



THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Criminal Petition No. 285/2023

1. M/s Protech Enterprise;
Havng its Office at 73A, Hauz Khas Village, New-Delhi,
represented by its Proprietor Shri Balbir Singh, resident of 73A,
Hauz Khas Village, New-Delhi 110016.
2. Shri Balbir Singh,
Resident of 73A, Hauz Khas Village, New-Delhi, 110016.
3. Shri Amrit Khurana,
S/o Om-Prakash Khurana,
R/o 102 Sharda Apartments, West Enclave, Pitampura, Delhi-
110034, Manager, Protech Enterprise.

...Petitioners

Versus

1. The State of Assam,
Represented by the Public Prosecutor, Assam.
2. M/s BA Enterprise,
A partnership firm having its registered office at
T.R. Phukan Road, Machkhowa, Guwahati,
Represented by its partner Zuned Ahmed,
S/o Late Zahed Ahmed,
Resident of T.R. Phukan Road, Machkhowa, PO and PS
Bharalumukh, Guwahati-781009, District-Kamrup(M), Assam.

...Respondents

:::BEFORE:::

HON'BLE MR. JUSTICE ROBIN PHUKAN

Appearance:-

For the Petitioner : Mr. P.Das

Respondent No.1 : Mr. P.Borthakur, Addl. P.P.

Respondents No. 2 : Mr. T.H. Hazarika

Date of hearing : 05.12.2023

Date of judgment : 04.01.2024

JUDGMENT AND ORDER

Heard Mr. P. Das, learned counsel for the petitioner. Also heard Mr. P.Borthakur, learned Additional Public Prosecutor for the State respondent No.1 and Mr. T. Hazarika, learned counsel for the respondent No.2.

2. In this petition, under Section 482 of the Code of Criminal Procedure, 1973 Cr.P.C., the petitioners have prayed for setting aside and quashing the Complaint Case No. 878^C/2021, under Sections 420/406/34 IPC, pending before the Court of Munsiff No.4 -cum-JMFC, Kamrup(M) Guwahati.

3. The background facts leading to filing of the present petition is adumbrated herein below:-

"The petitioner No.1 is a proprietary concern, represented by its Proprietor -Shri Balbir Singh and deals with building structures, pre-engineered building, aluminium framework, Tensile structures etc. The respondent Firm deals with works of construction as well as supply under different departments of Government of Assam. In the month of March 2015, the respondent/complainant Firm had placed order for pre-engineered Building Structures pertaining to construction of School Rooms such as Addl. Class Rooms, Headmaster Room and Mid-day meal Kitchen within the state of Assam, under the Scheme of Assam Sarba Siksha Abhiyan, to the petitioner No.1 Firm. Accordingly, the petitioners have sent the materials to the respondent Firm at Guwahati by Truck/Vehicles as per order placed by the respondent Firm with Tax-Invoices as well as other documents. The respondent used to transfer the amount against the construction materials in favour of the petitioner Firm by RTGS from time to time, and a sum of Rs.2,00,50,000/- was transferred to the account of the petitioners by the respondents for supply of materials. Thereafter in the year 2017 another sum of Rs.35,98,937/- were deposited by the respondents in the institution of the petitioners after all adjustment the respondent Firm entitled for cumulative expenses equivalent to three Trucks of the said materials and out of the same the petitioners have sent one Truck materials for a sum of Rs.15,56,386/-, and the same was received in the second week of March, 2017. The

respondent Firm, after receiving materials for a sum of Rs.1,75,07,449/- including the cost of transportation, and thereafter a balance of Rs.20,42,551/- remains with the petitioners Firm against which the petitioners Firm agreed to send two Trucks construction materials equivalent to said amount. But, inspite of request, the petitioners have not send the remaining two Trucks materials. On several occasions the representative of the petitioners' Firm was requested either to return the amount or to send the construction materials, but the petitioners have failed to return the amount and intentionally cheated the respondents in a shrewd manner and misappropriated the amount. Thereafter, the respondent Firm has filed a complaint before the court of learned Chief Judicial Magistrate and thereafter the said complaint was transferred to the court of learned Judicial Magistrate 1st Class, Kamrup(M), upon which the learned court below had taken cognizance of the offence under section 420/406/34 IPC and issued process to the petitioners to appear before the learned court below and to stand trial under the said sections of law."

4. Being aggrieved, the petitioners have approached this Court by filing the present petition u/s 482 Cr.P.C. to quash and set aside the criminal proceeding on the following grounds:-

- (i) that, the case is purely a civil dispute, prima-facie attracting breach of contract and that the ingredients of the section under which the case has been filed is not at all

attracted and as such continuation of the proceeding is abuse of the process of the court;

- (ii) that, in the case of **Dalip Kumar and Others vs. Jagnar Singh and Another** reported in **(2009) 14 SCC 696**, Supreme Court has held that basically a civil dispute arising out of breach of contract for non-refunding of advance money would not constitute an offence of cheating; and since the alleged dispute is pertaining to civil issues the learned court below ought not to have taken cognizance of the offence and the order dated 04.11.2022 cannot withstand the legal scrutiny; in view of above decision;
- (iii) that, in the case of **Binod Kumar and Others vs. State of Bihar and Another** reported in **(2014) 10 SCC 663**, Hon'ble Supreme Court has held that basically a civil liability cannot be converted to criminal liability and also held that dispute relating to non-payment of bill amounts pertains to a contract and criminal proceedings are not a short cut to other remedies. In the case in hand the allegations do not attract the ingredients of sections section 420/406 IPC as there was no evidence of dishonest intention or otherwise for misappropriation of the said amount and that the respondents have already approached Civil Court by filing a Money Suit No. 67/2020, and while the said suit is pending for decision, filing of criminal case is barred by the Supreme Court;

- (iv) that, breach of contract does not give rise to criminal proceeding for cheating unless fraudulent or dishonest intention is shown right from the beginning of the transaction;
- (v) that, the order dated 04.11.2022, by which the learned court below had taken cognizance is bad in law, arbitrary and illegal and not sustainable in the eye of law;
- (vi) that, the learned court below has ignored the provision of law by not examining the witness under section 202 Cr.P.C. as the petitioners resides beyond the jurisdiction of that court;

5. Mr. P. Das, learned counsel for the petitioner reiterated the grounds mentioned in the petition and submits that the impugned order, so passed by the learned JMFC, Kamrup (M), suffers from manifest illegalities and ignoring the provision of section 202 Cr.P.C. and also the law laid down by the Hon'ble Supreme Court in the cases referred herein above and therefore, it is contended to allow the petition.

6. On the other hand, Mr. P. Borthakur, learned counsel for the respondents No.1 submits that from a bare perusal of the complaint petition reveals a prima facie case under section 420/406/34 IPC. Mr. Borthakur further submits that merely because the allegations in the complaint also give rise to civil liability, it cannot be said no criminal proceeding can be initiated. It is the further submission of Mr.

Borthakur that both the proceeding i.e. civil and criminal proceeding can go together. Mr. Borthakur, therefore contended to dismiss this petition.

7. Whereas, Mr. T. Hazarika, the learned counsel for the respondent No.2 submits that from a perusal of the complaint petition a clear case under section 420/406/34 IPC is made out and the learned court below has rightly taken cognizance of the same. Mr. Hazarika further submits that merely because a civil case is pending upon the same subject matter there is no bar in initiating a criminal proceeding also if the ingredients of the same are made out. Mr. Hazarika also submits that simultaneous proceeding of civil and criminal cases is not barred under the law. Mr. Hazarika also referred one case law- in **Syed Askari Hadi Ali Augustine Imam and Another vs. State (Delhi Administration) And Another** reported in **(2009) 5 SCC 528**, in support of his submission.

8. Having heard the submissions of the learned Advocates of both sides, I have gone through the petition and the documents placed on record and also perused the case law referred by the learned counsel for the petitioner as well as learned counsel for the respondents and also the impugned order passed by the learned Court below.

9. It appears from the record that there was business transaction between the petitioners and the respondents, since the month of March 2015. It also appears that the respondent/complainant Firm had placed order for pre-engineered Building Structures pertaining to construction of School Rooms within the state of Assam, under the

Scheme of Assam Sarba Siksha Abhiyan, to the petitioner No.1 Firm, and the petitioners used to send the materials to the respondent Firm at Guwahati by Truck/Vehicles, as per order placed by the respondent Firm with Tax-Invoices as well as other documents and the respondent used to transfer the amount against the construction materials in favour of the petitioner Firm by RTGS from time to time. It also appears that a sum of Rs.2,00,50,000/- was transferred to the account of the petitioners by the respondents for supply of materials, and in the year 2017 another sum of Rs.35,98,937/- was deposited by the respondents with the petitioners. And after all adjustment, the respondent Firm entitled for cumulative expenses equivalent to three Trucks of the said materials and out of the same the petitioners have sent one Truck materials for a sum of Rs.15,56,386/-, and the same was received in the second week of March-2017, and thereafter, a balance sum of Rs.20,42,551/- remains with the petitioners Firm, against which the petitioners Firm agreed to send two Trucks construction materials equivalent to said amount. But, inspite of request, the petitioners have not send the remaining two Trucks materials. On several occasions the representative of the petitioners' Firm was requested either to return the amount or to send the construction materials, but the petitioners have failed to return amount and intentionally cheated the respondents in a shrewd manner and misappropriated the amount.

10. It also appears that the respondent Firm has filed a complaint, upon which the learned Judicial Magistrate 1st Class, Kamrup (M), had

taken cognizance of the offence under section 420/406/34 IPC and issued process to the petitioners to appear before the learned court below and to stand trial under the said sections of law.

11. Indisputably, the petitioners are resident of New-Delhi, which is outside the jurisdiction of learned court below. In that view of the matter, compliance of the provision of section 202 Cr.P.C. is mandatory. The section read as under:-

"202. Postponement of issue of process.

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, and shall in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub- section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub- section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer-in- charge of a police station except the power to arrest without warrant.

12. Thus, from a bare perusal of section 202 Cr.P.C. shows that in a case, in which the accused is residing at a place beyond the area over which the Magistrate exercises his jurisdiction, he shall postpone issue of process against the accused and shall hold an inquiry either by himself or direct investigation to be made by a Police Officer or by such other person as the Magistrate thinks fit, for the purpose of deciding whether or not, there is sufficient ground for proceeding against the accused. The word used "shall" makes it mandatory for the Magistrate to hold the inquiry contemplated by the section, where the accused resides beyond the territorial jurisdiction of the concerned Magistrate. The object of such enquiry is to ascertain the truth or falsehood of the allegations made in the complaint for the limited purpose of finding out as to whether a prima facie case for issue of process is made out or not. Thus, a serious responsibility is being

casted upon the Magistrate to decide as to whether there is sufficient ground for proceeding against accused persons when the accused is residing at a place beyond the area of exercise of jurisdiction of the concerned Magistrate.

13. In the case of **Vijay Dhanuka etc. Vs. Nazima Mamtaj etc.** reported in **2014 (14) SCC 638**, Hon'ble Supreme Court held that in a case where accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry or investigation, as the case may be, by the Magistrate, is mandatory, which is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints.

14. Again in the case of **National Bank of Oman Vs. Barakara Abdul Aziz** reported in **2013 (2) SCC 488**, Hon'ble Supreme Court has held that:-

"8. We find no error in the view taken by the High Court that the CJM, Ahmednagar had not carried out any enquiry or ordered investigation as contemplated under Section 202 CrPC before issuing the process, considering the fact that the respondent is a resident of District Dakshin Kannada, which does not fall within the jurisdiction of the CJM, Ahmednagar. It was, therefore, incumbent upon him to carry out an enquiry or order investigation as contemplated under Section 202 CrPC before issuing the process."

15. Having regard to the proposition of law, so laid down in the aforementioned cases, and applying the same to the facts and circumstances in hand, I find that the impugned order dated 04.11.2022, passed by the learned JMFC, Kamrup, (M), in C.R. Case

No. 878^c/ 2021 suffers from manifest illegality, requiring interference of this Court. Mr. P. Das, the learned counsel for the petitioner has rightly pointed this out during hearing and I find substance in the same.

16. Further, it appears that while taking cognizance of the offence against the petitioners, the learned court below has not mentioned the specific allegations against petitioners and the role played by them in their respective capacities in the order and taking cognizance as mandated by Hon'ble Supreme Court in the case of **GHCL Employees Stock Option Trust vs. India Infoline Limited** reported in **(2013) 4 SCC 505**. In the case in hand the aforesaid mandate has not been carried out.

17. Again Hon'ble Supreme Court in the case of **Pepsi Foods Ltd. v. Special Judicial Magistrate**, reported in **(1998) 5 SCC 749** in paragraph 28, observed and held as under:

"28. Summoning of an accused in a criminal case is a serious matter.

Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home

to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

18. Further, it appears that the dispute between the petitioners and the respondents is a civil dispute and the respondent had already instituted a Civil Suit, being Money Suit No.67/2020. Moreover, the business transaction between the petitioners and the respondents was started since the year 2015, and the dispute arose only in the year 2017. Thus, it cannot be said that from the very inception of the business transaction, the intention of the petitioners was dishonest. It is to be noted here that to attract the ingredients of the offence of cheating, fraudulent or dishonest intention has to be shown right from the very beginning of the transaction. Mr. Das, the learned counsel for the petitioner has rightly pointed this out during hearing and I find substance in the same and the ratios, laid down in case of **Binod Kumar and Others** (supra) and in **Dalip Kaur & Others** (supra) referred by him, also strengthened his submission. It is to be noted here that in the case of **Dalip Kaur & Others** (supra) Hon'ble Supreme Court has held that –

"11. The ingredients of Section 420 of the Indian Penal Code are:

- (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."

12. The High Court, therefore, should have posed a question as to whether any act of inducement on the part of the appellant has been raised by the second respondent and whether the appellant had an intention to cheat him from the very inception. If the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the part of the appellants by non-refunding the amount of advance the same would not constitute an offence of cheating. Similar is the legal position in respect of an offence of criminal breach of trust having regard to its definition contained in Section 405 of the Indian Penal Code. {See Ajay Mitra v. State of M.P. [(2003) 3 SCC 11]}."

19. I have also carefully gone through the case laws referred by Mr. Hazarika, learned counsel for the respondent No.2 and I find that the ratio laid down in the aforementioned cases would not advance his case, for reason discussed herein above.

20. In the result, this Court finds sufficient merit in this petition and accordingly, the same stands allowed. Complaint Case No. 878^C/2021, under sections 420/406/34 IPC, pending before the Court of Munsiff No.4 -cum-JMFC, Kamrup(M) Guwahati is hereby set aside and quashed, as allowing the same to continue would be an abuse of the process of the court. The parties have to bear their own cost.

JUDGE

Comparing Assistant