

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
(CRIMINAL REVISIONAL JURISDICTION)**

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

**CRR 82 of 2021
CRAN 1 of 2022
CRAN 2 of 2022**

**G. VENKATESH BABU & ANR.
VS.
THE STATE OF WEST BENGAL & ANR.**

For the Petitioner	: Mr. Arjun Syal, Adv. Mr. Akhilesh Wahal, Adv. Mr. Hillol Saha Poddar, Adv.
For the O.P. No.2	: Ms. S. Sethia, Adv.
For the State	: Mr. Aditi Shankar Chakraborty, Ld. APP Mr. Abhijit Sarkar, Adv.
Hearing concluded on	: 31 st August, 2023
Judgement on	: 8 th September, 2023

Siddhartha Roy Chowdhury, J.:

1. This application under Section 482 of the Code of Criminal Procedure challenges the propriety and legality of the proceeding being C.R. Case No. 11 of 2019 under Section 418/420/120B/34 of the Indian Penal Code, 1860, pending before the learned Judicial Magistrate, 1st Court, Siliguri.
2. Briefly stated, G. Venkatesh Babu and L. Madhusudhan Rao, petitioners herein have been arrayed as accused persons no. 2 and 3 being the Managing Director of Lanco Infratech Limited and whole time Director of the said company, by the complainant/opposite party

no. 2. It is alleged that the complainant used to supply dissolved acetylene oxygen industrial cylinders to the construction site of the accused persons at Sirwani, Singtham. But in the breach of understanding the company Lanco Infratech Limited failed to return the empty cylinders and denied the obligation by simply stating that they never received the said cylinders. Thereby the accused company misappropriated the cylinders of the company worth Rs. 38,66,500/-.

3. Aggrieved complainant filed a petition of complaint against the accused persons which was registered as C.R. Case no. 459 of 2017. learned Judicial Magistrate, 3rd Court having taken cognizance, was pleased to issue summons against the accused persons and accused nos. 1, 2 and 3 convinced the complainant that they would pay Rs. 29,02,550/- in instead of Rs. 38,66,500/- by seven installments. Incidentally they paid Rs. 12,00,000/- in one go, and they promised to pay the balance amount of Rs. 17,02,550/- in six equal monthly installments starting from March, 2018 to August, 2018 upon withdrawal of the complaint case. The complainant was thus induced by accused nos. 1, 2 and 3 to enter into an agreement and pursuant to such agreement the learned Judicial Magistrate, 3rd Court, Siliguri was approached by filing an application dated 27th July, 2017 to pass necessary order pursuant to the settlement out of the Court.

4. But after the withdrawal of the complainant, the accused persons did not honour the terms of the settlement despite being requested by the complainant by letter dated 14th March, 2018. Even accused persons refused to speak to the complainant when the complainant

tried to contact over phone on 21st September, 2018 and on subsequent dates. It is alleged that had there been no such inducement on the part of the accused persons the complainant would not have entered into the settlement agreement or withdrawn the complaint case.

5. Learned Jurisdictional Magistrate seisin over C.R. 11 of 2019, after invoking the provision of Section 200 Cr.P.C. was pleased to issue process upon the accused persons under Section 418/420/120B/34 of the Indian Penal Code. The accused persons however, did not appear before the learned Trial Court and warrant of arrest was issued.
6. Heard Mr. Arjun Syal, learned Counsel representing the petitioners, Ms. S. Sethia and Mr. Abhijit Sarkar, learned Counsels representing the private opposite party and the State respectively.
7. It is submitted by Mr. Syal that the provision of Section 202 of the Code of Criminal Procedure has not been complied with by the learned Judicial Magistrate. No enquiry was held as contemplated under Section 202 of the Cr.P.C. It is further contended that the complainant suppressed the material fact and set the criminal proceeding into motion which amounts to abuse of process of law. Drawing my attention the settlement agreement it is submitted that on 27th July, 2017 the parties entered into an agreement towards settlement of dispute and upon deliberation it was settled that M/s Lanco Infratech Limited (herein after referred as 'LITL') would pay a sum of Rs. 12,00,000/- by way of demand draft to M/s Baid

Distributors Private Limited (hereinafter referred to as 'BDPL') in the Court as soon as the complainant would give his consent before the learned Court to compound the offence and rest amount of Rs. 17,02,550/- would be paid in six monthly installments w.e.f. March, 2018 to August, 2018. The agreement was between the two companies represented by Mr. L. Sashi Kumar as authorized signatory of LITL and Srikantha Baid, the authorized signatory of BDPL. Pursuant to such agreement a sum of Rs. 12,00,000/- was paid by the LITL.

8. But by the order of the National Company Law Tribunal, passed on 7th August, 2017, the company, at the instance of the creditor under the Insolvency and Bankruptcy (Application of Adjudicating Authority) Rules, 2016 slipped into moratorium under Section 14 of the IBC and Sri Savan Godiawala was appointed as Interim Resolution Professional. The company, by this subsequent development was prohibited from the transferring, encumbering, alienating and disposing of its assets or any legal right or potential interest. As a result, the company was sufficiently prevented from complying with the terms of settlement.
9. This fact was known to the complainant and as corporate creditor Baid Distributors Private Limited (BDPL) lodged its claim amounting to Rs. 17,02,550/- before the Interim Resolution Professional. Such claim was duly acknowledged by the Resolution Professional and presently the company is in liquidation. Resolution professional Sri Savan Godiawala is appointed as liquidator. It is submitted by Mr.

Syal, learned Counsel that this legal embargo prevented the company to discharge the obligation. It cannot be said that the company or its alter ego Managing Directors had any mens rea to induce or cheat the complainant company. On the other hand, the complainant filed this petition of complaint with malafide intention suppressing this material fact. Therefore, the proceeding may be quashed invoking the provision of Section 482 of the Code of Criminal Procedure.

10. Refuting such contention of Mr. Syal, Ms. S. Sethia, learned Counsel representing the complainant opposite party no. 2 submits that the accused persons promised to pay a sum of Rs. 29,02,550/- in terms of the settlement and such promise goaded the complainant to withdraw the complaint case, upon receipt of Rs. 12,00,000/-. Had there been no such representation the complainant would not have withdrawn the case. Since very inception, the intention of the accused persons was to defraud the complainant company and the complainant was induced by false promise.
11. The complainant had the obligation to participate and lodge its claim before the Resolution Professional but the embargo of Section 14 of IBC is not applicable in a criminal proceeding.
12. In order to constitute an offence of cheating the complainant is to show prima facie that since the inception of transaction the accused persons had the intention to cheat the complainant.
13. Supporting the contention of Ms. Sethia, Mr. Sarkar, learned Counsel for the State submits that the payment of Rs. 12,00,000/-

out of Rs. 29,02,550/- is sufficient to hold that it was an inducement to cheat the complainant of Rs. 17,02,550/-.

14. From the attending facts of the case, it is admitted that a sum of Rs. 12,00,000/- was given to the complainant by the company. In order to hold a person culpable for committing offence within the meaning of Section 415 of the Indian Penal Code, it is necessary to say that the said person had fraudulent or dishonest intention at the time of making promise or induce the other persons intentionally to do or omit to do anything which he would not do if he were not so induced and deceived.
15. From the attending facts of the case, it is admitted that pursuant to the agreement dated 27th July, 2017 the company LITL paid a sum of Rs. 12,00,000/- and within proximate period of time the proceeding under IBC was initiated against the company on 7th August, 2017.
16. Had there been any intention on the part of the accused persons to defraud the complainant company, they would not have paid even the said sum of Rs. 12,00,000/-. This factum of payment rules out the existence of required mens rea to commit the offence. In absence of mens rea the criminal proceeding cannot survive. That apart from the facts of the case, it appears that commercial dispute virtually cropped up and it is civil in nature which has been imbibed with colour of criminality.

17. The complainant company having lodged its claim before the Interim Resolution Professional, did not disclose the said fact in the petition of complaint.

18. Hon'ble Apex Court in **USHA CHAKRABORTY VS. STATE OF WEST BENGAL & ANR.** reported in **2023 SCC Online SC 90** held that :-

“17 in the aforesaid circumstances, coupled with the fact that in respect of the issue involved which is of civil nature the respondent had already approached the jurisdictional civil court by instituting a civil suit and it is pending there can be no doubt with respect to the fact that the attempt on the part of the respondent is to use the criminal proceeding as weapon of harassment against the Appellants.”

19. In a recent judgement in **SALIB @ SHALU @ SALIM VS. STATE OF UP & ORS.** reported in **2023 SCC online SC 947**, Hon'ble Supreme Court held :-

“28 in frivolous or vexatious proceeding, the court owes a duty to look into many other attending circumstances emerging from the record of the case over and above the averments and, if need be, with due care and circumspection try to read in between the lines. The court while exercising its jurisdiction u/s 482 of the Cr.P.C. or article 226 of the Constitution need not restrict itself only to the stage of a case but is empowered to take into account the overall circumstances leading to the initiation/registration of the case as well as the materials collected in course of investigation.....”

20. In the case of **B. SURESH YADAV VS. SHARIFA BEE & ANR.** reported in **(2007) 13 SCC 107** Hon'ble Supreme Court held :-

“13. For the purpose of establishing the 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. In a case of this nature, it is permissible in law to consider the stand taken by a party in a pending civil litigation. We do not, however, mean to lay down a law that the liability of a person cannot be both civil and criminal at the same time. But when a stand has been taken in a complaint petition which is contrary to or inconsistent with the stand taken by him in a civil suit, it assumes significance.....”

21. Hon'ble Apex Court in **STATE OF HARYANA VS. BHAJAN LAL** reported in **1992 Supp (1) SCC 335** it is held :-

“108. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(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 concerned Act (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 concerned Act, 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.”

22. Upon considering facts and circumstances of the case, I am of the view that the criminal proceeding being C.R. Case No. 11 of 2019 is attended with malafide as the complainant initiated the proceeding suppressing the material fact knowing fully well that the company and the accused persons no. 2 and 3 being the alter ego of the company had no authority to deal with the fund of the company to transfer the same. That apart the agreement was entered into by and

between the companies. Therefore, at all any offence was committed, it was committed by the company. Therefore, criminal proceeding cannot be allowed to survive without the company being arrayed as an accused.

23. Hon'ble Supreme Court in the case of **STANDARD CHARTERED BANK VS. DIRECTORATE OF ENFORCEMENT** reported in (2005) 4SCC 530 held :-

“6. There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.”

24. Hon'ble Apex Court in **MAKSUD SAIYED VS. STATE OF GUJARAT** reported in (2008) 5 SCC 668 held :-

“13. Where a jurisdiction is exercised on a complaint petition filed in terms of [Section 156\(3\)](#) or [Section 200](#) of the Code of Criminal Procedure, the Magistrate is required to apply his mind. Indian [Penal Code](#) does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion

that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.”

25. In the case of **SUNIL BHARATI MITTAL VS. CBI** reported in **(2015) 4 SCC 609** wherein Hon’ble Supreme Court held :-

“44. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect.”

26. Therefore, the proceeding in C.R. Case No. 11 of 2019 pending before the learned Judicial Magistrate, 1st Court, Siliguri cannot be allowed to remain in force and should be set aside, which I accordingly do.
27. Consequently, the criminal revision is allowed on contest however, without cost. Pending applications, if any, stand disposed off.
28. Let a copy of the judgement be sent to the learned Trial Court for information and necessary action.
29. Urgent photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)