

(2024) 06 BOM CK 0048

In the Bombay High Court

Case No : Criminal Application (Apl) No. 1070 Of 2023

Sujata Malewar

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 25-06-2024

Acts Referred:

Constitution of India, 1950 — Article 226
Code of Criminal Procedure, 1973 — Section 155(2), 156(1), 482, 483
Indian Penal Code, 1860 — Section 34, 420

Citation : (2024) 06 BOM CK 0048

Hon'ble Judges : Vinay Joshi, J; Vrushali V. Joshi, J

Bench : Division Bench

Advocate : Anil Mardikar, D.N. Mehta, T.H. Udeshi, R.S. Renu, S. Wahane

Final Decision : Disposed Of

Judgement

Vinay Joshi, J

1. Heard.

2. The registration of First Information Report ('FIR') vide Crime No. 272/2023 registered with Police Station Ganeshpeth, Nagpur for the offence punishable under Section 420 read with Section 34 of the Indian Penal Code caused the applicants to invoke inherent powers of this Court vested under section 482 of the Code of Criminal Procedure.

3. The applicants partnership firm working under the name "Sagacious Impex", was indulging into trade of agro commodities. Non-applicant No.3 Pargan Singapore PTE Ltd., is a registered private limited company based at Singapore. Non-applicants are also engaged in the business of trading of agro commodities. Non-applicant No.2 is an employee of non-applicant No.3 Company. Sometime in the year 2021, the applicants' firm has placed order for Soyabean at certain price from the non-applicants. The goods were supplied as per order, however the applicants did not pay therefore, the offence of cheating.

4. As per FIR dated 16.06.2023 the applicants have ordered for purchase of 210 MT Soyabean worth Rs. 1,56,82,885/-. On 4. 09.2021, parties have entered into contract for the said purpose. On 29.09.2021, the informant sent requisite documents for verification from the respective authorities. After verification on

6. 10.2021 the applicants urged to supply Non-Genetically Modified Organism (Non-GMO) Certificate for the purpose of clearance of goods. The informant has supplied all requisite documents for clearance to which the applicants affirmed. The goods were displaced from Singapore and received by applicants at Nhava Sheva Port, Mumbai.

5. It is contended that in the month of December 2021, the applicants again asked informant to re-submit another Non-GMO Certificate which was required by Food Safety and Standard Authority of India ('FSSAI') for clearance. In accordance with that the informant has forwarded another Non-GMO Certificate on 21.12.2021. After receipt of goods, the applicants assured for payment, but they did not. There was exchange of correspondence between them, but payment was not made. Therefore, report has been lodged alleging that the applicants have cheated to the informant Company for huge sum, and thereby committed the offence of cheating punishable under Section 420 of the Indian Penal Code.

6. Heard both sides exhaustively and gone through the material placed on record. Shri Mardikar, learned senior counsel appearing for applicants primly canvassed that it was purely a commercial transaction of civil nature which has been coloured as criminal to pressurize the applicants. In other words, it was a contractual dispute or at the most a case of breach of contract which per se does not disclose the intention to deceive to evolve a criminal action. It is submitted that as per rules and regulations, it is the obligation of the consignor that goods are as per contract and all necessary documents for the consignment of goods are proper and in order. As per requirement, Non-GMO Certificate though essential was not supplied by the informant. The certificate which was sent, was not approved by the authority and thus, it was fake. According to the applicants, despite assurances, the requisite documents have not been supplied, which caused huge losses to the applicants. The unverified and unauthenticated certificate was furnished for verification, which was declined by the authority..

7. It is applicants contented that they had paid huge amount for the goods to be parked at bonded warehouse during the time when the authentication and verification of documents was awaiting. Continuous correspondence was made for supply of necessary documents, but it was not complied. It is argued that the questioned transaction was one of the regular commercial transaction. The applicants would submit that there were series of business transaction in between the parties and even post questioned transaction they indulged into the trading. The business transaction continued in between the parties between September 2021 to April 2022. According to the applicants since they have asked for the damages, a false report has been lodged to pressurize by giving criminal

colour to the ordinary commercial transaction. Moreover, it is submitted that while entering into a business contract dated 04.09.2021, the parties have agreed to resolve the dispute by way of arbitration as per Clauses 125 and 188 of GAFTA (The Grain and Feed Trade Association). The objection regarding territorial jurisdiction has also been raised by contending that the entire transaction took place out of the Nagpur and thus, the concerned Police could not have registered the Report.

8. In substance, it is submitted that in absence of averments about intention to deceive from the beginning, the offence is not made out, therefore, in order to avoid uncalled harassment, the proceeding needs to be quashed by invoking inherent powers of this Court. The learned counsel appearing for applicants relied on the decision of the Supreme Court in cases of Sushil Sethi & anr. Vs. State of Arunachal Pradesh & ors., (2020) 3 SCC 240 and Lalit Chaturvedi & ors. Vs. State of Uttar Pradesh & anr. 2024 SCC Online SC 171. to substantiate his stand.

9. Per contra, learned counsel Mr. Renu appearing for non-applicants vehemently resisted the application by filing reply affidavit as well as advancing oral arguments. It is contended that the applicants have received the consignment of Soyabean goods which they sold in the market, but did not pay, therefore, the intention to cheat is evident. The Non-GMO origin certificate was duly issued which was verified. The applicants have acknowledged the correctness of documents, hence the reason put-forth was incorrect. It is contended that admittedly goods have been released from the port which itself shows that the documents were in order and therefore, the very intent of the applicants was to cheat by stalling false claim of damages.

10. It is submitted that though it is a commercial transaction, civil as well as criminal action may lie in the peculiar facts of the case. According to the non-applicants, though there was an arbitration clause in the agreement, that by itself does not preclude the non-applicants from initiating criminal action. Moreover, it is submitted that in the facts of the present case, the genuine prosecution cannot be stifled at its initial stage. To substantiate said contention, the informant relied on the decision of the Supreme Court in cases of Priti Saraf & anr. Vs. State of NCT of Delhi & Anr. (Criminal Appeal N(s). 296 of 2021 decided on 10.03.2021) and M/ s Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra & ors. (Criminal Appeal No. 330 of 2021, decided on 13.04.2021).

11. Undisputedly both parties are traders indulging into business of agro commodities. On 04.09.2021, the parties have entered into a contract for sale of 220 MT commodity namely Soyabean (Non-GMO) for specified rate. The port of loading was Tema Ghana whilst the port of discharge was Nhava Sheva, India. The contract discloses that the seller shall provide shipment advise to the buyer within specified days with requisite documents. Undisputedly, serial No.9 of the list of document contains supply of Non-GMO Certificate by the seller. The price/rate was agreed between the parties. The non-applicants initially sent a set of third party documents for the approval to which the applicants replied that they

were waiting for approval from Food Safety and Standard Authority of India for Non-Genetically Modified Certificate. Documents were again forwarded by the non-applicants. There is no dispute that in the month of November 2021, the non-applicants surrendered the original bill of lading in Singapore and allowed for the release and delivery of the cargo to the applicants. It is not in dispute that goods were released which the applicants sold later.

12. The dispute is about non-supply of requisite Non-GMO certificate without which the goods cannot be cleared. It is applicants' contention that the Non-GMO Certificate was unauthorized which required applicants to bring things in order. According to the applicants, it was purely laps on the part of the non-applicants in supplying all necessary documents and thus, on such failure, they suffered damages. The cargo was released on assurances to produce valid documents.

13. The learned counsel appearing for applicants attracted our attention to the email communication dated 29.08.2022. It was sent by applicant No.1 to the informant. The said communication was pressed into service to impress that since prior to the issuance of legal notice dated 04.11.2022, there was a dispute on account of non-supply of requisite documents for which the parties were negotiating. The said communication indicates that the first set of documents supplied by the informant were identified as a fake and therefore, second set of documents was demanded. The applicants conveyed that by use of goodwill, they made arrangement and by requesting the authorities, allowed the movement of cargo on the assurance that later they would submit the verification and authenticity of the documents. The said communication indicates that for want of authenticated documents, the parties were making correspondence for a long. The said communication supports the cause canvassed by the applicants regarding non-supply of authenticated documents. Therefore, it is hard to accept the informant's contention that with deceitful intent, the applicants entered into agreement.

14. The learned counsel appearing for applicants initially attracted our attention to the document of contract between the parties (page 33) which does bear a Clause No. 18 pertaining to resolving dispute by way of arbitration in terms of GAFTA. The learned counsel appearing for non-applicants relying on the decision of the Supreme Court in case of Priti Saraf (supra) would contend that existence of remedy by arbitral proceeding does not itself foreclose the informant's right to initiate criminal action. There can be no dispute about said proposition of law. But on facts, one has to take a call whether fraudulent or dishonest intention at the time of entering into contract exist. Inbuilt clause of the arbitration provides a remedy for resolving the dispute which has to be considered for the purpose of inferring an intention of the parties.

15. Both sides have produced several documents to support their respective stand. The applicants have produced a format of formal certificate for Non-GMO origin (page 40) which ought to have complied with. The first certificate issued by the non-applicants (page 41) and another Certificate (page 43) has been

tendered on record to show that they were unauthenticated. In-fact, second certificate dated 12.09.2021 bearing Certificate No. 003164 appears to have been issued by the authority. The applicants have produced a communication dated 15.07.2023 (page 310), whereby the same authority has denied the authentication, which it puts serious dent on the non-applicants' stand of furnishing requisite authenticated documents.

16. The learned counsel appearing for non-applicants has attracted our attention to letter issued by the Deputy Director of FSSAI dated 19.07.2023 to the Police Inspector stating prima facie correctness of the Non-GMO Certificate. Apparently, it was a communication to the Police expressing prima facie opinion which cannot be considered. The informant has relied on document (page 185) to contend that the authority has certified the correctness of the documents. However, the said extract appears to be a report of inspection of lot which does not specify the particular transaction with the questioned documents.

17. Considering the averments made in the Police Report, the main allegation is about non-payment for sold goods. Reading of the entire Police Report prima facie does not disclose that there was a fraudulent and dishonest intention on the part of the applicants to cheat the informant. Notably, the applicants have specified that even thereafter there were several transactions between the parties which has not been denied. Certainly, it has bearing for the purpose of inferring the intention of the parties. The FIR barely states that the applicants assured for payment of sold goods, but they did not, despite persistence. We may advert to the legal notice dated 04.11.2022 issued by the informant about the disputed transaction. Entire tenor of notice indicates that the applicants neglected to make payment. By said notice, the informant called upon the applicants to make the payment within 15 days as well as compensate for the damages including interest. Reading of said notice equally postulates that it was an ordinary commercial transaction between the traders and a case of non-payment of price of sold goods which is amenable to civil action. No doubt, certain transaction may give rise to both civil as well as criminal action, but unless there exist essential ingredients to constitute an offence of cheating namely deception and fraudulent intention from the beginning, the transaction cannot be turned into criminal action.

18. We may make useful reference of the decision of the Supreme Court in case of V.Y. Jose and another Vs. State of Gujarat and another (2009) 3 SCC 78, wherein it is categorically stated that though in breach of contract per se would not come in the way of initiation of criminal proceeding, yet in the absence of averments of ingredients of offence inherent jurisdiction can be invoked. Taking review of various earlier decisions, the Supreme Court has observed in paras 21, 23 and 28 as below:-

"21. There exists a distinction between pure contractual dispute of civil nature and an offence of cheating. Although breach of contract per se would not come in the way of initiation of a criminal proceeding, there cannot be any doubt

whatsoever that in absence of the averments made in the complaint petition wherefrom the ingredients of an offence can be found out, the court should not hesitate to exercise its jurisdiction under Section 482 of the Code of Criminal Procedure.”

23. Section 482 of the Code of Criminal Procedure, saves the inherent power of the court. It serves a salutary purpose viz. a person should not undergo harassment of litigation for a number of years although no case has been made out against him.

28. A matter which essentially involves dispute of a civil nature should not be allowed to be the subject matter of a criminal offence, the latter being not a shortcut of executing a decree which is non-existent. The Superior Courts, with a view to maintain purity in the administration of justice, should not allow abuse of the process of court. It has a duty in terms of Section 483 of the Code of Criminal Procedure to supervise the functioning of the trial courts.

19. In case of Lalit Chaturvedi (supra), the supreme Court has emphasized that to constitute the offence of cheating, essential ingredients are that there must be a deception or a dishonest inducement. In case of Sushil Sethi (supra), it is reiterated that the transaction must disclose fraudulent or dishonest intention at the time of entering into contract. Therefore, from the very beginning of the formation of the contract, there must be intention to deceive, in absence of such averment made in the report, the prosecution would not withstand.

20. Observations made by the Supreme Court in case of Mahmood Ali and ors. Vs. State of U.P. & ors., AIR 2023 SC 3709 in para 12 are worth to be noted which reads as below:-

“12. At this stage, we would like to observe something important. Whenever an accused comes before the Court invoking either the inherent powers under Section 482 of the Code of Criminal Procedure (CrPC) or extraordinary jurisdiction under Article 226 of the Constitution to get the FIR or the criminal proceedings quashed essentially on the ground that such proceedings are manifestly frivolous or vexatious or instituted with the ulterior motive for wreaking vengeance, then in such circumstances the Court owes a duty to look into the FIR with care and a little more closely. We say so because once the complainant decides to proceed against the accused with an ulterior motive for wreaking personal vengeance, etc., then he would ensure that the FIR/complaint is very well drafted with all the necessary pleadings. The complainant would ensure that the averments made in the FIR/complaint are such that they disclose the necessary ingredients to constitute the alleged offence. Therefore, it will not be just enough for the Court to look into the averments made in the FIR/complaint alone for the purpose of ascertaining whether the necessary ingredients to constitute the alleged offence are disclosed or not. In frivolous or vexatious proceedings, the Court owes a duty to look into 13 many other attending circumstances emerging from the record of the case over and above

the averments and, if need be, with due care and circumspection try to read in between the lines. The Court while exercising its jurisdiction under Section 482 of the CrPC or Article 226 of the Constitution need not restrict itself only to the stage of a case but is empowered to take into account the overall circumstances leading to the initiation/registration of the case as well as the materials collected in the course of investigation.”

Therefore, the legal position is clear that quashment of criminal proceedings can be resorted to when the material do not constitute to attract the offence alleged to be committed. Similarly, the Court owes a duty to look into the other attending circumstances, over and above the averments to see whether material indicates that a criminal proceeding is manifestly attended with mala fide and proceeding instituted maliciously with ulterior motive. Once the said fact is established, the same is a good reason to quash the criminal proceedings.

21. It is evident from the facts that, initial notice was nothing, but demand notice for payment of goods, whilst FIR only indicates that despite assurances, payment was not made. There is marked distinction in between mere breach of promise in commercial transaction or intentional breach made by deceitful intent of the parties. There is nothing to indicate that since beginning applicants intended to deceive.

22. In case of M/s Neeharika Infrastructure Pvt. Ltd. (supra), it has been held that the inherent power of the High Court is though wide, it has to be exercised carefully and with great caution. The Court shall not thwart any investigation into cognizable offence nor genuine prosecution shall be stifled at initial stage. However, it is also settled that there is no hard and fast rule laid down for exercise of extraordinary jurisdiction under Section 482 of the Code of Criminal Procedure. 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. The court must ensure that criminal prosecution is not used as an instrument of harassment or for wreaking private vengeance.

23. At this stage, we may refer to the parameters laid down by the Supreme Court for quashing of an FIR in the case of State of Haryana v. Bhajan Lal, AIR 1992 SC 604. The parameters are:-

“(1) Where the allegations made in the first information report or 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 a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any

offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

On reassessment of facts, the case is squarely covered in criteria Nos. (1) and (3) of the above decision.

24. To summarize the position, reading of Police Report and material on record do not disclose ingredients to indicate that, since inception, the applicants intended to deceive by non-payment for the price of goods. Rather it is evident that on the issue of non-supply or supply of required documents, the dispute arose. The facts are not indicative of a deceitful intention on the part of the applicants. The case is predominantly of civil commercial nature. In above peculiar facts, continuation of prosecution would lead to uncalled harassment and thus, would be abuse of the process of the Court.

25. In view of above, we hold that the applicants have made out a case for invoking our inherent powers. By allowing application, we hereby quash and set aside FIR vide Crime No. 272/2023 registered with Police Station Ganeshpeth, Nagpur for the offence punishable under Section 420 read with Section 34 of the Indian Penal Code.

26. Application stands disposed of in above terms.