IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

CRR 2495 of 2022

ECE Industries Limited & Anr.
Vs
M/s. GPS Builder & Anr.

For the Petitioners	:	Mr. Sayan De Mr. Asoke Basu Mr. Sayan Kanjilal
For the Opposite Party No. 1	:	Mr. Krishnendu Bera Ms. Debolina Chakraborty
Heard on	:	26.06.2024
Judgment on	:	23.7.2024

Ajoy Kumar Mukherjee, J.

1. Petitioner herein has prayed for quashing of the proceeding being C.N 1169 of 2021 dated 27.12.2021 under sections 406/506/120B of the Indian Penal Code (IPC), presently pending before Learned Metropolitan Magistrate 18^{th} court Calcutta. Petitioners contended that they succeeded in a tender process for installing lift as floated by BHEL. Accordingly a demand of quotation for scaffolding work was made by the petitioner no.2 being Regional Manager of petitioner no.1 from the opposite party no. 1 through an email dated 18.01.2019. After considering the quotation the petitioners issued work order for a period of three months. Accordingly an invoice was issued by the opposite party no.1 for Rs. 1,14,224/- and after deduction, Rs. 1,13,256/- was paid to the opposite party no.1 by the petitioners. Thereafter the work order was extended from time to time and the invoices raised by the opposite party no. 1was cleared by the petitioners. An email was conveyed to the petitioners by the opposite party no.1dated 07th December, 2019 for further extension of time period, but the same was not done. Thereafter the petitioner no.2 by an email dated 21st December, 2019 asked the opposite party no.1 to remove all the scaffolding materials as no further extension of work order would be issued. However the same was not complied by the opposite party no.1 and on the contrary the opposite party no.1 kept on raising invoices as rent for the scaffolding items that are lying on the site. Subsequently a dispute arose between opposite party no. 1 and the petitioners with regard to the quantum of the rent which according to opposite party no.1 had summed up to the tune of Rs. 3,19,529/-. It is further alleged that the opposite party no. 1 sent two of their representatives at the site for collecting the items, lying there on 28th October, 2021, without informing the petitioners during the Covid Pandemic situation and as such the security guard did not allow the representatives of opposite party no.1to enter the site in the absence of representative of the petitioners Accordingly the instant criminal proceeding has been initiated, against the petitioners.

2. Mr. Dey learned counsel appearing on behalf of the petitions submit that the dispute between the parties is civil in nature where the actual arrear amount of rent has to be decided, which can only be determined by a

Civil Court. He further submits that the allegations levelled in the FIR, even if taken to be true does not disclose any offence against the petitioners. He further submits that the security staff had sufficient reason for not allowing the representative of the opposite party to enter into the site as the representative of the OP No. 1 has gone to the site without informing the petitioners that too in a pandemic Situation and as such may be, the representative of the opposite party no. 1 was not allowed to enter in the site by the security.

3. He further submits in spite of that the petitioners had time and again asked the opposite party no.1 in getting their materials lifted by obtaining requisites permissions from NTPC and the petitioners are till date willing to co-operate with the opposite party no.1with regard to the collection of scaffolding items from the site by obtaining requisites permission. He also submits in this context that all the letters addressed to the petitioners by the opposite party no.1 with regard to the dispute had been duly replied and solution to the effect had been suggested for redressal of the issue but the opposite party no.1 with a *malafide* intention and in order to malign the reputation of the petitioners, have initiated the present proceeding.

4. Mr. Dey further argued that the scaffolding items are lying at the site due to the negligence on the part of the opposite party no. 1. Moreover the directors, chairman, Managing Director cannot be held responsible vicariously unless the statute specifically says so, and unless specific allegations mentioning individual role, have been attributed against each of them.

5. He further submits sections 406/506/120B have no manner of application in the present context. Accordingly petitioners have prayed for quashing the aforesaid proceeding.

6. Mr. Bera Learned Counsel appearing on behalf of opposite party No.1 submits that the scaffolding items are still lying at the aforesaid site and the petitioners herein did not take the necessary measures for arranging gate pass to the opposite party no.1 for getting their scaffolding material lifted from the site and on the contrary their representatives were not allowed to collect the same from the site. From the allegations and counter allegations it is palpable clear that the petitioners with a criminal intention in their mind are not allowing the opposite party no. 1 to collect the materials from the site and they are intentionally not making any arrangement for issuing necessary gate pass and they are also not paying any rent which clearly establishes *mens rea* on the part of the petitioners. He further submits that truth will only reveal after the conclusion of trial and the proceeding is not liable to be quashed at the threshold, merely assuming that an attempt has been made to imbibe criminality over a civil dispute.

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

8. On perusal of the written complaint it appears that in para 3, complainant have clearly admitted that as per work order company sent several items for scaffolding work and thereafter they raised an invoice dated 13.02.2019 amounting to Rs. 1,14,224/- and after some deduction a some of Rs. 1,13,256/- was paid to the complainant/opposite party no. 1 herein on 01.03.2019. In para 4 of the complaint, it is further stated that thereafter the period was extended for four months from 11.05.2019 to 10.09.2019 by issuing another work order dated 19th September, 2019 for extended four months period and accordingly the complainant raised invoices for Rs. 59000/- for the extended period and out of said Rs.59000/-, Rs.58,500/- was paid to the complainant/opposite party no. 1 on 05.03.2020 after undisputed deductions.

9. However. Dispute arose when after completion of said extended period, opposite party herein regularly pursuing the petitioners herein/accused persons for work order for further extended period from 11.09.2019 but the petitioners did not issue the same nor instructed the petitioner for next course of action, whereas the rent of said scaffolding was increasing day by day as alleged in para 5 of the complaint. Further allegation levelled in paragraph 7 is that petitioner raised proforma invoice for Rs. 62,437/- for the period from 11.09.2019 to 18.01.2020, but the payment has not been paid by the petitioners/accused persons. Accordingly the contents of the complaint reveals that there was a continuous business transaction between the parties and infact, real dispute arose with regard to lifting of the scaffolding items that are lying on the site and also the quantum of rent of the said items.

10. Needless to say that in order to attract punishment under section 406 IPC there must be ingredients under section 405 of the IPC which says in order to commit criminal breach of trust there must be a dishonest misappropriation of property or a dishonest usage or disposal of the property on the part of the accused. Under whose negligence the items could not be lifted from the site can always be a subject matter of a civil court but by no stretch of imagination it can be said that there was any entrustment or mis-appropriation or dishonest usage or disposal of the property. The email letters given by the opposite party no. 1 and replied by the petitioners herein also does not suggest anything about criminal breach of trust.

11. Most importantly when the witnesses were examined under section 202 of Cr.P.C. before issuance of process, the witnesses have only stated that their business is to provide scaffolding on rent for the construction works and repairing works and on the basis of quotation they received the work order from accused company for providing scaffolding on rent for three months and the accused company has made some payments from time to time but thereafter the accused company stopped paying Rs. 3,19,529/- nor they had returned materials supplied for scaffolding and they have also stated in their initial deposition that they went to the company for lifting the materials but the security of the accused company did not allow them to enter the site without gate pass.

12. This is most unfortunate that on the basis of said initial deposition, the court below before issuance of process observed that there is sufficient ground to proceed the case against the accused persons under sections 406/506/120B IPC, in spite of the fact that no witness including the complaint disclosed anything which may constitutes any criminal offence far from offence under sections 406/506/120B IPC.

13. It is now well settled that non-payment or under-payment of rent of items supplied by the complainant does not amount to commission of offence of criminal breach of trust. It is essentially a civil dispute. Merely because the security guard of the petitioners company did not allow the representatives of the complainant to enter the site for some reason or other, does not mean that it constitutes offence of criminal breach of trust. There is a clear distinction between a civil wrong in the form of breach of contract and non-payment of money with disregard to violation of contractual terms and a criminal offence under section 420 and 406 of IPC.

14. From the initial deposition taken under section 202 Cr.P.C., it is clear that complainant's grievance centred about petitioner's failure to pay arrear rent inspite of repeated demands. It is not in dispute that at least previous two occasions, the petitioners have made payments.

15. Assuming that the assertions regarding arrear rent made in the complaint are correct, even then offence under section 405 does not attracts as ingredients of such offence are conspicuously absent in the complaint as well as in the initial deposition. In fact so far as previous two transactions are concerned when payments were made after deduction, there was no dispute between the parties. The ingredients of entrustment, dishonest intention leading to delivery of property with knowledge to cause wrongful loss are not on record. Similarly no allegation of criminal conspiracy or of criminal intimidation has been attributed either in the complaint or in the initial deposition.

16. In fact while the witnesses were examined under section 202, there is no iota of allegation as to the dishonest intention in mis appropriating the property. Needless to say in order to make out a case of criminal breach of trust, it is not sufficient to show that rent has been retained by the petitioners, it must also be shown that the petitioners dishonestly disposed of the same in some way or dishonestly retained the same. The mere fact that the petitioner did not pay the money to the complainant does not amount to criminal breach of trust.

17. Though it is true that at the stage of issuing summon a magistrate only needs to be satisfied with a prima facie case for taking cognizance but the duty of the magistrate is also to be satisfied whether there is sufficient ground for proceeding. The learned magistrate in the present context while issued process under section 204 had recorded an order in a cryptic manner. There is no quarrel with the proposition that at the stage of issuing summons detailed reasoning as to why a magistrate is issuing summon is not necessary, but in the present case I am convinced that the allegations made in the complaint do not give rise to the offences for which the petitioners has been summoned for trial. A civil dispute which ought to have been resolved through the forum of civil court, has been given colour of criminality. The learned magistrate here failed to apply his mind in issuing summon and since no case at all has been made out for which machinery of the criminal court can be invoked, I find that this is a fit case where this court's inherent power under section 482 has to be exercised.

18. In view of aforesaid discussion **CRR 2495 of 2022** is allowed.

19. All proceedings being complaint case no. CN/1169/2021 presently pending before 18th Metropolitan Magistrate, Calcutta is hereby quashed.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(AJOY KUMAR MUKHERJEE, J.)