

**IN THE HIGH COURT AT CALCUTTA
Circuit Bench at Jalpaiguri
(Criminal Revisional Jurisdiction)**

APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

**C.R.R. 16 of 2023
Satish Damodar Upadhyay & anr.
Vs.
The State of West Bengal & anr.**

For the petitioner	:	Mr. Aayush Mitruka Mr. Suresh Kumar Mitruka Ms. Manisha Gupta
For the State	:	Mr. Aditi Shankar Chakraborty Mr. Nilay Chakraborty
For the opposite party no.2	:	Mr. Jagriti Mishra Ms. Ananya Bhattacharyya Mr. Raj Kumar Mitra Ms. Mrinmayee Das
Heard on	:	16.11.2023
Judgment on	:	22.11.2023

Ajoy Kumar Mukherjee, J.

1. This application under section 482 of the Code of the Criminal Procedure (hereinafter called as Cr.P.C) has been preferred for quashing of First Information Report (FIR) bearing no. 1125 of 2022 dated 06.12.2022, registered

by the Siliguri Police Station against the petitioners herein, under the provisions of section 417/420/406/120B of the Indian Penal code, 1860 (hereinafter called as IPC) and all subsequent proceedings being GR. No. 5292 of 2022.

2. Petitioners herein contended that the petitioner no.1 is the proprietor of Vada Agro, which is engaged in the business of supply and trading agricultural commodities. The petitioner no.2 is the son of petitioner no.1. It is alleged that sometimes in June- July 2022, the opposite party no.2 approached the petitioner no. 1 herein, with a request for supply of dried cashew nuts in shell. After discussions, the opposite party no. 2 placed an order for supply of an aggregate quantity of approximately 70.5 tons of dried raw cashew nuts in shell and the total agreed value was Rs. 79,015/-. It is alleged by petitioners that In spite of the request the opposite party no.2 failed to make advance payment for the said transaction but based on the representations and requests made by the opposite party no. 2, the petitioner no. 1 herein reluctantly agreed to make the delivery without any advance payment under a *bonafide* belief that the opposite party no. 2 would make the payment as soon as the delivery would be received. Subsequently the opposite party no. 2 made the requisite payment after consistent follow-ups in several installments in the period from 22.06.2022 to 29.07.2022. It is further alleged that said transaction has been suppressed intentionally by the opposite party no.2 in the FIR.

3. Subsequently sometime in September, 2022 the opposite party no. 2, once again approached the petitioner for supply of 50 metric tons of dried cashew nuts in shell of IVC quality. However the petitioner herein informed the opposite party no. 2 that the supply of IVC quality of cashew nuts could take sometime as it was not readily available but he can supply the BOKE quality (which is superior and more expensive) provided opposite party no.2 makes payment in advance. The petitioners state that they emphasized on advance payment because of the unusual delay in the earlier payment as aforesaid. The complainant/opposite party no. 2 herein agreed to purchase BOKE quality and paid an advance of Rs. 57,01,700/- as it was getting very competitive price and the final payment was made only when the goods were loaded and after checking the quality through its agent, on 26.09.2022. It is further alleged that on 29.09.2022, 50 tons of cashew nuts were supplied and received by the complainant and it is further alleged that the complaint checked the quality and accepted the delivery but raised no concern. He further alleged that in the FIR there is no mention that he received 50 tones of cashew nuts on 29.09.2022.

4. Petitioner herein alleged that there was sudden fall in the market price of BOKE quality of cashew nuts in the month of October, 2022. It is further alleged that after almost two months, in the last week of November, 2022, the petitioner no. 1 was surprised to receive a legal notice dated 18.11.2022 wherein it is alleged that the parties did not agree to BOKE quality cashew nuts

and called upon the petitioner to replace the 50 tons of delivered BOKE quality of cashew nuts with IVC quality.

5. Mr. Mitruka learned Counsel appearing on behalf of the petitioner submits that on bare perusal of the legal notice it appears that the claim made in the said notice was that the cashew nuts delivered to him about two months back, was not as per the quality agreed between the parties and most importantly in the said legal notice dated 18.11.2022, opposite party no.2/complainant did not make any allegation of criminality against the petitioner/accused persons, but alleging breach of promise complainant has requested for replacement.

6. Petitioners submits that in response to the aforesaid legal notice they gave reply through their lawyer on 26.11.2022 and in the said reply they have clearly clarified that the BOKE quality of cashew nuts are of superior quality than IVC cashew nuts and in fact he demanded additional payment of Rs. 1,48,740/- which is the incremental differential amount between the rate of IVC quality and BOKE quality. It is alleged by the petitioners that in the FIR complaint/opposite party have completely suppressed the aforesaid legal notice and the reply given by the petitioner herein intentionally.

7. Mr. Mitruka further alleged that realizing the fact that the legal notice did not yield the desired results, the complainant in order to create pressure upon the petitioner and to harass them, has filed the present false, frivolous and fraudulent criminal complaint against the present petitioners and thereby

has given a criminal colour to the dispute between the parties, which is actually civil in nature. He further argued that the contents of the FIR is a marked departure from the stand taken by the complaint/opposite party no.2 in the legal notice and it shows that the contents of FIR alleging criminality is an after thought and in fact he has used the criminal machinery as a tool to fulfill its ulterior motives and illegal designs.

8. Mr. Mitruka further contended that the petitioners are law abiding and peace loving citizens without any criminal antecedents whatsoever. He further contended that the transaction in question is purely a sale transaction/commercial transaction and no criminal proceeding ought to be allowed for the wrongful gain by the opposite party no.2. In fact the contents of the FIR do not disclose any criminal offence at all, much less any offence under sections 406/417/420 of the IPC and as such the impugned FIR deserves to be quashed as it is maliciously instituted with an ulterior motive. The opposite party no.2 at best could have sued for breach of oral contract, if any, before the competent civil court but the continuation of the present criminal proceeding against the petitioners if allowed, it would amount to abuse of process of court simply because the FIR and materials available in the record do not disclose the necessary ingredients to make out an offence under sections 406 or 417 or 420 of the IPC.

9. Mr. Mishra on behalf of the opposite party no. 2 relied upon section 66 (i) (b) of the Sale of Goods Act, 1930 which speaks about legal proceeding or

remedy and it does not say that in such cases criminal proceeding is not maintainable. Accordingly the complainant/ opposite party no.2 has chosen the right Forum, so that the persons who have committed the criminal breach of trust can get punished. While contradicting the petitioners allegations of lodging delayed FIR, the learned Counsel appearing on behalf of the opposite party no. 2 argued that though the cashew nuts were delivered on 29.09.2022, he had no scope to examine the cashew nuts and subsequently when he detected the fraud after opening the packet, he instantly lodged the FIR. Police after receipt of the FIR make preliminary enquiry and on being satisfied started investigation and as such interference in the investigation at this preliminary stage, invoking jurisdiction under section 482 of the Cr.P.C. by this court does not arise.

10. Mr. Chakraborty, learned counsel, appearing on behalf of the State submits that investigation has not yet been completed and it would not be proper to quash the FIR at the budding stage of investigation. If it is found during investigation that the dispute between the parties are not criminal in nature, then the police would submit final report in the form of FRT, but the said investigation should not be quashed invoking jurisdiction under section 482 of the Cr.P.C. at this premature stage.

11. Mr. Mitruka learned counsel appearing on behalf of the petitioner in reply submitted that no preliminary enquiry was made by the police because the complaint was lodged on 06.12.2022 and the formal FIR was registered on

the same date. He further contended that it would be a dangerous precedent, if the argument of the opposite party no. 2 is accepted that whenever there would be a breach of contract, then the parties will have option to go for either criminal proceeding or civil proceeding at his choice in terms of section 66 (i) (b) of the Sale of Goods Act 1930. The complaint failed to give any reasonable justification in lodging delayed FIR, which clearly shows that FIR was filed maliciously which is an afterthought, to intimidate and pressurize the petitioners. He further pointed out that Tax invoice dated 26th September, 2022 shows that the dispute between the parties is subject to Navi Mumbai jurisdiction. Now in order to avoid such jurisdiction, the opposite party no.2 has given the colour of criminal jurisdiction in a civil dispute in order to attract the jurisdiction of the Siliguri Court.

12. I have considered submissions made by both the parties.

13. It is not in dispute in the present context that the cashew nuts was supplied to the opposite party no.2 on 29.09.2022. It is also not in dispute that the opposite party no. 2 sent lawyers letter immediately before lodging the FIR. On perusal of said lawyer letter dated 18.11.2022 it appears that said lawyer's notice is under the title

“Legal notice for replacement of 50 metric tons of raw BOKE cashew nuts with 50 metric tons of raw IVC cashew nuts”.

14. In the said letter dated 18.11.2022 it has been alleged by the complainant/opposite party no.2 herein that he had placed order to supply 50

metric tons of raw IVC cashew nuts which the petitioner herein agreed to supply, but thereafter on 26.09.2022 the present petitioner dispatched raw cashew nuts vide invoice no. VA/RC/22-23/1091 amounting to Rs. 28,62,250/- through vehicle no. WB 03 C 6245 and also dispatched raw cashew nuts vide invoice No. VA/RC/22-23/1092 for Rs. 28,39, 251/- through vehicle No. WB 78 4593. On perusal of the said Tax Invoice No. VR /RC/22-23/1091 and VR /RC/22-23/1092, it appears that there is no mention in the challans that raw cashew nuts of IVC quality was dispatched or delivered instead, it has been clearly mentioned that dried raw cashew nuts in shell was delivered. The complainant opposite party admitted in paragraph 6 of said notice that the aforesaid raw cashew nuts arrived at Siliguri on 29.09.2022 and after unloading the raw cashew nuts opposite party no.2/complainant found that present petitioner delivered raw cashew nuts of quality BOKE. He has also stated in the said notice that on examination of the raw cashew nuts despatched to the complainant are found to be not in conformity with the contract and are of different quality of raw cashew nuts and accordingly by the said lawyers notice he asked the present petitioners to take back the raw cashew nuts from the opposite party no.2 and replace with IVC quality raw cashew nuts as per alleged contract.

15. Immediate after getting aforesaid lawyer's notice, the petitioners herein gave reply to the said notice on 26th November, 2022 denying material allegations and contended that the opposite party no.2 herein was aware of the cargo being BOKE and expressly agreed to accept BOKE cargo in lieu of IVC

cargo as the delivery time for IVC Cargo was longer and opposite party no.2 allegedly confirmed acceptance of substitution of IVC cargo with BOKE cargo which was duly conveyed and after being satisfied with the quality, origin and contents of the cargo, the complainant's representative dispatched lorries at their own cost to lift the cargo and it is further contended in the reply that when the cargo arrived at the factory of the complainant, no claim or contention as to any problem with the cargo was raised immediately. in the said reply dated 26th November, 2022 it is further stated that it was only at a future date after lifting the cargo, when the complaint found crash in the market price of the raw cashew nuts, he came up with an excuse that the cargo origin was not as per agreed terms even though he accepted and confirmed the cargo of BOKE origin. In the said reply it has been specifically contended by the petitioners herein that BOKE and IVC are both from the west coast of Africa and that BOKE origin is typically USD 50 to USD 70, higher than the cost of IVC per metric tons and in the aforesaid transaction, the difference came to Rs. 1,48,740/-, which amount, the petitioner herein, demanded from the opposite party no.2 for payment in the said reply dated 26.11.2022. It further appears that soon after receipt of the said reply from the present petitioner, the FIR was lodged on 06.12.2022 and police started investigation by drawing formal FIR on the self same date i.e. on 06.12.2022.

16. Now the petitioners herein during hearing strenuously argued that the cashew nuts was delivered on 29.09.2022 and the complainant accepted delivery and raised no concern for about two months and for the first time on

18.11.2022, he sent the lawyers notice for replacement of raw BOKE cashew with IVC cashew nuts as in the meantime there was a fall in the market price. He further alleged that on perusal of the said lawyer's letter dated 18.11.2022 it appears that the opposite party no.2/complainant only requested for replacement of raw BOKE cashew nuts with raw IVC cashew nuts and there appears to be no allegation of criminal breach of trust or cheating. It has further been argued on behalf of the petitioner herein that on perusal of the aforesaid invoices it is clear that every dispute between the parties in connection with the present commercial transaction are subject to Navi Mumbai jurisdiction. It is alleged that this prompted the complainant not to avail civil remedies before Mumbai jurisdiction and he has lodged the present FIR after getting reply of the petitioners dated 26.11.2022., which is after about two months of delivery of the cashew nuts. Petitioner further argued during hearing that without explaining cause of delay in lodging the FIR, the petitioner tried to convert purely civil disputes into a criminal case in order to create pressure of eminent settlement, though the present civil disputes and claims do not involve any criminal offence.

17. It is trite law that while exercising jurisdiction by the High Court under section 482 of the code of criminal procedure where the petitioner has sought for quashing of an investigation, the court is basically required to look into whether the averments made in the complaint discloses commission of cognizable offence or not and at this stage court is not supposed to embarking upon an inquiry as to the reliability or genuineness or otherwise of the

allegation made in the FIR. Since in the present context, it appears that the FIR has been lodged after about two months from the delivery of the cashew nuts and criminality in allegation has been made after exhausting request through lawyer for replacement of raw BOKE cashew with raw IVC cashew nuts, it is quite natural that the complainant while drafting the FIR would take care to ensure that the averments made in the FIR are such that it discloses the ingredients to constitute the criminal breach of trust and/or cheating. As a matter of fact in the present context, it will not be just enough for this Court to look into the averments made in the FIR only for the purpose of ascertaining whether the necessary ingredients to constitute the offence of cheating or criminal breach of trust are disclosed in the FIR or not, but while disposing the present Application, this Court needs to look into other attending circumstances emerging from the case record and the case diary to take into account the overall circumstances leading to initiation of the present proceeding.

18. The basic requirement to bring home the acquisition under section 405 of the Indian Penal Code (IPC) are the requirement to prove conjointly the entrustment with property and that the accused was actuated by dishonest intention, thereby misappropriated it or converted it to his own use to the detriment of the persons who entrusted it. Similarly in case of cheating there has to be a dishonest intention from the very beginning which is sine qua non to hold the accused guilty for commission of the said offence. The offence of cheating is established only when the accused induced the other side to deliver

any property or to do or omit to do something which he would otherwise not have done or omitted.

19. Now come back to the present scenario. In the FIR dated 06.12.2022 Relevant portion has been drafted as follows:-

“The representation made by Mr. Satish Damodar Upadhyay and his son Mr. Anmol Upadhyay that the order quality and quantity is ready with them an also the representation that I need not worry for the advance amount. Both these representation made by them were false and both them very well knew that the representation they are making is false and such that the false representation was made with dishonest intention of deceiving me.

By making such representation they have induced me to deliver in advance the full amount which I would otherwise not have done had I not been deceived.”

20. Curiously such averment in the FIR is completely absent in the lawyers letter, which was sent few days back on 18.11.2022 by the complainant opposite party no.2. and on the contrary in the said letter request was made for replacement. It has been held repeatedly by the Apex Court as well as by the High Courts that the key ingredients for establishing of the offence of criminal breach of trust and cheating is dishonest or fraudulent inducement since the beginning and there must be dishonest misappropriation. In the present context the petitioner herein in his reply through his lawyer dated 26.11.2022 has specifically taken the plea that the complainant was made aware of the cargo being BOKE and he had expressly agreed to accept the BOKE cargo in lieu of IVC cargo and on the confirmation of the acceptance of substitution of IVC cargo with BOKE cargo which was conveyed directly by the complainant to the petitioner herein and after being satisfied with the quality, origin and the contents of the cargo, it was dispatched. Though such allegations have been

denied and disputed by the complainant in the FIR but fact remains that inspite of submission made before this court on 04.10.2023 by the counsel appearing on behalf of the opposite party no.2 that he requires instruction as to whether any order was placed which would reflect that the purchase would be for IVC quality or BOKE quality of cashew nuts, the opposite party no. 2 has failed to produce any such order and it appears from the materials in CD that police during investigation has retrieved the messages communicated to each other by the parties and it shows that petitioners reiterated that it was clear and agreed that IVC cargo is taking time therefore on consent and confirmation given by the complainant petitioners gave delivery of same quality IBS BOKE cargo and on being satisfied the complainants had placed lorries and took the delivery in the presence of broker of the complainants. The course of conversation through messages as retrieved during investigation also suggest that the petitioners herein had refused the prayer for replacement, since such request of replacement appeared to the petitioner as absurd and illogical, as it was made after receiving the cargo and as such the petitioner straight way rejected the said request. The statements of witnesses which were recorded by investigating officer during investigation, under section 161 of the Code of the Criminal Procedure, only states that the complainant discovered during unloading that instead of raw IVC cashew nuts, the petitioner herein have sent low quality BOKE cashew nuts cargo and there is no allegation which can corroborate the FIR story that the petitioner herein and his son made any false representation with dishonest intention or of deceiving them or by making such

representation the petitioners induced the complainants to deliver in advance the full amount, which he would otherwise would not have done, had he not been deceived.

21. It is true that there might have some dispute as reflected from the correspondences made by the parties before lodging the FIR, regarding colour, nut count, quality of cashew nuts interms of agreement etc. But all these are disputes which concerned to the allegation as to whether there is any breach of contract or not which is purely civil in nature.

22. It is trite law that there exists a distinction between pure contractual dispute of a civil nature and an offence of cheating. Whether breach of contract would amount to cheating or not depends upon the intention of the accused at the time of inducement and mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention and/or inducement is shown right at the beginning of the transaction. Thus merely by inserting a paragraph in the FIR that the petitioners herein have induced by false representation to deliver in advance the full amount, which he would otherwise not have done, had he not been deceived, can hardly constitute the criminal offences like criminal breach of trust or cheating.

23. Here the main offence alleged by the complainant is that the petitioners herein committed the offence of cheating and thereby dishonestly induced him to deliver property. To 'deceive' is to induce a man to believe that a thing is a true which is false and which the petitioner, allegedly practicing the deceit,

knows or believes to be false. From the materials available in the record and in the case diary, I find nothing to suggest that the petitioners herein made any willful misrepresentation. Even the FIR maker admitted that the parties entered into a valid agreement for commercial transaction.

24. In ***Hari Prasad Chamaria Vs. Bishun Kumar Surekha & others***, reported in **AIR 1974 SC 301**, it was held that unless the complaint showed that the accused had dishonest or fraudulent intention at the time the complainant parted with the money, it would not amount to an offence under section 420 of IPC and it may only amount to breach of contract. In ***G.V. Rao Vs. L.H.V. Prasad & others***, reported in **2000 (3) SCC 393**, it was reiterated that guilty intention is an essential ingredient of the offence of cheating and therefore to secure conviction 'mens rea' on the part of the accused must be established. It has been further held that in order to constitute offence of cheating the intention to deceive should be in existence at the time when the inducement was offered.

25. It has also been reiterated time and again by the Courts that 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. Needless to repeat that an FIR whether 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. On careful consideration of the contention of FIR, it appears that the FIR maker while disclosing civil transaction, had made an

attempt to give a criminal texture by adding some paragraphs but on perusal of the materials as stated above, it is clear that the present dispute in connection with the commercial transaction, is purely civil in nature and attempt has been made to give colour of criminal offence over a civil dispute. In fact there is nothing either in the complaint or in the record that any property was entrusted to the petitioner at all which he dishonestly converted for his own use so as to satisfy the ingredients of section 405 punishable under section 406 of IPC. Apex court in a number of cases gave caution against criminalizing civil dispute such as breach of contractual obligation. It is to be kept in mind that criminal proceedings are not a short cut of other remedies available in law.

26. In ***Indian Oil Corporation Vs. NEPC India Ltd. and others*** reported in **(2006)6 SCC 736** it was clearly observed by the Apex Court in paragraph 13 and 14 as follows:-

“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.”

27. In **V.Y. Jose and another Vs. State of Gujarat and another** reported in **(2009) 3 SCC 78**, Their Lordship observed that it is one thing to say that a case has been made out for a trial and as such the criminal proceeding should not be quashed but it is another thing to say that a person should undergo a criminal trial despite the fact that no case has been made out at all.

28. In the present context from the facts and circumstance of the case and also material available so far clearly suggest that the essential ingredients of a criminal offence like criminal breach of trust or cheating are completely absent in the present context either at initial stage or at subsequent stage and in such view of the matter, further proceeding of Siliguri P.S. case no. 1125 of 2022 dated 06.12.2022 (being G.R. No. 5292 of 2022) if allowed to be continued any further it would be merely an abuse of process of law, which must be discouraged in its entirety and as such the impugned proceeding being G.R. case no. 5292 of 2022 arising out of Siliguri P.S. Case no. 1125 of 2022 dated 06.12.2022 stand quashed.

C.R.R. 16 of 2023 is accordingly allowed. Connected Application are accordingly disposed of.

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJOY KUMAR MUKHERJEE, J.)