

CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH
AT JALPAIGURI
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE SUVRA GHOSH**

CRR 22 of 2019
With
CRAN 1 of 2019

Jully Techi & Ors.
- VERSUS -
The State of West Bengal & Anothers.

For the Appellant/Petitioner:	Md. Sabir Ahmed
	Md. Hillol Saha Podder
For the Opposite Party No. 2:	Mr. Sourav Chatterjee
	Mr. Soumya Nag
For the State:	Mr. A. S. Chakraborty
	Mr. Sourav Ganguly,

Heard on: April 23, 2019

Judgment on: April 26, 2019

SUVRA GHOSH, J. :-

1. In the instant revisional application, the petitioners have prayed for quashing of proceedings in G.R. Case No. 3244 of 2018 pending before the Learned Additional Chief Judicial Magistrate, Siliguri.
2. The contention of the petitioners is that they are directors and employees of the TKE&C Private Limited company registered under the Companies Act and opposite party no. 2 lodged a written complaint before the officer-in-charge, Siliguri police station, alleging *inter-alia*, commission of offence by the petitioners punishable u/s 420/406/120B/34 of the Indian Penal Code to the effect that being induced by false and malafide representation made by the petitioners herein, opposite party no. 2 who is the proprietor of Kohinur Enterprise entered into a sub-contract agreement with them in the second week of May, 2018. The complainant further stated that as per terms of the agreement, the complainant/opposite party no. 2 would execute seven kilometers of earthwork excavation up to subgrade top including procurement and laying 250 mm compacted GSB layer and for the said work TKECPL (the company of the petitioners) would pay the complainant company Rs.65,00,000/- (sixty five lakhs) per kilometer and would also make immediate payment after completion of 3.3 kilometers work on bills being raised. It was alleged that no written registered agreement was executed by the petitioners and even after completion of the entire work, no payment was made to the complainant. The complainant made substantial investment in the project but no payment was made to him by the petitioners as promised, despite several requests and reminders. The complainant alleged that the petitioners had no intention to honour the promises and representations made by them at the inception of the transaction and have fraudulently and dishonestly deceived

the complainant by withholding the payment of Rs. 3,85,00,000/- (three crores eighty five lakhs). The complainant also learnt that the petitioners were trying to handover the project work to some other sub-contractor and were also trying to influence the employees of the complainant to complete the work beyond the knowledge of the complainant.

3. The petitioners made payments to opposite party no. 2 through RTGS to the tune of Rs. 50,00,000/- (fifty lakhs) and it was also found that opposite party no. 2 completed only 2.97 kilometers instead of 7 kilometers of the work. The petitioners have also paid Rs. 20,00,000 /- and Rs. 53,73,905/- to the complainant/opposite party no. 2 and the dispute between the parties is purely civil in nature and lacks criminal flavour.
4. The petitioners' contention is that an agreement was entered upon by and between the parties which was deliberately suppressed in the written complaint by opposite party no. 2. There was a specific arbitration clause in the said agreement which stated that "Any kind of dispute between first party and second party shall be referred to Arbitration and Conciliation proceeding by way of sole Arbitrator appointed by mutual consent of first part and the second party." It is the petitioners who suffered monetary loss due to non-completion of the work by the opposite party and no case has been made out against them u/s 420/406/120B/34 of the Penal Code in the FIR. The impugned investigation is a gross abuse of the process of the Court and the dispute is only with regard to a monetary claim and nothing more.
5. Also, the subject matter of the agreement was execution of a work in the State of Arunachal Pradesh and in view of section 177 and 178 of the Code, the Magistrate lacked the jurisdiction to continue the proceedings in Siliguri. It is

the complainant who has violated his part of the obligation and the complaint does not disclose any offence which can be taken cognizance of.

6. The petitioners have referred to several judicial pronouncements in support of their contention. Learned advocate for the petitioners has referred to the decision in Uma Shankar Gopalika v/s State of Bihar and another, reported in (2005) 10 Supreme Court Cases 336 wherein the Hon'ble Supreme Court held that the first information report which does not disclose any offence is liable to be quashed. In its judgment in Vinod Natesan v/s State of Kerala and others, reported in (2019) 2 Supreme Court Cases 401, the Hon'ble Supreme Court held that when upon considering the averments made in the FIR and the case of the appellant, it cannot be said that the ingredients of Section 406 and 420 are satisfied and the dispute between the parties can at the most be said to be a civil dispute which is tried to be converted into a criminal dispute, the criminal proceedings against the accused should be quashed. In another judgment of the Hon'ble Supreme Court in Anil Mahajan v/s Bhor Industries Limited and another, reported in (2005) 10 Supreme Court Cases 228 referred to by the petitioners, the Hon'ble Supreme Court held that mere use of the term "cheating" is not sufficient and the substance of the complaint is to be seen. Also, in V.Y Jose and another v/s State of Gujarat and another, reported in (2009) 3 Supreme Court Cases 78, it was held that the ingredients of an offence of cheating should be made out and the complaint should show that the accused had fraudulent or dishonest intention at the time of making the promise or representation. Even if an allegation is made with regard to failure on the part of the accused to keep his promise, no offence u/s 420 of the Penal

Code can be made out in absence of a “culpable intention at the time of making initial promise.”

7. The petitioners, therefore, prayed for quashing of the proceedings against them.
8. Opposite party no. 2 vehemently opposed the contention of the petitioners and submitted that an application u/s 482 of the Code should be dealt with by the Court with great caution and circumspection. He has referred to the decision of the Hon’ble Supreme Court in the State of Madhya Pradesh v/s Surendra Kori, reported in (2012) 10 Supreme Court Cases 155, wherein the Court held that inherent jurisdiction u/s 482 of the Code should be used sparingly, carefully and with caution and the Court should normally refrain from giving prima facie decision in the case where the entire facts are incomplete and hazy and evidence has not been collected. Similar view has been taken by the Hon’ble Supreme Court in the decision in State of Karnataka v/s M. Devendrappa and another, reported in (2002) 3 Supreme Court Cases 89.
9. Learned advocate submitted that the petitioners did not comply with the notice issued upon them u/s 41A of the Code by the investigating officer. The cause title of the present application reveals that petitioner no. 3 is the Superintendent Engineer, PWD Government of Arunachal Pradesh on one hand and is also a director/employee of the company, despite being a Government employee.
10. Learned advocate has drawn the attention of the Court to several documents filed by the petitioners and has submitted that such documents are disputed by opposite party no. 2 and their veracity is subject to investigation. Such documents cannot be taken into consideration while dealing with an application u/s 482 of the Code. The documents with regard to bank

transactions appended to the petition also do not bear any detail as to for what purpose and in whose favour they were issued. Learned advocate has referred to the view of the Hon'ble Supreme Court in the State of Madhya Pradesh v/s Awadh Kishore Gupta and others, reported in (2004) 1 Supreme Court Cases 691 and in Amit Kumar v/s Ramesh Chander and another, reported in (2012) 9 Supreme Court Cases 460 to the effect that external material given by the accused cannot be taken into consideration by the Court in exercise of its jurisdiction u/s 482 of the Code and the Court has to consider the record and documents annexed by the prosecution. The Hon'ble Court has also held that such annexures cannot be termed as evidence without being tested and proved.

11. Pointing to the written complaint itself, learned advocate has submitted that as the proposal for the work was given to opposite party no. 2 by the petitioners in the office of opposite party no. 2 at Siliguri within the district of Darjeeling, part of the cause of action arose within the jurisdiction of the Learned Trial Court and the Learned Trial Court did not commit any error in entertaining the complaint.

12. It is further averred by learned advocate for opposite party no. 2 that even if it is held that the impugned agreement, the veracity of which has been challenged by opposite party no. 2, contained an arbitration clause, lodging of a criminal case cannot be a bar. Such view has been taken by the Hon'ble Supreme Court in Trisuns Chemical Industries v/s Rajesh Agarwal and others, reported in (1999) 8 Supreme Court Cases 686 and in S.W. Palanitkar and others v/s State of Bihar and another, reported in (2002) 1 Supreme Court Cases 241, wherein the Hon'ble Supreme Court held that an arbitration clause

in the agreement cannot prevent criminal prosecution if the act constituting a criminal offence is made out even prima facie. Further, in reply to the contention of the petitioners that the dispute is only a monetary claim which is purely civil in nature, opposite party no. 2 drew the attention of the Court to the decision of the Hon'ble Supreme Court in Indian Oil Corporation v/s NEPC India Limited and others, reported in (2006) 6 Supreme Court Cases 736. It is held therein that "A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence..... The test is whether the allegations in the complaint disclose a criminal offence or not." Learned advocate has submitted that he has suffered wrongful loss of an amount which is not less than Rs. 3,85,00,000/- (three crores eighty five lakhs) and as such, prima facie ingredients of offence u/s 420/406 of the Penal Code have been made out against the petitioners, more so, as the petitioners had the fraudulent intention of not living up to their promise since inception of the contract.

13. The State is represented and speaks in conformity with the contention of opposite party no. 2. The State submits that the petitioners did not care to comply with the notice served upon them u/s 41A of the Code in spite of several reminders received by them. The documents relied upon by the petitioners in their applications were also not produced before the investigating officer during investigation and the petitioners have deliberately refused to co-operate with the investigation of the case.

14. The principal allegation made out against the petitioners in the FIR is u/s 406/420 of the Penal Code. Section 406 of the Penal Code refers to the

punishment for criminal breach of trust and criminal breach of trust has been defined in Section 405 as set out hereunder:

Criminal breach of trust – *Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits ‘criminal breach of trust’*

15. The ingredients of offence as enumerated u/s 420 of the Penal Code are as follows:

- (i) *Deception of any persons;*
- (ii) *Fraudulently or dishonestly inducing any person to deliver any property; or*
- (iii) *To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.*

16. It is clearly envisaged in section 420 of the Penal Code that a complaint under the said provision of law can be quashed “Where the allegations made in 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 the case alleged against the accused. For this purpose, the complaint has to be examined as a whole but without examining the merits of the allegations. The power should be used sparingly and with abundant caution. Such view has been taken by the Hon’ble Supreme Court in MEDCHL Chemicals and Pharma (P) Limited v/s Biological Engineering Limited and others, reported in (2000) 3 Supreme Court Cases 269.

17. On careful scrutiny of the FIR, it is evident that the allegation against the petitioners is that they being the directors and employees of TKECPL entered into a contract with opposite party no. 2 wherein it was agreed that opposite party no. 2 would execute 7 kilometers of earthwork excavation up to subgrade top including procurement and laying of 250mm compacted GSB layer and would be paid Rs. 65,00,000/- (sixty five lakhs) per kilometer irrespective of any force-majeure, accident, etc. The complainant/opposite party no. 2 alleged that though the entire work was completed by his company, the petitioners failed and neglected to make the payment as promised, despite several requests.

18. According to opposite party no. 2, the petitioners fraudulently persuaded opposite party no. 2 to undertake the work and had the intention of committing fraud upon him and cheating him from the inception of the agreement. But a plain reading of the complaint suggests no such intention of the petitioners. It is alleged that in spite of completion of the work, the petitioners failed to make payments to the complainant. Such lapse on the part of the petitioners can at best be termed as a breach of contract as nowhere in the complaint has it been stated that there was any intention on the part of the petitioners to cheat the complainant at the time of entering into the agreement.

19. It appears that certain documents have been appended to the application by the petitioners and the petitioners have insisted that the Court considers the said documents while allowing the prayer of the petitioners. But it is settled law that in exercising jurisdiction u/s 482 of the Code, the Court should confine itself to the contents of the complaint itself and not venture to

look into the external material/documents relied upon by the accused persons/the petitioners herein. Veracity and genuineness of such documents relied upon by the petitioners need to be tested. The documents in question deal with disputed questions of fact which cannot be looked into at this stage.

20. Also, existence of an arbitration clause in the impugned agreement is not a bar to institute criminal proceeding if such criminal offence is made out, as observed by the Hon'ble Supreme Court. It is also trite law that even in case of a commercial dispute or a civil dispute, a criminal proceeding can be initiated if the act alleged constitutes a criminal offence as well.

21. True, jurisdiction u/s 482 of the Code ought to be exercised with extreme care, caution and circumspection and should not be used to stifle or axe down a legitimate prosecution. The test is whether the uncontroverted allegations as made out in the complaint prima facie establish the case and also whether continuation of such complaint shall amount to abuse of the process of law.

22. In the present case, the allegations made out in the complaint are bereft of any guilty intention or mens rea on the part of the accused/petitioners at the time of making the inducement. No prima facie case of dishonest inducement at the inception itself is found in the complaint. The averments in the complaint give out a prima facie picture of a breach of contract between the parties whereby the complainant was allegedly denied payment by the accused after completion of work allotted to him by the accused. No entrustment with property or any dominion over property has also found place in the allegations made out in the complaint. Even if it is held that there was a breach of contract between the parties, such breach may have developed subsequently and no intention to cheat or violate any entrustment at the very inception is found in the complaint. Mere insertion of Sections 406 and 420 of the Penal

Code in the complaint does not by itself make out a prima-facie offence under the said provisions and it is the substance of the complaint which has to be taken into consideration.

23. In the premise, taking into account the contents of the complaint itself, it can be concluded that the complaint does not disclose any criminal offence, far less an offence u/s 406/420 of the Penal Code and continuation of such complaint shall amount to abuse of the process of law.

24. In the result, the complaint along with the proceeding in G.R. Case No. 3244 of 2018 pending before the Learned Additional Chief Judicial Magistrate, Siliguri is liable to be quashed.

25. CRR 22 of 2019 is allowed accordingly and CRAN 1 of 2019 is disposed of.

26. The proceedings in G.R. Case No. 3244 of 2018 pending before the Learned Additional Chief Judicial Magistrate, Siliguri is quashed.

27. The petitioners be released at once and discharged from their bail bonds.

28. There will be no order as to costs.

29. Copy of order be sent to the Learned Additional Chief Judicial Magistrate, Siliguri for information and necessary action.

30. Urgent website copies of this judgment, if applied for, be supplied to the parties expeditiously on compliance with the usual formalities.

(Suvra Ghosh, J.)

