IN THE HIGH COURT AT CALCUTTA
(Criminal Revisional Jurisdiction)
Appellate Side

Present:
The Hon'ble Justice Rai Chattopadhyay

C.R.R No.3033 of 2016

Hindustan Insecticides Ltd. & Ors.
Vs.
Global Adsorbents Pvt. Ltd.

For the Petitioners	: Mr. Biswajit Manna, : Mr. Somnath Roy.
For the Opposite Party	: Mr. Shahjahan Hossain, : Ms. Sanjida Sultana, : Mr. Prithwiraj Biswas.

Hearing concluded on: 22/12/2022

Judgment on: 03/01/2023

Rai Chattopadhya,J.

(1) This revision is directed against the proceedings which was initiated against the present petitioners pursuant to a complaint filed by the de facto complainant on 16th June 2016, in the court of Chief Metropolitan Magistrate at Calcutta. Petitioners are the directors/government servants working for gain with the opposite party No.1 company, that is, Hindustan Insecticides Limited having its registered office at New Delhi.

(2) Crux of the allegation against the petitioners as enumerated in the 6 page long complaint may be stated to be that the complainant once were induced by the petitioners to deliver goods. Subsequently the petitioners floated tenders when the defecto complainant participated and emerged to be the 'LI' bidder. Pursuant to the work order, the defacto complainant supplied goods. Allegedly the petitioners refused to accept the supplied goods on the pretext of that being of inferior quality. Quality was ascertained after quality control checking tests. The de facto complainant has supplied goods of a sum of Rs. 1,75,440/-. However even after rejecting the goods, those were not returned back to the defacto complainant. The money was also not paid. The goods are still in the custody of the petitioners. Accordingly the defecto complainant was aggrieved of the deceitful manner in which they have been treated by the petitioners and the accused company. Also they are aggrieved of the breach of trust committed to them by present petitioners. Hence the complaint. Magistrate has taken cognizance of the same, examined two witnesses under section 200 Cr.P.C, 1973 and issued summons against the present petitioners.

(3) Mr. Biswajit Manna along with Mr. Somnath Roy, appearing on behalf of the petitioners submits that the de facto complainant participated in the tender process for supply of goods (active carbon) floated on 25th June 2015. Defacto complainant participated in the process by sending quotation dated 1st July 2015 and ultimately obtained the tender. A written purchase order was issued to them on 7th July 2015. Allegations of deceitfully compelling them to supply goods to the accused company is denied.

(4) It is submitted and accepted that on 6th August 2015 the complainant has supplied 2 metric tons of activated carbon to the factory of the petitioner company at Rasayani, District – Raigad, Maharashtra. It is further submitted that quality control check was done of the goods supplied at the said factory and those were found of inferior quality than was requisitioned. It is submitted that as the goods did not confirm with the specified quality requisitioned, those were not accepted and the work order was terminated.

(5) According to him the entire transaction happened pursuant to a commercial affair and no element of any criminality is at all involved in the same. He says that the complaint does not reveal any element or ingredient of offense as alleged against the petitioners. He further says that no cognizable case is at all made out in the said complaint against the petitioners. According to him pursuant to the laws settled to govern the field the instant complaint should not be maintained against the petitioners. He says that committing the petitioners to trial pursuant to the said complaint dated 16th June, 2016, would in one way prejudice the petitioners and in the other way shall abuse the process of court. According to him on this count the entire proceedings against the petitioners should be quashed, being illegal.

(6) The second point raised by the petitioners is that to make the directors, that is, the petitioners liable for any action of the accused company, their involvement as to the day to day affairs of the company at the time of commission of the alleged offence should have been specifically pleaded in the complaint. Their role as to the affairs and management of the company should have been brought on record in specific terms in the complaint to make the same maintainable in the eyes of law. The complaint has again been gone into, to show that the same is devoid of any mention about the petitioners involvement or role as to the day to day affairs of the company at the time of commission of the alleged offense. It is submitted that mere mentioning the petitioners to be the directors of the company would not be sufficient for their implication for an act of culpable nature, if any, committed by the company.

(7) The other point argued on behalf of the petitioners is of illegality and unsustainability of the process of issuance of summons by the magistrate. This Court's attention is drawn to the complaint to show that the seat of the accused company and the other accused persons is at New Delhi and also at Rasayani Maharashtra. It is mandated under section 202 Cr.P.C, 1973, that the Magistrate is to compulsorily postpone issuance of process against the accused persons in case their place of residence appears to be beyond the area in which he exercises his jurisdiction. Instead he is to either enquire by himself into the case or direct an investigation to be made by a police officer or by any other person of his consideration, for the purpose of deciding whether or not there is sufficient ground for proceeding. It is submitted that in this case there has been no such enquiry/investigation as envisaged in the above stated provision of law before issuance of process by the magistrate. Hence issuance of process in this case suffers from blatant and manifest illegality.

(8) On behalf of the petitioners quashment of the complaint and all subsequent proceedings thereto has been prayed for.

(9)The following judgements have been referred to by Mr. Biswajit Manna along with Mr. Somnath Roy, in support of his case:

(i) *Inder Mohan Goswami and Another vs State of Uttaranchal and Others, reported in (2007) 12 SCC 1;*

(ii) *Zandu Pharmaceutical Works Limited and Others vs Md. SharafulHaque and Another reported in (2005) 1 SCC 122;*

(iii) *Sushil Sethi and Another vs State of Arunachal Pradesh and Others reported in (2020) 3 SCC 240;* and

(iv) *GHCL Employees Stock Option Trust vs India Infoline Limited reported in (2013) 4 SCC 505.*

(9) Mr. Shahjahan Hossain along with Ms. Sanjida Sultana and Mr. Prithwiraj Biswas, on behalf of the opposite party No.2 has raised strong objection as to the contentions and prayer of the petitioners as mentioned above. His first submission is that the complaint is eloquent enough to content the illegal acts of cheating and deception by the petitioners. By referring to the complaint it has been submitted that the complainant in unequivocal terms has described as to how cheating has been committed upon him by the petitioners to procure goods from his end. It is also categorically submitted that the goods once delivered to the petitioners have been kept in their custody since then. No money has been remitted as against the same. Accordingly, once entrusted and not returned back by the petitioners, neither have paid for the same, the petitioners are holding the goods unauthorisedly and has committed an offence of criminal breach of trust.

(10) By relying on a judgment of the Hon'ble Supreme Court reported in **2014 2 Crimes (SC) 99** [**Vijay Dhanuka vs NajimaMamtaz** etc] arguments have been advanced on behalf of the said opposite party that the enquiry conducted by the Magistrate in this case would come under the purview of section 202 Cr.P.C, 1973 and there is no infirmity in the same.

(11) The scope for a revision court to exercise extraordinary jurisdiction under section 482 Cr.P.C, 1973, has been illustrated in the judgments referred to by the petitioner in the manner as stated herein bellow.

(12) In the judgment of ***Inder Mohan Goswami*** the Hon'ble Supreme Court has been pleased to hold that:-

> **"46. The court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurise the accused. On analysis of the aforementioned cases, we are of the opinion that it is neither possible nor desirable to lay down an inflexible rule that would govern the exercise of inherent jurisdiction. Inherent jurisdiction of the High Courts under Section 482 CrPC though wide has to be exercised sparingly,**

carefully and with caution and only when it is justified by the tests specifically laid down in the statute itself and in the aforementioned cases. In view of the settled legal position, the impugned judgment cannot be sustained."

The Court went on to analyze the ingredients of offence of 'cheating' under section 415 IPC and if the prima facie materials disclosed in the FIR would constitute the same along with the other offence alleged therein and came to the finding that no such offences were prima facie revealing.

Hon'ble Court further held:-

"23. This Court in a number of cases has laid down the scope and ambit of courts' powers under Section 482 CrPC. Every High Court has inherent power to act *ex debito justitiae* to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Section 482 CrPC can be exercised:

(*i*) to give effect to an order under the Code;

(*ii*) to prevent abuse of the process of court, and

(*iii*) to otherwise secure the ends of justice.

24. Inherent powers under Section 482 CrPC though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the statute."

The Hon'ble Court relied on amongst many other judgments, that of ***State of Haryana vs. Bhajanlal*** *[reported in* ***AIR 1992 SC 604****],* which may profitably be relied on in this case too.

> **"*102*. (*1*) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.**
>
> **(*2*) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.**
>
> **(*3*) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.**
>
> **(*4*) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.**
>
> **(*5*) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.**
>
> **(*6*) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.**
>
> **(*7*) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."**

(13) In **Zandu**'s judgment the Hon'ble Apex Court has been pleased to hold that:-

> **"36. This Court in *Zandu Pharmaceutical Works Ltd.* v. *Mohd. Sharaful Haque* observed thus : (SCC p. 128, para 8)**
> **"*8.* … It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."**

(14) These authorities as mentioned above has clearly laid down the law as to how and in what manner a court may exercise its inherent and extraordinary power under section 482 Cr.P.C, 1973. The reason to justify exercise of this power would be to do real and substantial justice or to prevent abuse of the process of the court. Such inherent power shall also be exercised to give effect to an order under the Code or to otherwise secure the ends of justice. A complaint can be quashed by exercise of such power of a court when the allegations made therein, taken at their face value, do not prima facie constitute any offence or make out a case against the accused person, or that a cognizable case is not disclosed justifying an investigation and also when the criminal proceeding is encumbered with mala fide or malice and instituted with an ulterior motive for wreaking vengeance on the accused.

(15) The law having been settled as above it is now the duty of this court to apply its mind as to whether the complaint filed in this case has at all disclosed any cognizable offence or made out any case against the present petitioners/accused persons. Facts which are revealing from the complaint in this case are that the complainant responded to a tender notice issued by the petitioner company and obtained the bid. Goods were supplied but rejected by the petitioner on account of its being of lower quality than sought for. For this reason the goods supplied by the complainant were rejected by the accused company. The obvious conclusion to be drawn from these facts as discussed above is that the connection and relationship between the parties here is only due to commercial transaction between them. A very committed effort has been shown on behalf of the opposite party/ complainant that he has been induced by false representation and deception by the petitioners to enter into to a business transaction with the the accused company and the entire part of it was spare headed by these accused persons/ petitioners. Such submission however has failed to raise any confidence of this court, on the ground that complainant's participation in the tender process and emerging as a lowest bidder cannot be a result of any inducement from anybody. Or else it would have been a case of larger conspiracy and malpractice which as a matter of fact is not there in this case. Therefore the materials available suggest in this case about existence, if any, of a civil dispute only between the parties. No element of culpable intention or motive is apparent against the petitioners, who acted on behalf of the company, in discharge of their official duties. There should not be any hesitation to hold in this case that allegations against the present petitioners in the complaint do not prima facie constitute any offence or make out a case against the accused person. Also that, no cognizable case is made out against the petitioners justifying them to be committed to trial. The complainant at best, should have taken recourse in a civil court, if at all. So far as petitioner's involvement in a criminal offence under section 420 or 406 IPC is concerned, the ingredients thereof are not at all substantiated and validated from the facts, circumstances and allegations expressed.

(16) Argument of the opposite party, though forceful, is still not acceptable that the petitioners have kept the so called rejected goods with them till date, without even remitting any payment for the same, attracting thereby the provisions of 406 IPC to constitute an offence there under. 'Entrustment' is the key word and the determining factor as to whether provisions under section 406 IPC would attract or not. There should be 'entrustment' of the property by the transferor to the transferee, that is a conscious and voluntary making over thereof. The Hon'ble Supreme Court in its judgment of ***Ramaswami Nadar vs. State of Madras*** *reported in* ***AIR 1958 SC 56*** has been pleased to hold that the word 'entrusted' in the section is very important, unless there is entrustment there can be no offence under the section. In this case there has been no 'entrustment' as per law, but only a commercial transaction between the parties.

(17) Also considering the definition of 'cheating' as envisaged under section 415 IPC, the Apex Court held in the judgment of ***Inder Mohan*** as follows:-

> **"42. On a reading of the aforesaid section, it is manifest that in the definition there are two separate classes of acts which the person deceived may be induced to do. In the first class of acts he may be induced fraudulently or dishonestly to deliver property to any person. The second class of acts 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 need not be fraudulent or dishonest. 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 a fraudulent or dishonest intention at the time of making the promise. From his mere failure to subsequently keep a**

promise, one cannot presume that he all along had a culpable intention to break the promise from the beginning."

(18) As it has already been discussed earlier, that no element of inducement is available in complaint against the petitioners, much less of either any fraudulent or dishonest or intentional inducement by the petitioners of the complainant. At the time of participating in the tender process by the complainant, there could be no promise or intention of the petitioners as the directors of the company to induce the complainant fraudulently or dishonestly. The complainant having won the bid in tender to receive work order for supply of goods is a fact admitted in this case. Tender is a process which is open for all and premeditating the bid, particularly the lowest bid is farfetched and not viable at all. So the petitioner's inducing the complainant, his participation in the tender process for that and also winning the same appears to be a cock and bull story and nothing else. A simple commercial transaction between two business houses are being tried to be adorned with the veil of criminality, which is not maintainable in the eyes of law.

(19) The concept of vicarious liability is unknown to criminal law unless specifically provided. In this case it has already been discussed that provisions of Section 420 or 406 IPC are not attracted the allegations/complaint being devoid of the necessary components thereof.

Findings of the Hon'ble Apex Court in the judgment of ***GHCL Employees Stock Option Trust*** may profitably be relied on in this context:-

> **"Summoning of accused in a criminal case is a serious matter. Hence, the criminal law cannot be set into motion as a matter of course. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The Magistrate has to record his satisfaction with regard to the existence of a prima facie case on the basis of specific allegations made in the complaint supported by satisfactory evidence and other material on record. In the present case, in the summoning order the Magistrate has not recorded his satisfaction about a prima facie case as against Respondents 2 to 7 and the role played by them in the capacity of Managing Director, Company Secretary or Directors of the accused Company which is sine qua non for initiating criminal action against them."**

(20) The other judgment that of ***Sushil Sethi*** as relied on by the petitioners as also elaborating the same point in the following words:-

> **"Considering the averments and the allegations in the FIR and even the charge-sheet the main allegations are that the company, namely supplied sub-standard materials – runner bucket turbines and the supplied runner bucket turbines were not as per the technical specifications. It is also required to be noted that there is no FIR/complaint/charge-sheet against the company – and the appellants are arrayed as an accused as the Managing Director and Director of S respectively. From a bare reading of the FIR and even the charge-sheet, there are no allegations that there was a**

> **fraudulent and dishonest intention to cheat the Government from the very beginning of the transaction. Even there are no specific allegations and averments in the FIR/charge-sheet that the appellants were in-charge of administration and management of the company and thereby vicariously liable. In light of the aforesaid, the prayer of the appellants to quash the criminal proceedings against the appellants for the offence under Section 420 IPC is required to be considered."**

(21) It is therefore for the complainant to narrate in the complaint about the specific actions of the accused persons to fulfil the criteria under the law to attract the applicable provisions thereof. The entire discussion as above should go to show absence of the same against each of the accused persons. This aspect was to be considered and dealt with by the Magistrate while taking cognizance of offence as per the complaint made before it. In this case it is found that the Magistrate has failed to discharge his such a vital statutory duty, instead has accepted the complaint in a routine manner and as the matter of course only. The consequent action of the Magistrate of taking cognizance of the said complaint dated 16th June, 2016, is therefore should not have sanction of law.

(22) Mandate under Section 202 Cr.P.C, 1973, after its amendment in the year 2005 are to be followed unfailing by the Magistrate – is the principle decided in various cases. The case referred to on this point on behalf of the opposite parties, i.e, of ***Vijay Dhanuka*** is one of those. The following words may be quoted from there:-

> **"We have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate."**

(23) It is further noted in this case that the complaint being not maintainable in accordance with the settled legal principles the arguments regarding the following steps undertaken by the Magistrate to be rectified by remand of the case or not, assumes less importance. No doubt if any cognizable case would have been made out by the complaint against the petitioners justifying trial to prove the same and if materials could have been made available in the complaint to disclose prima facie offensive act by the petitioners, this court could have necessarily gone into the question if or not any curable irregularity or breach of law has been committed by the Magistrate while issuing of summons. However, in this case in view of the facts and circumstances there would be no necessity at all to go into that question, since no case has been made out here against the petitioners by the complaint itself.

(24) Accordingly on the basis of the entire discussions as made above it is found that the challenge by the petitioners of the criminal proceedings initiated against them is sustainable. Therefore the present revision case is found legible to be allowed.

(25) Hence, CRR 3033 of 2016 is allowed.

(26) Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

(**Rai Chattopadhyay, J.**)