(2013) 08 CAL CK 0016

In the Calcutta High Court

Case No : C.R.R. No. 1857 of 2011

Sanat Karar and Others — APPELLANT

Vs

State of West Bengal and Another — RESPONDENT

Date of Decision : 07-08-2013

Acts Referred:

Companies Act, 1956 — Section 434
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 482
Industrial Disputes Act, 1947 — Section 33(C)(2)
Penal Code, 1860 (IPC) — Section 120B, 336, 406, 420

Citation : (2013) 4 CALLT 295 : (2014) 2 CCR 46 : (2013) CriLJ 4141

Hon'ble Judges : Joymalya Bagchi, J

Bench : Single Bench

Advocate : Sudipta Moitra, Mr. Subhas Chandra Karar, Mr. Amitava Pyne and Mr. Surajit Roy, for the Appellant; Sanjib Mal, Ms. Rituparna De, Mr. Dibanath Dey and Ms. Anasua Sinha, for State, for the Respondent

Judgement

Joymalya Bagchi, J.—The petitioners have prayed for quashing of proceeding in G.R. Case No. 573/2011 pending before the Chief Judicial Magistrate, Howrah arising out of Jagacha P.S. Case No. 51 dated 02.02.2011 under Sections 406/420/336/120B of the Indian Penal Code, 1973. The instant criminal case was initiated on the basis of an application u/s 156(3) of the Code of Criminal Procedure, 1973 instituted by opposite party no. 2 herein before the Chief Judicial Magistrate, Howrah, inter alia, alleging as follows:

2. Opposite party no. 2 is carrying on business in manufacturing and sale of wagons, coaches and other equipments to Indian Railways and has high reputation in the said field; opposite party no. 2 commenced manufacturing of EMU (Electrical Multiple Unit) coaches for carrying passengers since 2007; for the purpose of manufacturing such coaches, the company was required to purchase (i) break pull rods for bogie breaks as per railways'' drawing and specification No. EMU/M-3-2063 and (ii) block hanger inner vide railways'' drawing and

specification No. EMU/M-3-2050; the petitioner No. 1 carries on business in manufacturing of such products and petitioner nos. 2 and 3 are his associates; in or around 2008, the petitioners represented that they shall manufacture and supply such articles in accordance with the railways'' specification and design to the opposite party no. 2; on the basis of such representation and believing the same to be true, opposite party no. 2 company placed purchase order dated 21.09.2010 for a sum of Rs. 13,66,560/- for purchase of aforesaid articles, namely, break pull rods for bogie breaks and inner block hanger as per railway''s drawing and specifications; the goods were supplied to opposite party no. 2 company and utilized for the purpose of manufacturing of coaches; such manufactured coaches were supplied to the railways authorities, the railways authorities, particularly, Santoshpur Carshed, complained that the aforesaid components, namely, break pull rods and inner break block hangers were malfunctioning; opposite party no. 2 company was compelled to take back the defective materials from the railways authorities on 23.09.2010; the quality control tests conducted by the opposite party no. 2 company revealed that the said components were faulty and/or defective; the said defective articles were thereafter sent to the petitioners for replacement with a request to supply articles as per specification and/or quality; till date, nothing has emerged despite the petitioners having received the said articles; the opposite party no. 2 suffered loss of goodwill due to the act of the petitioners in supplying faulty and defective components resulting in rejection of EMU coaches supplied by opposite party no. 2 to the railways authorities; supply of such coaches had also put the lives of many passengers at stake and opposite party no. 2 was induced to pay Rs. 13,66,560/- for purchase of such defective and faulty components; petitioners thereby committed offence punishable under Sections 406/420/336/120B of the Indian Penal Code.

3. Pursuant to the direction of the learned Chief Judicial Magistrate, Howrah, impugned criminal proceeding being G.R. Case No. 573/2011 arising out of Jagacha P.S. Case No. 51 dated 02.02.2011 under Sections 406/420/336/120B of the Indian Penal Code pending before Chief Judicial Magistrate, Howrah was registered for investigation.

4. During pendency of the aforesaid criminal proceeding, petitioners approached this Court praying for quashing of the same, inter alia, on the premises that the uncontroverted allegations did not disclose the ingredients of the alleged offences and the impugned proceeding was instituted in malicious and harassive manner as a counterblast to a notice of winding up u/s 434 of the Companies Act issued by petitioners upon opposite party no. 2 company for non-payment of outstanding dues to the tune of 18,28,968/- against materials delivered.

5. It was pleaded in the said notice that although some articles were found defective the same had already been replaced by petitioner company but the latter had failed and neglected to pay the outstanding dues. Investigation proceeded and during pendency of this revisional application, charge-sheet was

filed against petitioners before the learned Chief Judicial Magistrate, Howrah. Liberty was given to petitioners to assail the impugned charge-sheet in the instant proceeding.

6. Accordingly, petitioners filed a supplementary affidavit challenging the impugned charge-sheet.

7. Affidavit-in-opposition was filed on behalf of the opposite party no. 2. In the said affidavit-in-opposition the opposite party no. 2 repeated and reiterated the allegations in the impugned first information report. The opposite party no. 2 admitted that out of 175 bills raised by the petitioners 135 bills have been paid and 40 bills were not cleared owing to prevailing dispute.

8. It has been argued on behalf of petitioners that the impugned criminal proceeding instituted by opposite party no. 2 company is a mala fide one and an abuse of the process of Court, inasmuch, as the allegations made herein are contrary to and/or inconsistent with the case pleaded by opposite party no. 2 company in the civil proceeding instituted by the latter being C.S. Case No. 53 of 2011 pending before this Court wherein opposite party no. 2 company prayed for money decree to the tune of Rs. 6,000,00,00/- as and by way of damages and other ancillary reliefs.

9. Petitioners have also placed on record the plaint of the said suit by way of a supplementary affidavit.

10. Mr. Moitra, learned advocate appearing for the petitioners submitted that the allegations in the impugned charge-sheet, even if believed to be true, merely disclosed a case of alleged breach of contract and they did not disclose the existence of dishonest deception from the inception of the alleged transaction in any manner whatsoever.

11. He further submitted that investigation clearly revealed that the defective materials were replaced. Moreover, even in the pleadings of the civil suit filed by the opposite party no. 2 company such fact is admitted. He further submitted that the continuation of the impugned criminal proceeding was clearly an abuse of process of the Court and the same is liable to the quashed.

12. He has relied on 2008(2) ECN 670, 2005(2) SCC (Cri.) 1600, 2000(1) SCC (Cri.) 786, Anil Kumar Bose Vs. State of Bihar, 1998 SCC (Cri.) 1400, R. Kalyani Vs. Janak C. Mehta and Others, , B. Suresh Yadav Vs. Sharifa Bee and Another, , Inder Mohan Goswami and Another Vs. State of Uttaranchal and Others, All Cargo Movers (I) Pvt. Ltd. and Others Vs. Dhanesh Badarmal Jain and Another,

13. Mr. Mal, learned advocate appearing for opposite party no. 2 submitted that admittedly defective materials were supplied. The fact whether they were replaced or not is a disputed question of fact. He further submitted that the ingredients of the alleged offences were disclosed and this Court ought not quash the criminal proceeding at this preliminary stage.

14. I have considered the submissions of the parties.

15. The case made out by petitioners in the impugned criminal proceeding is that the accused persons had supplied defective materials and after the said defective materials were returned they did not replace the same and thereby cheated the opposite party no. 2 company. Relevant accusation in this regard is set out in paragraph 11 of the FIR which reads as follows:

The said defective articles thereafter were sent back to the accused persons for replacement with a request to supply articles as per specifications and quality. Till date nothing has emerged out despite the accused persons having received back the said articles.

16. On the other hand, in the civil suit instituted by opposite party no. 2 company over the self-same cause of action an entirely different case has been made out. While in the criminal case, the opposite party no. 2 company has stated that the accused persons had not replaced the defective materials in civil suit. The opposite party no. 2 company had in effect, admitted the defective parts were replaced, though belatedly, and therefore pleaded that such belated replacement was of no help to them as the supplies had already been rejected by the railways authorities and that even some of those replaced parts were again found to be defective.

17. Relevant portions of the pleadings in said plaint at paragraphs 14 and 17 are set out below:

14..... The plaintiff states that allegedly replacing defective components does not serve the purpose in sensitive item like EMUs once they have already been fitted on the EMUs. Subsequent discovery of such defect on commission of EMUs cannot be rectified easily. IN fact, in some of the cases, even the replaced components were found to be defective and in variance to the specification prescribed by the plaintiff...."

"17. ....The plaintiff states that allegedly replacing defective components does not serve the purpose in sensitive item like EMUs once they have already been fitted on the EMUs. Subsequent discovery of such defect on commission of EMUs cannot be rectified easily. In fact, in some of the cases, even the replaced components were found to be defective and in variance to the specification prescribed by the plaintiff.

18. Learned counsel for the State has placed the case diary, including the result of investigation before this Court.

19. Perusal of the documents seized in the course of investigation particularly challans issued by the petitioners evidence the receipt of replaced materials at the end of opposite party no. 2 company.

20. It is settled law that Courts should not ordinarily interfere with a criminal proceeding at the preliminary stage. However, if it appears from materials on

record that a criminal proceeding was set into in a dishonest and unjust manner and constitutes an abuse of the process of the Court, it is imperative in the interest of justice that the High Court in exercise of its inherent jurisdiction puts an end to the continuation of such vexatious and oppressive proceeding.

21. Foundation of the impugned criminal case is that the accused persons had supplied defective materials to opposite party no. 2 company. It resulted in a rejection of railways wagons manufactured by opposite party no. 2 by the Indian Railways. On being requested to replace the defective materials they failed to do so. Such version of the opposite party no. 2 company in the criminal case is wholly contradicted by the case pleaded by them in the civil suit wherein opposite party no. 2 company has admitted replacement of defective materials but explained away the same by saying that such belated replacement was of no value in the transaction in question or that even such replaced materials were not up to the mark.

22. Investigation of the alleged crime revealed documents evidencing replacement of defective materials. However, there is no material collected during investigation to show that such replacement materials were again found to be defective or contrary to specifications.

23. The gist of the case made out in the civil suit is therefore wholly inconsistent with the allegation that defective materials were not at all replaced by the petitioners as alleged in the impugned criminal proceeding.

24. In All Cargo Movers (I) Pvt. Ltd. and Others Vs. Dhanesh Badarmal Jain and Another, , the Apex Court quashed a criminal proceeding on the premise that the allegations contained in complaint were wholly inconsistent with the pleadings in a collateral civil proceeding. It held as follows:

17. We are of the opinion that the allegations made in the complaint petition, even if given face value and taken to be correct in its entirety, do not disclose an offence. For the said purpose, This Court may not only take into consideration the admitted facts but it is also permissible to look into the pleadings of the plaintiff-respondent No. 1 in the suit. No allegation whatsoever was made against the appellants herein in the notice. What was contended was negligence and/or breach of contract on the part of the carriers and their agent. Breach of contract simpliciter does not constitute an offence. For the said purpose, allegations in the complaint petition must disclose the necessary ingredients therefor. Where a civil suit is pending and the complaint petition has been filed one year after filing of the civil suit, we may for the purpose of finding out as to whether the said allegations are prima facie cannot notice the correspondences exchanged by the parties and other admitted documents. It is one thing to say that the Court at this juncture would not consider the defence of the accused but it is another thing to say that for exercising the inherent jurisdiction of this Court, it is impermissible also to look to the admitted documents. Criminal proceedings should not be encouraged, when it is found to be mala fide or otherwise an

abuse of the process of the Court. Superior Courts while exercising this power should also strive to serve the ends of justice.

25. In K.L.E. Society and Others Vs. Siddalingesh, on a similar issue, the Apex Court quashed a criminal proceeding labeling it to be an abuse of process of Court as the allegations contained in the complaint ran contrary to the averments made in the petition filed under the Industrial Disputes Act. The Apex Court held as follows:

7. One thing is clear on reading of High Court''s reasoning that the High Court came to the conclusion that deductions were made without any rhyme and reason and without any basis. That was not the case of the complainant. On the other hand, it tried to make out a case that the deduction was made with an object. That obviously, was the foundation to substantiate claim of entrustment. On a close reading of the complaint it is clear that the ingredients of Sections 403, 405 and 415 do not exist. The statement made in the complaint runs contrary to the averments made in the petition in terms of Section 33-(C)(2).

26. In State of Orissa Vs. Debendra Nath Padhi, , the Supreme Court held that the High Court could take into account materials of "unimpeachable character of sterling quality" while exercising its inherent powers to quash a criminal proceeding and observed as follows:-

29. Regarding the argument of accused having to face the trial despite being in a position to produce material of unimpeachable character of sterling quality, the width of the powers of the High Court u/s 482 of the Code and Article 226 of Constitution is unlimited whereunder in the interests of justice the High Court can make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice within the parameters laid down in Bhajan Lal''s case.

27. Undoubtedly, plaint filed by the opposite party no. 2 in the collateral civil proceeding over the self-same issue falls within such category.

28. In Vijaya Rao Vs. State of Rajasthan and Another the Supreme Court held that merely using expressions like "fraudulent representation" and "mala fide intention" does not give rise to an inference that the complaint discloses the ingredients of the offence of cheating.

29. In Hridaya Ranjan Pd. Verma and Others Vs. State of Bihar and Another, the Supreme Court succinctly laid down the distinction between breach of contract in one hand and the offence of cheating in the other.

15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning

of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.

30. In Anil Kumar Bose Vs. State of Bihar, the Supreme Court held that mere failure to perform a duty or observe rules of procedure may be an administrative lapse or any error of judgment but cannot be equated with dishonest intention or cheating.

31. Criticizing the institution of malicious and frivolous criminal proceeding against individuals, the Apex Court in Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, held as follows:

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. 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.

32. In R. Kalyani Vs. Janak C. Mehta and Others, the Apex Court held that role of each accused must be expressly stated in respect of Penal Code offences and the legal fiction of vicarious liability cannot be invoked for such purpose.

33. In B. Suresh Yadav Vs. Sharifa Bee and Another, the Apex Court again highlighted the distinction between a mere breach of contract and the offence of cheating.

34. In Inder Mohan Goswami and Another Vs. State of Uttaranchal and Others, the Apex Court analysed inherent powers of the High Court u/s 482 as follows:

23. This court in a number of cases has laid down the scope and ambit of courts'' powers u/s 482 Cr.P.C. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power u/s 482 Cr.P.C. can be exercised:

(i) to give effect to an order under the Code;

(ii) to prevent abuse of the process of court, and

(iii) to otherwise secure the ends of justice.

24. Inherent powers u/s 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute.

35. It is therefore clear that in the event the institution of a criminal proceeding in the attending facts and circumstances of a case irresistibly points towards an abuse of process of the Court, this Court in exercise of its inherent power is justified to quash the same.

36. The facts of the instant case portray a desperate effort on the part of opposite party no. 2 company in "dressing up" a civil dispute relating to alleged breach of contract into a criminal proceeding by making out a case of sheer refusal to replace defective components in a complete departure from its own version as disclosed in the civil suit.

37. Moreover, the allegation of non-replacement of defective materials is also not borne out in the course of investigation as evidenced through seizure of challans showing such replacement. No material has also been collected in support of the claim that such replaced components were defective.

38. It is also undeniable that the impugned criminal proceeding was instituted by opposite party no. 2 company immediately on receipt of the notice for winding up u/s 434 of the Companies Act for nonpayment of outstanding dues in respect of materials supplied.

39. Institution and continuation of such proceeding at the behest of opposite party no. 2 company who had not come before the criminal court with clean hands and had sought to portray a "more sinister picture" relating to the alleged transaction than what was disclosed in the pleadings of its civil suit is a malicious attempt to convert a dispute relating to alleged breach of contract into an offence of cheating and criminal breach of trust. Such endeavour clearly falls within the species of "abuse of process of Court" and ought to be nipped in the bud.

40. The uncontroverted allegations in the impugned charge-sheet particularly in the view of the attending circumstance of replacement of defective materials by the petitioners as disclosed through documents seized during investigation and the lack of materials to support the claim that even replaced materials were defective, give rise to a dispute which at its height portrays an alleged breach of contract and does not disclose the existence of either "initial deception" or "dishonest misappropriation" which are the sine qua non for offences of cheating and criminal breach of trust respectively.

41. With regard to other allegations of commission of offence punishable u/s 336 of the Indian Penal Code on the specious plea that petitioners had acted rashly and/or negligently in supplying defective components which may have endangered lives of passengers, I am afraid that such inferential accusation is too remote and there is no reasonable nexus between the two, particularly in view of the fact that there was no privity of contract between the petitioners and the Indian Railways in the matter of supply of wagons.

42. For the aforesaid reasons, I am of the opinion that the impugned charge-sheet does not disclose essential ingredients of the alleged offences and in the attending facts and circumstances of the case, as discussed above, the continuation of the impugned proceeding is clearly an abuse of the process of Court and the same is accordingly quashed. There shall be no order as to costs.