(2024) 01 JH CK 0021

In the Jharkhand High Court

Case No : Criminal Miscellaneous Petition No. 2323 Of 2019

Case New Holland Construction Equipment (India) Pvt. Ltd., Through Its Director Abhijit Gupta, Delhi And Others — APPELLANT

Vs

State Of Jharkhand And Others — RESPONDENT

Date of Decision : 09-01-2024

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 156(3)
Indian Penal Code, 1860 — Section 406, 420
Companies Act, 2013 — Section 397, 398

Citation : (2024) 01 JH CK 0021

Hon'ble Judges : Sanjay Kumar Dwivedi, J

Bench : Single Bench

Advocate : A.K. Kashyap, Amit Kumar, Rashmi Kumar, Shiv Shankar Kumar, P.K. Mukhopadhyay, S.K. Dubey

Final Decision : Allowed/Disposed Of

Judgement

SANJAY KUMAR DWIVEDI, J

1. Heard Mr. A.K. Kashyap, learned senior counsel appearing for the petitioners, Mr. Shiv Shankar Kumar, learned counsel for the State and Mr. P.K. Mukhopadhyay, learned counsel for opposite party no.2.

2. This petition has been filed for quashing of the entire criminal proceeding including the order dated 21.02.2019, whereby, Complaint Case No.1326 of 2018 was transmitted for lodging of FIR under Section 156(3) Cr.P.C. and for quashing the FIR being Telaiya P.S. Case No.109/2019 registered under Sections 406, 420 of the Indian Penal Code, pending in the Court of the learned Chief Judicial Magistrate, Koderma. The cognizance was taken on 10.05.2023 during the pendency of this petition, which was challenged by way of filing I.A. No.7774 of 2023 and the same was allowed vide order dated 29.09.2023. In view of that, the order taking cognizance dated 10.05.2023 is also under challenge in this petition.

3. The complaint case was filed alleging therein that the complainant company is engaged in the business of sales, spares and service support of the petitioner company's construction equipment since 2015. It was alleged that in terms of the offer letter dated 17.03.2015 spelling out specific details Dealer Agreement dated 18.05.2016 was executed appointing the complainant as a Dealer. It was further alleged that the complainant gave bank guarantee of Rs.100 Lakhs and also paid Rs.22,50,000/- through RTGS to the petitioner company. It was also alleged that the complainant acted in terms with the agreement, but the petitioner company has cheated the complainant and induced him to enter into the development agreement. It was alleged that petitioner no.2 had assured the complainant that he will be getting interest on Rs.1 Crore deposited on 30.09.2015 and in spite of mails, interest has not been credited to complainant's account. It was further alleged that the complainant was not provided with Dealership agreement and only after repeated reminders on 03.07.2018, copy of the same was made available. It was also alleged that the complainant had been assured to be given Dealership for Jharkhand too and initially invoices for Jharkhand were also raised in 2015. It was further alleged that not giving copy of Dealer agreement, denying Dealership of Jharkhand and not crediting interest on the Security amount is cheating on part of the petitioner company. It was also alleged that wrong invoice has been created by the petitioner company inasmuch as machine which was manufactured a year ago was supplied to the complainant to supply to customer which the customer has refused to take causing loss to the complainant. It was further alleged that on 30.03.2018, the complainant received a mail mentioning the area of operation of the complainant as only few areas in Bihar. It was alleged that machines of Rs.1,75,00,000/- and spare parts of Rs.80,00,000/-are lying in the office of the complainant. It was alleged that on account of wrong billing the complainant received a notice under Jharkhand VAT Act, 2015 dated 18.01.2018 from the Commercial Taxes Department, Government of Jharkhand. It was further alleged that the accused persons have completely failed to conform to the terms and conditions agreed between the parties and had intention to cheat from the beginning and thereby the accused are liable to be punished under Sections 406 and 420 of the Indian Penal Code.

4. Mr. A.K. Kashyap, learned senior counsel appearing for the petitioners submits that earlier the complainant had lodged Complaint Case No.1326 of 2018 on 03.10.2018, which was sent by the learned Court under Section 156(3) Cr.P.C. and subsequently FIR being Telaiya P.S. Case No.109 of 2019 was lodged. Mr. A.K. Kashyap, learned senior counsel appearing for the petitioners submits that in the complaint, the complainant has alleged that he was not given the dealership agreement and he has not been given dealership for Jharkhand though the petitioner company had assured to give dealership for Jharkhand and he has not been paid interest on the security deposit of Rs.1 Crore and an equipment of one year old was sent to him which the customer refused to receive and equipment, machinery and spare parts are lying with him. By way of referring contents of the complaint case and FIR, he submits that for a civil

wrong, present complaint case was filed which was transmitted for registration of FIR under Section 156(3) Cr.P.C. By way of referring supplementary affidavit, filed by the petitioners, he submits that for the grievance of interest, the complainant has instituted Original Suit No.92 of 2018, which was dismissed vide order dated 27.01.2023 with observation that since arbitration clause is there, the parties are kept at liberty to invoke arbitration clause and pursuant to that, arbitration clause has been invoked by opposite party no.2, which is pending before the learned Arbitrator. He submits that for a civil wrong, the present case has been filed against the petitioners. He relied upon the judgment passed by the Hon'ble Supreme Court in the case of Chandran Ratnaswami v. K.C. Palanisamy, reported in (2013) 6 SCC 740. Paragraph 5 of the said judgment is quoted hereinbelow:

"5. Cross-appeals were filed by the parties before the High Court of Judicature of Madras and the High Court vide order dated 5-8 -2011 [C.G. Holdings (P) Ltd. v. Ramasamy Athappan, CSAs Nos. 2 to 5 of 2009, order dated 5- 8-2011 (Mad)] confirmed the order dated 13 -8-2008 passed by the Company Law Board, in the following terms:

"54. On analysis of various aspects, the Company Law Board concluded that it was no longer possible for the parties to carry out joint venture business of CEPL as per the terms of joint venture agreement. Only to have smooth exit of ORE and Athappan, the Company Law Board passed the order directing CEPL to repay Rs 75 crores and Rs 4 crores invested by ORE Holdings and Athappan respectively. By perusal of the order of the Company Law Board, in our considered view, the Company Law Board has elaborately gone into the issues arisen between the parties even though those objections were filed under Sections 397 and 398 of the Companies Act. As demonstrated infra, there are commonality of issues raised in both the company petitions, OS No. 90 of 2007 and the petition filed before ICC seeking for arbitration.

55. Criminal cases: The learned counsel for the appellants, Mr Karthik Seshadri contended that the purport of the criminal proceedings are different and initiating of criminal complaints does not amount to waiver of arbitration. Of course, a party does not waive his right to invoke arbitration by filing criminal complaints. But what is relevant is the allegations in the plethora of criminal complaints filed at the instance of the appellants/father of KCP/respondents. Both parties have made serious allegations of cheating, forgery, falsification of records, etc., against one another. Even before the Arbitral Tribunal, the same allegations are made. The Hon'ble Supreme Court and the Madras High Court have held that the arbitration is not the appropriate forum if allegations of fraud, misappropriation and complicated facts are involved.

* * *

84. By a careful reading of the order of the Company Law Board in CPs Nos. 65 and 76 of 2005, it is clear that the alleged breach of Clause 9.2 has been

elaborately dealt with. The Company Law Board dealt with not only the issues pertaining to the oppression and mismanagement of CEPL and also the larger issues arising between the parties. Only to ensure smooth exit of ORE and Athappan, the order dated 13-8-2008 came to be passed by the Company Law Board. It is pertinent to note that KCP had not challenged the said order of the Company Law Board.

* * *

112. As pointed out earlier, several criminal cases have been filed and number of quash petitions also came to be filed. Of course a party does not waive his right to invoke the arbitration of the dispute by filing of criminal complaints. When a party deliberately chooses not to adopt a particular course of action, the arbitration agreement becomes inoperative and as the parties have waived or abandoned the arbitration clause, by invoking the jurisdiction of the civil court, the doctrine of waiver applies. The appellants had the option to go before ICC even in 2005 but the appellants chose to file CP No. 65 of 2005 and also stoutly defended CP No. 76 of 2005 filed by ORE Holdings. Even in CP No. 76 of 2005, the appellants have not sought for reference to arbitration. By agitating the matter before the Company Law Board for nearly two years, and filing the civil suit in OS No. 90 of 2007 before the District Munsif's Court, Kangeyam, by their conduct the appellants must be deemed to have given a go-by to the arbitration clause.

113. The parties have been engaged in pitched battle before the Company Law Board and orders were passed by the Company Law Board on 13-8-2008. When the matter was pending before the Company Law Board, the Company Law Board has passed interim orders at various stages. The learned counsel for the plaintiffs would submit that even settlements/proposals have been made disclosing parties intentions and discovery process has been utilised. We find much force in the contention of the respondents that Athappans and ORE have spent considerable time and money before the Company Law Board. Insofar as OS No. 90 of 2007 pending before the District Munsif's Court, Kangeyam, the suit is ready ripe for trial and the respondents are diligently defending the same. Having initiated proceedings before various forums, cannot now seek to invoke arbitration as an additional remedy.

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120. Company Appeals Nos. 21, 25 to 27 and 29 of 2009: The gist of order in CP Nos. 65 and 76 of 2005 dated 13-8-2008 is that:

CEPL, KCP and CG Holdings were to return Rs 75 crores to ORE and Rs 4 crores to Athappan. The money was to be paid within a period of one year starting 1-11-2008 with 25 per cent of the same, being paid every year.

CEPL, KCP and CG Holdings were to utilise Rs 20 crores maintained in the fixed deposit at State Bank of India, Erode to pay ORE and Athappan. In the event of failure to pay the money the property of VMC situated in Coimbatore is to be transferred to ORE and Athappan in the proportion of 17.15 acres and 7.80 acres respectively. Until then VML was refrained from dealing with the property.

On receipt of money, ORE and Athappan were to surrender their shares in CEPL and CEPL shall accordingly be permitted to reduce its share capital.

The parties were given liberty to approach Company Law Board for limited purpose of overcoming difficulties in implementation of the said order.

* * *

145. As per order of the Company Law Board amount invested by ORE has to be refunded which of course, must be in accordance with applicable laws: be it compliance with FEMA or other Regulations, ORE, being a foreign investor, an entity of foreign origin, as per FEMA, cannot own immovable property in India. Compliance with FEMA or other applicable regulations cannot be bypassed. By the order dated 3-8-2009, the Company Law Board modified its earlier order directing VML to execute the sale deed conveying immovable properties of 17.15 acres to the nominee of ORE and thereby modified its earlier order. The order of the Company Law Board modifying its earlier order directing VML to convey the properties to 'nominee of ORE' is to be modified to the effect that any such conveyance should be subject to applicable laws and regulations and with required approval/permission to be obtained by ORE from the competent authorities. The order of the Company Law Board in CA No. 155 of 2008 is to be modified to that extent.

146. … Company Appeals Nos. 21 and 29 of 2009 preferred by ORE and Company Appeals Nos. 25 and 26 of 2009 preferred by N. Athappan and R. Athappan are allowed. Company Appeal No. 27 of 2009 is disposed of modifying the order of the Company Law Board dated 3-8-2009 in CA No. 155 of 2008 to the effect that the conveyance of immovable properties to nominee of ORE is subject to all applicable laws and regulations and if need be, with necessary approval/permission to be obtained by ORE from the competent authorities."

5. By way of referring the above judgment, Mr. A.K. Kashyap, learned senior counsel appearing for the petitioners submits that the arbitration clause no.28 is there in the agreement and in view of the above judgment, the case of the petitioners is covered.

6. Mr. P.K. Mukhopadhyay, learned counsel appearing for opposite party no.2 opposes the prayer on the ground that criminality is made out. He submits that the petitioners have cheated the complainant and intention of cheating was there from very beginning. He further submits that once criminality is made out, criminal and civil cases, both can go simultaneously. He also submits that bank guarantee was given to the petitioner company by the complainant. On these grounds, he submits that this petition may kindly be dismissed.

7. Mr. Shiv Shankar Kumar, learned counsel appearing for the State submits that

it appears that for a civil wrong, complaint case has been filed.

8. The Court has gone through the materials on record and finds that every efforts have been made by the complainant to make out the case of criminality by way of filing the complaint case, however, gist of the entire case is that the complainant was not given dealership agreement and he has not been given dealership for Jharkhand though the petitioner company has assured to give dealership for Jharkhand and he has not been provided interest on the security deposit of Rs.1 Crore and equipment of one year old was sent to the complainant which was refused by the customer and equipment, machinery and spare parts are lying with the complainant. Apart from that, there is no other allegation and gist of the allegation is already disclosed hereinabove.

9. It is an admitted position that for the interest part, the complainant preferred Original Suit No.92 of 2018, which was dismissed by the learned Civil Judge (Sr. Division)-III, Koderma vide order dated 27.01.2023 with observation that in view of arbitration clause, the parties may invoke arbitration clause and pursuant to that, the complainant invoked the said clause and the matter has been referred to the learned Arbitrator and the arbitration proceeding is still pending before the learned Arbitrator. In this background, it is crystal clear that the matter is arising out of commercial transaction and the entire nature of the complaint case is civil in nature, which is further fortified in view of the order passed by the learned Civil Judge (Sr. Division)-III, Koderma in Original Suit No.92 of 2018. Clause 28 is the arbitration clause and pursuant to the observation by the learned Civil Judge (Sr. Division)-III, Koderma, the arbitration clause has been invoked by the complainant.

10. On query of the Court where is the terms and conditions with regard to interest on deposit of the security money in the agreement, Mr. Mukhopadhyay, learned counsel appearing for opposite party no.2 has not been able to show that clause with regard to interest and that aspect has already been dealt with by the learned Civil Judge (Sr. Division)-III, Koderma in Original Suit No.92 of 2018.

11. In view of the above facts, reasons and analysis, the entire criminal proceeding including the order dated 21.02.2019, whereby, Complaint Case No.1326 of 2018 was transmitted for lodging of FIR under Section 156(3) Cr.P.C. as well as the order taking cognizance dated 10.05.2023 and the FIR being Telaiya P.S. Case No.109/2019 registered under Sections 406, 420 of the Indian Penal Code, pending in the Court of the learned Chief Judicial Magistrate, Koderma are quashed.

12. Accordingly, this petition is allowed and disposed of.

13. It is made clear that this order is meant for dealing with the present complaint case and the said FIR and civil proceeding will be decided, in accordance with law without prejudiced to this order.

14. Interim order, if any granted by this Court, is vacated.