

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

CRR 4596 of 2022

Ajay Agarwal

Versus

The State of West Bengal & ors.

For the Petitioner : Mr. Sabyasachi Banerjee
Mr. Amitesh P.Roy
Ms. Minal Palana

For the O.P. no.2 : Mr. Pradip Tarafdar
Mr. Subir Pal

For the State : Mr. Rudradipta Nandi
Mr. Bitasok Banerjee

Heard on : 09.09.2024

Judgment on : 26.11.2024

Dr. Ajoy Kumar Mukherjee , J.:

1. The instant application under section 482 of the Cr.P.C. has been filed by the petitioner for quashing of the proceeding being G.R. No. 314 of 2018 pending before the learned Additional Chief Judicial Magistrate Raghunathpur. The said proceeding emanates out of a complaint made by

the opposite party no.2 herein with the allegation that an annual rate contract (ARC) was awarded to M/s BLA project Pvt. Ltd., Kolkata on 23.03.2018 for transportation of coal in RCR Mode by using Chourasi Railway siding to Raghunathpur Thermal Power station (RTPS) unloading point. On 02.06.2018 three dumpers were allegedly caught red handed while dumping contaminated coal at unloading point of RTPS and said dumpers were almost full of extraneous materials other than coal. Statement of driver of the three dumpers were recorded and accordingly FIR was lodged on the next day. In their statement dumper drivers allegedly admitted that the contaminated coal containing mud and stones were forcefully loaded by the company people and that such corrupt practice was continuing prior to that date also. It is alleged in the complaint that M/s BLA project Pvt. Ltd. had violated various provisions of contract and that the agency had created a heap of inferior coal mixed with extraneous materials with the intended fraudulent and corrupt practice and that instead of ensuring enroute surveillance, the agency had adopted fraudulent practice with ill motive.

2. Pursuant to the said complaint the aforesaid case was registered under sections 409/420/506/34 of the Indian Penal Code against management staff of M/s BLA Project Pvt. Ltd. and three drivers of the three respective dumpers. After completion of the investigation, charge sheet has been submitted by the investigating agency on 24.10.2019 against aforesaid accused persons including the present petitioner.

3. Being aggrieved with the continuance of said proceeding, Mr. Banerjee learned counsel appearing on behalf of the petitioner submits that

the company has not been made accused in the instant criminal proceeding and the petitioner being the managing director of the company cannot be held vicariously liable for any contravention allegedly done by the company as the Indian Penal Code does not envisage the concept of vicarious liability. He further submits that the charge sheet does not disclose any role or involvement of the petitioner in the commission of alleged offence and in that view of the matter the criminal proceeding against the petitioner is not maintainable.

4. Mr. Banerjee on behalf of the petitioner further argued that in terms of the ARC, M/s BLA project Pvt. Ltd. had invoked arbitration for resolution of the dispute with the complainant company and an arbitration proceeding being AP No. 595 of 2018 was initiated between the parties which was culminated by an award passed by Id. Arbitrator in favour of M/s BLA Project Pvt. Ltd. and since the said award was passed on merits and allegations involved therein are identical to the instant criminal proceeding, the said proceeding cannot be allowed to continue on the same set of facts and the underlying principle being that higher standard of proof is required in criminal cases and therefore, the instant criminal proceeding is liable to be set aside.

5. Mr. Banerjee further submits that from the complaint and the statement of witnesses and collected evidences, not even a prima facie charge under sections 409/420/506/34 of the Indian Penal Coded has been established against the petitioner and in the charge-sheet the reason for implicating the petitioner herein has not been stated and the petitioner has bene implicated purely on the dint of his designation. He further

submits that the complaint is based on purported confession of the three drivers of dumpers which have no evidentiary value and the incident allegedly had taken place on 2nd June, 2018 but the complaint was lodged after a delay of seven days i.e. on 09.06.2018.

6. Mr. Banerjee further argued that the complaint itself reflects that there has been alleged breach of provisions of contract and the ARC itself provides for a penalty clause being clause 13 (c) for contamination in the coal. Similarly clause 13(g) deals with additional penalties. Moreover, the contract sets a tolerance level upto 0.80% of the coal received during the billing period and also contemplated imposition of penalty or any deviation thereof.

7. He further submits that the seizure list dated 11.06.2018 was signed by two witnesses, both of whom were employees of the complainant/opposite party no. 2 and no independent witness was present during alleged seizure. He further submits that seizure was allegedly made on 11.06.2018 but the test report reveals that the sample was received on 20.11.2018 which is five months after the seizure and the charge sheet failed to explain that delay in sending the said seized sample for examination.

8. It has been further argued that nowhere in the test report dated 21.11.2018 as well as the letter dated 26.08.2019, it has been stated that coal sample was contaminated. Therefore, in the absence of report showing contamination in coal sample, the investigation officer has submitted the instant charge sheet against the petitioner without any justification. It has been further argued that the coal supplied by M/S BLA Project Pvt. Ltd.

had been accepted by the opposite party no.2 without any allegation as to contamination of coal. The seized dumpers were not owned by the petitioner but taken on hire basis by the company from a transporter. He further submits that neither in the complaint nor in the statement of the witnesses recorded under section 161 of the Code, the petitioner's name had transpired. It is also not the case of the complainant that the petitioner had directed the transportation or had transported the heap of coal at the unloading point. In the absence of any such incriminating material on record against the petitioner, continuation of the instant proceeding against the petitioner would be an abuse of process of law. Infact the charge-sheet mechanically states that a prima facie case has been established against the petitioner, however fails to explain how the petitioner had been active in commission of the alleged contravention. In this context the petitioner relied the judgment of ***Sarad Kumar Sanghi Vs. Sangeeta Rane*** reported in **(2015) 12 SCC 781**. Mr. Banejee further submits that it is evident from the provisions of the contract, that the allegations leveled in the FIR and the materials surfaced in the charge sheet, that the instant dispute is absolutely of a civil nature which has been given an element of criminality for harassing the petitioner. In this context petitioner also relied upon the judgment in ***Y.V. Josh and another Vs. State of Gujarat*** reported in **(2009) 3 SCC 78**.

9. Mr. Banerjee further submits that in the instant case it is matter of record that the coal supplied by the company, M/s BLA Project Pvt. Ltd. had been accepted by the opposite party no.2 and therefore in absence of any element of entrustment with the petitioner herein, the offence

punishable under section 409 of the code cannot be made out against the petitioner.

10. Petitioner further submits that the aforesaid company had challenged the wrongful termination of the contract by the opposite party no.2 before the sole arbitrator and in the aforesaid arbitration proceeding arbitrator had observed that the said termination of contract was wrongful and illegal and had set aside the same by directing the opposite party no.2 to pay a sum of Rs. 14.5 crores to the company towards compensation. Opposite party no.2 herein challenged the said order before this court but this court refused to interfere with the observation made by the arbitrator, where the arbitrator observed that the actions committed by the company does not come under the purview of corrupt practice or fraudulent practice as provided for in the contract. Quoting the judgment reported in ***Radhe shaym Kejriwal Vs. State of West Bengal*** reported in **(2011) 3 SCC 581** petitioner submitted that if the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue but however in case of exoneration on merit, where the allegation is found to be not sustainable at all and the persons held innocent, criminal prosecution on the same set of fact and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof is required in criminal cases.

11. Finally, quoting the judgment of ***State of Haryana Vs. Bhajanlal*** reported in **1992 SCC (cri) 426**, Mr. Bajernee submitted that to prevent abuse of the process of any court or otherwise to secure the ends of justice

the criminal proceeding can be quashed. Accordingly he prayed for quashing the impugned proceeding.

12. Mr. Tarafdar learned counsel appearing on behalf of the private opposite party no. 2 submits that in view of the West Bengal Criminal law amendment (special court) Act, the court below may be directed to transmit the case record to the competent special court having jurisdiction with a further direction to take cognizance of the offence ignoring the cognizance already taken by the incompetent court. He further submits that from the proper appraisal of the charge sheet it would clearly reveal that a strong *prima face* case has been made out against the company as well as petitioner and the three drivers of the three dumpers for commission of the offence punishable under section 409/420/506/34 of I.P.C. He further submits that the said drivers admitted that the contaminated coal containing mud and stones, was forcefully loaded by the company people and that such corrupt practice was continuing even prior to 2nd June 2018. He further submits that although there is specific allegation against the company, M/s B.L.A Project Pvt. Ltd. Of it's involvement in the commission of the offence mentioned hereinabove, yet the investigating officer did not make the said company as an accused and learned Magistrate while taking cognizance of the offence failed to discharge his duties by not summoning the said company as an additional accused. Relying upon the judgment of ***Raghubans Dubey Vs. State of Bihar and others*** reported in (1967) SCC OnLine SC 3, Mr. Tarafdar argued that when cognizance is taken by the Magistrate, he takes cognizes of an offence and not against the offender. Once he takes cognizance of the offence, it is his duty to find out who the

offenders really are and once he comes to the conclusion that apart from the reports sent by the police, some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by him taking cognizance of an offence. In this context he further relied upon paragraph 5,6,7 of the judgment of Apex court in ***Municipal Corporation of Delhi Vs. Purshotam Dass Jhunjunwala and others*** reported in **(1983) 1 SCC 9**.

13. Mr. Tarafdar further submits that when from the appraisal of the complaint, statement recorded by the police under section 161 and other document referred to under section 173, it is revealed that a strong *prima face* case has been made out against the company, but the investigation officer did not make the company as an accused, necessary direction may be passed upon the Special court to take cognizance of the offence against the company M/s B.L.A Project Pvt. Ltd.

14. While distinguishing the judgment relied by petitioner in the case of ***Aneeta Hada Vs. Godfather Travels and Tours Ltd*** reported in **(2012) 5 SCC 661** and ***Ravindra nath Bajpe Vs. Mangalore Special Economic Zone Limited and others***. reported in **(2022) 15 SCC 430**, Mr. Tarafdar contended that in the said two cases principle of law relating to vicarious liability has been laid down and it has been held that the officials i.e. managing director cannot be held vicariously liable for the offence committed by the company unless there appears specific allegation and averments against them with respect to their individual role and involvements. This well settled laws are also squarely applicable in the instant case in as much as in the charge sheet there is specific allegation

against the petitioner, being the Managing Director of the company of his involvement in the commission in the offence.

15. He further submits that the case law as relied by the petitioner in ***Radhe shyam Kejriwal Vs. State of West Bengal*** and ***Surendranath Tewari Vs. C.B.I*** are not applicable in the present context and the said case is distinguishable in the instant case as the issue involved and framed by the Arbitrator for resolution of the dispute and the case involved in the criminal prosecution is not identical and infact completely different. Referring the case of ***Sreenivasa General Traders and others Vs. State of Andhra Pradesh and others*** reported in **(1983) 4 SCC 353**, Mr. Tarafdar contended that a case is an authority only for it actually decided and not for what may logically follow from it. Every judgment must be read as applicable through the particular facts proved or assume to be proved since the generality of the expression which may be found there not intended to be exposition of the whole law but govern or qualified particular fact of the case in which such expression are to be found. He further submits that the finding recorded by the Arbitrator in Arbitral proceeding while passing its award could not be binding in criminal proceeding. Accordingly opposite party no. 2 submits that a strong *prima facie* case has been made out against the petitioner and on that score, the criminal proceeding is not liable to be set aside.

16. Having heard learned counsel appearing on behalf of the parties and on perusal of the relevant materials placed before me the following three Key issues required determination in the instant case

- i)** Whether the necessary ingredients for committing offence of cheating and criminal breach of trust are *prima facie* made out against the petitioner.
- ii)** Whether the instant criminal proceeding is liable to be set aside in view of the fact that the arbitration proceeding being A.P no. 595 of 2018, culminated by an award in favour of petitioner
- iii)** Whether the dispute is one of entirely civil in nature and therefore liable to be quashed.

17. On bare perusal of the Written Complain dated 09.06.2018, it appear that the specific allegations have been attributed against M/s B.L.A Project Private Limited, alleging criminal breach of trust and cheating. It is also not in dispute in the present context that the petitioner is the Managing Director of the said company. In the FIR it has been specifically alleged that three dumpers were caught red-handed while dumping contaminated coal at unloading point and those dumpers were almost full of extraneous materials other than coal. In the complaint it has also been alleged that the statement of the drivers of the dumpers were recorded and on the basis of the same, the FIR was registered. During the course of hearing, learned counsel appearing on behalf of the State pointed out the statements recorded under section 161 of the Cr.P.C which discloses *prima facie* materials to go for trial against the petitioner being the managing director of the company and also against the driver of the dumpers. During the course of argument learned counsel for the petitioner, has taken various points which includes the fact that under ARC there is a penalty provision and the contract states a tolerance level up to 0.80 percent of the coal

received during the billing period and also contemplated imposition penalty or any deviation thereof. It was also extensively argued that the search and seizer made by the prosecution agency is suspicious in view of the fact that both the witnesses of the seizure list are the employees of the complainant/opposite party no. 2 and no independent witness was present during such seizure and not only that the seizure was allegedly made on 11.06.2018 but sample was sent for testing five months thereafter and the test report also does not in favour of the prosecution, as nowhere it states that the coal sample was contaminated.

18. It is settled position of law that while exercising jurisdiction under section 482 of the Code, it is not permissible for the court to act like a trial judge. On the contrary at this stage court is only required to prima facie satisfied about existence of sufficient ground for proceeding against the accused. There are specific allegations with regard to contamination of coal in the FIR as well as in the materials collected during investigation. Here the main allegation made by the complainant is that they entrusted coal for carrying by the accused company, whose men have cheated the complainant by contaminating the coal on its way.

19. For the purpose of constituting offence of cheating the term 'deceived' attracts when one induces a man to believe that a thing is true which is false and which the person practicing the "deceive" knows or believed to be false and it also must be shown that there existed a fraudulent and dishonest intention at the time of commissions of the offence. Here in the present case there is specific allegation which reflected from the material including FIR that the respondents made a willful misrepresentation

though he entered into a valid agreement for transportation of coal and the petitioner and its men allegedly failed to discharge their contractual obligation by making fraud or dishonest inducement. It is also specific case of the complainant that the petitioners company got entrustment of the coal by fraudulent inducement and/or willful misrepresentation. The petitioner placed much reliance upon the award passed by the arbitrator and it is his specific case that since such award passed on merits and allegation involved therein are identical to the instant criminal proceeding, so there is hardly any chance of conviction because higher standard of proof is required in a criminal case.

20. It is no more *res integra* that interference by the High Court under section 482 Cr.P.C. is to prevent the abuse of process of any court or otherwise to secure the ends of justice and while doing so, the evidence produced by the accused in his defence is not required to be looked into by the court except in exceptional circumstances. The present proceeding is at the initial stage and at this stage High Court cannot embark upon the appreciation of evidence to conclude whether the materials produced by the accused are sufficient or not for convicting the accused. Infact while dealing with the prayer for quashing High Court should not act on the basis of annexures filed by the accused, since it cannot be termed as evidence without being tested and proved. If a *prima facie* case is made out about the ingredients of the offence alleged against the accused, the court can hardly invoke its power under section 482 Cr.P.C. to quash a criminal proceeding. At this stage High Court should normally refrain from giving a *prima facie* decision, where the entire facts are subject matter of trial and

the issues involved are both factual and legal and are of magnitude and cannot be seen in their true perspective without sufficient evidence or material. It would not be proper for the High Court to analyze the case of the complainant from a perception that complainant has failed to succeed in arbitration proceeding over a similar dispute and as such it is hardly possible that prosecution will succeed in the criminal proceeding where higher standard of proof is required. It would be mere repetition to say that in a proceeding where prima facie case of committing cognizable offence based on alleged confession made by some of the accused have been made out in the FIR, exercise of the inherent power to quash the proceeding is uncalled for. Exercise of such inherent power is justified only in a case where the FIR does not disclose any offence against the petitioner or the allegation is frivolous vexatious or oppressive.

21. Thus I find that the allegations made in the complaint and the materials collected during investigation clearly constitutes cognizable offence and this case does not fall under any of the categories of cases formulated by the Apex court in ***State of Haryana Vs. Bhajanlal*** reported in **AIR 1992 SC 604**, calling for the exercising of extra ordinary or inherent power of the High Court to quash the criminal proceeding.

22. Learned counsel appearing on behalf of the private opposite party rightly pointed out that whether the company has been made accused in the charge sheet or not is of secondary importance and cannot by themselves be the basis of quashing the proceeding. Similarly whether prosecution will be succeeded in proving the allegation of making contamination of coal, since seizure witness is not an independence person

or for the reasons that the sample of the coal was sent for examination after making inordinate delay, are all dependent upon the outcome of trial and require meticulous analysis by the trial court to find out whether the case would end in conviction or acquittal. Such issue is necessarily an issue relating to appreciation of evidence and the same can be gone into by the Trial Court during trial when the entire evidence would be adduced by the parties.

23. In the present case charge sheet has already been submitted about five years back and I am informed that the charge has not yet been framed. It is well settled that inherent power of the High Court under section 482 can be exercised only when no other remedy is available to the litigant and not in a situation where specific remedy is provided by the statute. In the present circumstances since the charge sheet has already been submitted, the accused has always the remedy at the time of framing of charge to pray for discharge, if the materials on the basis of which charge sheet has been filed can be said to be insufficient to frame a charge. But it would not be justified for the High Court in quashing the criminal proceeding by appreciating the materials collected during investigation.

24. In such view of the matter I find that this is not a fit case to quash the criminal proceeding.

25. CRR 4596 of 2022 stands dismissed. However this dismissal order will not preclude the petitioner from raising all these issues agitated herein before the Trial Court either at the time of framing of charge or at any appropriate subsequent stage.

26. I clarify that I have not expressed any opinion on the merits of the case and the Trial Court shall decide the matter expeditiously, uninfluenced by any observation made by this court.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(DR. AJOY KUMAR MUKHERJEE, J.)

Later:-

After delivering the judgment learned counsel appearing on behalf of the petitioner prays for stay of operation of the judgment and order.

Learned counsel appearing on behalf of the opposite party raised objection.

Having considered the submissions made on behalf of the parties, the prayer is considered and rejected.

(DR. AJOY KUMAR MUKHERJEE, J.)