash s/o Kaluram
Ruhatiya, aged about Adult,
Occ. Business, Office at Kirana Bazar,
Akola, Tq. & Dist. Akola.

(Amendment carried out as per Court's order dated 13.12.2019)

Mr. S.A. Mohta, Advocate for applicants
Mr. A.R. Chutke, APP for respondent no.1
Mr. Z.Z. Haq, Advocate for respondent no.2

CORAM : AVINASH G. GHAROTE, J.
DATE : 24/02/2022

1. Heard Mr. Mohta, learned Counsel for the applicants, Mr. Chutke, learned Additional Public Prosecutor for the respondent no.1 and Mr. Haq, learned Counsel for the respondent no.2.

2. The applicants are arrayed as accused in R.C.C. No.25/2014 (***State Vs. Nikhil and others***) for the offences punishable under Sections 420, 406 and 427 r/w 34 of the Indian Penal Code before the learned Judicial Magistrate First Class, Akola. The present application challenges the order dated 14/1/2016, passed by the learned Judicial Magistrate First Class (Court No.2), Akola in R.C.C. No.25/2014, whereby the application for discharge, as filed by the present applicants, came to be rejected and so also the judgment dated 19/8/2019, passed by the Additional Sessions Judge, Akola in Criminal Revision No.26/2016, dismissing the revision and

confirming the order passed by the learned Judicial Magistrate First Class, Akola.

3. Mr. Mohta, learned Counsel for the applicants submits that on 22/11/2012, a contract came into existence between the applicants and the respondent No.2, whereunder the respondent no.2 undertook to supply 1000 M.T. of Indian Solvent Extracted Toasted Yellow Soyabean Meal produced from Yellow Soyabean to be delivered on F.O.R. basis by Railway Rake between 1 to 10 December 2012 from Akola to Navkar, Mumbai, as per the specifications indicated in clause (4) of the contract (page 32). Under another contract dated 1/12/2012, a further quantity of 1000 M.T. of the same product was agreed to be delivered on the same terms and conditions within 5 to 20 December, 2012 at Navkar or Hind Terminal, Port at Mumbai at the seller's option. 1560 M.T. of the product was delivered at Navkar Port on 12/12/2012 by respondent no.2 by Railway Rake, the receipt of which is not disputed by the applicant. It is, however, contended that upon inspection on 18/12/2012 by the analyst, M/s Geo-Chem Laboratories Pvt. Ltd., Mumbai, a mail was received by the

applicants, stating that on opening of wagons, it was observed that in a number of bags, cargo was infected with fungus and high moisture and therefore, in order to avoid quality problem at destination, it was recommended not to load the cargo into the containers (page 37). The inspection report of the second inspection made on 19/12/2012 (page 105) which report is dated 20/12/2012 and was provided on 23/04/2013 indicates the same position as observed in the e-mail dated 18/12/2012. Thereafter, there were some discussions and negotiations between the parties, which resulted into a settlement arrived at on 10/01/2013, whereunder the applicants, upon receiving an allowance, whereunder the rate of the cargo was settled at 1500 per M.T. on 'as is where is basis', without the question of rejecting the cargo, agreed to accept the entire cargo (page 187). The applicants, however, thereafter finding that it was not able to sell off the cargo, by e-mail dated 10/01/2013 asked the respondent no.2 to take back the cargo, as it was unable to sell the same on account of quality issues (page 188). It is thereafter stated that, out of 1560 M.T. received, the respondent no.2 took back 770 M.T. of the cargo, leaving the applicants with 790 M.T. of cargo, out of which payment for 627.69 M.T. is claimed to have been made by the applicants and the balance amount of 163 M.T. was remained to be paid. As the amount for this balance 163 M.T. was not received, a complaint came to be filed on 21/03/2013 under Sections 406, 420 and 427 of the Indian Penal Code against the applicant (page 47 to 53), in which, the process was issued by the learned Judicial Magistrate First Class and thereafter the charge-sheet has been filed on 30/12/2013.

4. The application for discharge came to be filed on 16/05/2014 (Exh.8), contending that it was a purely commercial transaction, sans any criminality, which was also spelt out from the charge-sheet and therefore, the applicants were required to be discharged. This application came to be rejected by the learned Judicial Magistrate First Class on 14/01/2016 by holding that the charge-sheet *prima facie* indicated the existence of material for the aforesaid offence, and the matter therefore was required to go to trial (page 272). In revision, the learned Sessions Court by the judgment dated 19/8/2019, affirmed the view taken by the learned Judicial Magistrate First Class, which is how the matter is before this Court.

5. Mr. Mohta, learned Counsel for the applicants contends that the entire complaint as well as the material along with the charge-sheet would indicate that there is no criminality in the matter, as the transaction was a pure and simple commercial transaction and therefore, the necessary ingredients to bring it within the four corners of the offences punishable under Sections 406 and 420 of the Indian Penal Code were not made out. Reliance is placed upon ***Alpic Finance Ltd. Vs. P. Sadasivan and another, 2001 AIR SCW 823; Anil Mahajan Vs. Bhor Industries Ltd. And another, (2005) 10 SCC 228; Devendra and others Vs. State of Uttar Pradesh and another, (2009) 7 SCC 495*** and ***Medmeme, LLC and others Vs. Ihorse BPO Solutions Private Limited, (2018) 13 SCC 374*** in support of his contention.

6. Further reliance is placed upon ***Vesa Holdings Private Limited and another Vs. State of Kerala and others, (2015) 8 SCC 293***, which holds 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 inspection and if the intention to cheat has developed later

on, the same cannot amount to cheating. For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent and dishonest intention at the time of making promise or representation. It has further been held that the 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 Indian Penal Code can be said to have been made out. It is further contended, by relying upon ***Sushil Sethi and another Vs. State of Arunachal Pradesh and others, (2020) 3 SCC 240***, that since the company has not been made a party accused, and only the directors of the said company, namely, Shlogam Agro Pvt. Ltd. have been made accused without any specific allegations against them personally, the proceedings would not be maintainable. He also contends that thereafter, an award has also been passed, against the applicants and in favour of the respondent no.2 on 10/08/2015, holding the applicants responsible for payment for the value of the material retained by the applicants. He further contends that an award has since been passed regarding the balance unreturned goods by the Arbitrator on 10/08/2015, against Shlogam

Agro Pvt. Ltd., which would substantiate the contention that there was no criminality in the matter.

7. Mr. Haq, learned Counsel for the respondent no.2, opposes the application and contends that the intention to deceive was in existence right from the beginning. He submits that this is manifest from the fact, that the goods were inspected at the time when they were loaded in the rake at Akola. (However, that report is not a part of the charge-sheet.). He further submits that from the side of the complainant Dr. Amin Controller Pvt. Ltd. was appointed as the analyzing agent for analyzing the goods, at Mumbai. Upon receipt of goods at Mumbai, the said agency had taken samples of the material and a positive report was given by the said agency immediately. It is contended, that the reports, by Geo-Chem and Inspectorate Griffith India Pvt. Ltd. the agencies appointed by the applicants, were intentionally delayed and incorrectly given. The inspection reports, according to him, are thus unworthy of any reliance. He further submits, that the intention to deceive is also further manifest, from the fact, that even after a settlement between the parties on 10/01/2013, under which, the applicants upon

receiving a discount agreed to accept the entire cargo on ‘as is were is basis’, the quantity of which was 1500 M.T., did not make the payment for the same to the respondent no.2 rather on the other hand, pressurized the respondent no.2 to receive back the goods, as a result of which, goods to the tune of 770 M.T. were received back, leaving a balance of 790 M.T., out of which 627.69 M.T. were sold by the applicants. It is contended that the very fact that the applicants were able to sell 627.69 M.T. and make payment of Rs.1,71,00,000/- to the respondent no.2, would indicate, that there was nothing wrong with the goods. It is, therefore, submitted that so far as the balance quantity of goods of 163 M.T. is concerned, the payment having not been made, the intention to deceive right from the beginning would be manifest. He further contends that the order dated 14/01/2016 by the learned Judicial Magistrate First Class, clearly appreciates, the entire position and rightly rejects the application for discharge (page 272). He also supports the judgment passed by learned Sessions Court (page 282), dismissing the revision, finding a *prima facie* case to frame charge. Reliance is placed on ***State of Punjab Vs. Pritam Chand and Ors., (2009) 16 SCC 769*** (paras 6, 7, & 9). He therefore submits, that the application is without merits and needs to be rejected. Reliance is also placed on ***Priti Saraf and another Vs. State of NCT of Delhi and another, 2021 SCC Online SC 206*** paras 25 and 30. Reliance is also placed on ***Sharad Kumar Sanghi Vs. Sangita Rane, (2015) 12 SCC 781***, to contend that though the company was not made a party, there are allegations against the directors of the company.

8. Mr. Chutke, learned Additional Public Prosecutor for the respondent no.1, places reliance upon ***International Advanced Research Centre for Powder Metallurgy and New Materials (ARCI) and others Vs. Nimra Cerglass Technics (P) Ltd. & another, 2015 ALL MR (Cri) 4101 (S.C.)*** (para 14), which lays down the distinction between mere breach of contract and cheating and would depend upon the intention of the accused at the time of alleged inducement. Reliance is also placed on ***Darton Zink and another Vs. State of Maharashtra and another, 2016 ALL MR (Cri) 4078***, which holds that mere breach of contract cannot give rise to criminal prosecution, under Sections 406, 420 or 120 B of the Indian Penal Code, unless averments in complaint *prima facie* disclose essential

ingredients of offence and breach of the terms of the agreement, if any, would at the most give rise civil cause of action.

9. ***Vesa Holdings Private Limited ; Alpic Finance Ltd.; Anil Mahajan ; Devendra ; and Medmeme LLC*** (supra) though hold that where the complaint and the subsequent material in the charge-sheet, do not disclose a criminality in the matter, the transaction being a pure and simple commercial transaction, and therefore, the prosecution ought not to be continued, the same will have to be construed on the facts of each case. ***International Advanced Research Centre for Powder Metallurgy and New Materials (ARCI)*** [supra] also holds that the distinction between mere breach of contract and cheating would depend upon the intention of the accused at the time of alleged inducement, and on facts, it was held that the allegations in the complaint did not constitute the offence alleged and therefore, the continuation of the criminal proceedings was not just and proper and was quashed. Similar is a view taken in ***Darton Zinc and another*** (supra). In the factual position, as pointed out hereinafter, the complaint discloses existence of a *prima facie* case, as discussed above, and therefore, the dictum as laid in the

above judgments, would not be attracted. ***Devendra*** (supra) also holds that misrepresentation from the very beginning is a *sine qua non* for constitution of an offence of cheating, although in some cases, an intention to cheat may develop at a later stage of formation of the contract.

10. In ***Pritam Chand*** (supra), considering ***Rajesh Bajaj Vs. State NCT of Delhi and others, (1999) 3 SCC 259*** and ***Trisuns Chemical Industry Vs. Rajesh Agarwal & others, (1999) 8 SCC 686*** it was held that merely because an act has a civil profile, that is not sufficient to denude it of its criminal outfit. In ***Priti Saraf and another*** (supra), while considering the scope of exercise of the power under Section 482 of the Code of Criminal Procedure, after noting the principles, as laid down in ***State of Haryana Vs. Bhajan Lal, 1992 Supp (1) SCC 335*** and ***Vesa Holdings Private Limited*** (supra), it has been held as under :-

> *"30. In the instant case, the complaint/FIR/charge-sheet as noticed above, does, however, lend credence to the questions posed. It is settled that one is not supposed to dilate on this score, or intend to present that the allegations in the complaint will have to be accepted on the face of it and the truth or falsity of which would not*

be gone into by the Court at this stage, as noticed above, whether the allegations in the complaint were true is to be decided on the basis of the evidence led at the stage of trial and the observations on this score in the case of Nagpur Steel & Alloys Pvt. Ltd. Vs. P. Radhakrishna ought to be noticed. In para 3, this Court observed:-

> *"3. We have perused the complaint carefully. In our opinion it cannot be said that the complaint did not disclose the commission of an offence. Merely because the offence was committed during the course of a commercial transaction, would not be sufficient to hold that the complaint did not warrant a trial. Whether or not the allegations in the complaint were true was to be decided on the basis of evidence to be led at the trial in the complaint case. It certainly was not a case in which the criminal trial should have been cut short. The quashing of the complaint has resulted in grave miscarriage of justice. We, therefore, without expressing any opinion on the merits of the case, allow this appeal and set aside the impugned order of the High Court and restore the complaint. The learned trial Magistrate shall proceed with the complaint and dispose of it in accordance with law expeditiously."*

31. Be it noted that in the matter of exercise of inherent power by the High Court, the only requirement is to see whether continuance of the proceedings would be a total abuse of the process of the Court. The Criminal Procedure Code contains a detailed procedure for investigation, framing of charge and trial, and in the event when the

High Court is desirous of putting a halt to the known procedure of law, it must use proper circumspection with great care and caution to interfere in the complaint/FIR/charge-sheet in exercise of its inherent jurisdiction.

32. In the instant case, on a careful reading of the complaint/FIR/charge-sheet, in our view, it cannot be said that the complaint does not disclose the commission of an offence. The ingredients of the offences under Sections 406 and 420 IPC cannot be said to be absent on the basis of the allegations in the complaint/FIR/charge-sheet. We would like to add that whether the allegations in the complaint are otherwise correct or not, has to be decided on the basis of the evidence to be led during the course of trial. Simply because there is a remedy provided for breach of contract or arbitral proceedings initiated at the instance of the appellants, that does not by itself clothe the court to come to a conclusion that civil remedy is the only remedy, and the initiation of criminal proceedings, in any manner, will be an abuse of the process of the court for exercising inherent powers of the High Court under Section 482 CrPC for quashing such proceedings.

33. We have perused the pleadings of the parties, the complaint/FIR/charge-sheet and orders of the Courts below and have taken into consideration the material on record. After hearing learned counsel for the parties, we are satisfied that the issue involved in the matter under consideration is not a case in which the criminal trial *should have been short-circuited. The High Court was not justified in quashing the criminal proceedings in exercise of its inherent jurisdiction. The High Court has primarily adverted on two circumstances, (i) that it was a case of termination of agreement to sell on account of an alleged breach of the contract and (ii) the fact that the arbitral proceedings have been initiated at the instance of the appellants. Both the alleged circumstances noticed by the High Court, in our view, are unsustainable in law. The facts narrated in the present complaint/FIR/charge-sheet indeed reveal the commercial transaction but that is hardly a reason for holding that the offence of cheating would elude from such transaction. In fact, many a times, offence of cheating is committed in the course of commercial transactions and the illustrations have been set out under Sections 415, 418 and 420 IPC. Similar observations have been made by this Court in Trisuns Chemical Industry Vs. Rajesh Agarwal and Ors. (supra) :-*

> *"9. We are unable to appreciate the reasoning that the provision incorporated in the agreement for referring the disputes to arbitration is an effective substitute for a criminal prosecution when the disputed act is an offence. Arbitration is a remedy for affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the agreement. Hence, those are not good reasons for the High Court to axe down the*

> *complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases as indicated in State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335].""*

11. Two things which are to be considered while deciding an application for discharge in a complaint under Sections 406, 420 and 427 r/w 34 of the Indian Penal Code are, whether an intention to deceive was in existence from the beginning or the contract was of a purely commercial nature inviting civil consequences alone, and for which determination only the contents of the complaint and the documents annexed with it are to be looked into. Any defence, which may be raised by the accused, or which may be available, based upon the facts, would not be permissible to be considered while deciding an application for discharge.

12. It is an admitted position that in the complaint, the company, namely, Shlogam Agro Pvt. Ltd. is not a party/accused, on the basis of which an FIR under Section 154 of the Code of Criminal

Procedure came to be registered against the present applicants, who are the non-applicants in the complaint dated 21/03/2013, on the same date. Though ***Sharad Kumar Sanghi*** and ***Sushil Sethi*** (supra) have been pressed into service by Mr. Mohta, learned Counsel for the applicants to contend that on this ground the complaint would not be maintainable, it is, however, material to note, that the application under Section 239 of the Code of Criminal Procedure filed by the applicants for discharge is not based upon this ground, and therefore, the impugned orders, cannot be tested, on a ground, which has not been raised and considered by the Courts below. It would therefore not be appropriate for me, to go into this ground, for the reason, that what has been challenged in the present application is the order dated 14/01/2016 by the learned Judicial Magistrate First Class, rejecting the application for discharge and the judgment of the learned Sessions Court dated 19/08/2019 dismissing the revision, in which, there is no consideration of this ground on account of it not having been raised.

13. What has to be seen therefore, are the contents of the complaint on the basis of which the FIR has been registered. The

complaint (page 47) dated 21/03/2013, is filed against the applicants, who are the directors of Shlogam Agro Pvt. Ltd., which position has been disclosed in the complaint itself which describes them as the non-applicants. The nature of the allegations in the complaint demonstrate, that the incidences, can be divided into two parts, the first one being the contract between the parties and the supply made which was claimed by the applicants to be of substandard quality, and therefore, a dispute arose in this regard as to the payment of the consideration of the same. The second part can be said to commence post the settlement between the parties and the intention flowing from the settlement.

14. In so far as the first part is concerned, the complaint, specifically alleges that the non-applicants (applicants therein), who are the Directors of Shlogam Agro Pvt. Ltd., had agreed to take delivery at Bombay and the goods were accordingly so transported by railway from Akola. It is contended, that if the non-applicants, did not find the goods, to meet the specifications agreed, they ought not to have downloaded the goods from the railway wagon and filled it in the containers. It is further alleged, that this very act on

the part of the non-applicants, was done with a dishonest intention as they were aware that once the material was filled in the containers, the unloading and the return of the material, to the complainant would be very onerous to him, requiring the expenses to be incurred for reloading in the rakes and transporting them back to Akola, which expenses, according to the complaint, would have been to the tune of Rs.45 to 50 lakhs and it is with this in mind, that the further actions of the non-applicants, were done. In so far as the second part is concerned, in spite of the settlement, under which the non-applicants had agreed to accept the entire consignment on 'as is where is basis', by discounting the price of the material the non-applicants with an intention to deceive had done so, which was indicated from the action on their part to subsequently thereafter refuse to accept the material on the same pretext, that it did not meet their standards, as a result of which, the complainant was forced to take back 770 M.T. of the goods, though the complaint discloses that the same goods to the tune of 627.29 M.T. were sold by the non-applicants, for which, payment was made. It is, thus, apparent, that the intention to deceive *prima facie* appears to be manifest, as in the first instance, the goods ought not to have been loaded in the containers without, they being tested as to the quality parameters and in the second instance even though the goods were agreed to be received on ‘as is where is basis’, the responsibility to make payment of the entire consignment at the discounted rate, could not have been obviated by the non-applicants on the ground of interior quality.

15. It would thus be apparent that there being a contract between the parties would not be the only consideration for exercise of the power under Section 239 of the Code of Criminal Procedure for discharging the accused, as the material on record will have to be considered in totality and if a *prima facie* case is disclosed, then the exercise of the power under Section 239 of the Code of Criminal Procedure will have to be declined.

16. In view of what has been discussed above, in relation to the averments made in the complaint, both the Courts below, have not erred in law in arriving at a conclusion, that the complaint disclosed a *prima facie* material, against the non-applicants. The impugned order of the learned Judicial Magistrate First Class as well

as that of the learned Sessions Court, is based upon an appreciation of the material on record, which according to them, is sufficient to demonstrate the existence of the *prima facie* case requiring the matter to go to trial.

17. The contention, that there are no averments, against the non-applicants, who are the directors, based upon ***Sharad Kumar Sanghi*** (supra) does not appear to be correct for the reason that all the actions as alleged in the complaint are attributed to the non-applicants themselves and considering what has been discussed above, *prima facie*, this does not appear to be a clear-cut case of a breach of contract. The passing of an award, in favour of the applicant, on 10/8/2015, which is subsequent to the application for discharge, which came to be filed on 16/5/2014, would not detract, from the *prima facie* existence of material on record, indicating the commission of the offence under Sections 406, 420 and 427 r/w Section 34 of the Indian Penal Code.

18. In view of the above position, I do not see any reason to interfere with the orders passed by the Courts below. The criminal application is, therefore, **rejected**.

19. Mr. Mohta, learned Counsel for the applicants, considering that there was a stay operating, in view of the order dated 02/02/2021, seeks continuation of the same for a further period of eight weeks. Considering, that the stay of the proceedings is operating from 02/02/2021, the same shall continue for a further period of eight weeks from today.

JUDGE

Sarkate