Form No.J(1)

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRR 1177 of 2021

Oil India Limited & Ors.

-vs-

Ashok Kumar Bajoria & Ors.

For the petitioners	:	Mr. Sudhakar Prasad, Mr. Somopriya Chowdhury Mr. N. Banerjee
For the opposite party no.2	:	Mr. Indrajit Adhikari Mr. Ayan Bhattacharya Mr. Suman Majumder
Heard on	:	**16.11.2022 & 06.12.2022.**
Judgement on	:	**12.12.2022.**

Tirthankar Ghosh, J:-

The present revisional application has been preferred challenging the proceedings relating to Case No. CS 10938 of 2021 pending before the learned Metropolitan Magistrate, 13th Court, Calcutta under Sections 120B/406/418/420/465/468/471/477A of the Indian Penal Code and all orders passed therein.

Mr. Somopriyo Chowdhury, learned advocate appearing for the petitioners draws the attention of this court to the relevant assertions made in this revisional application that the petitioner no. 1 is a public sector undertaking wholly owned by the Government of India and the petitioner no. 2 is the Chief General Manager (Legal) of petitioner no.1, Oil India Limited.

The subject matter of the complaint relates to an Arbitral Award passed in favour of the complainant which was passed on 30.11.2019 in AP No. 1732 of 2015.

It has been alleged that the said Arbitration Proceedings was initiated at the instance of the complainant against the accused company/petitioner no. 1 for non-payment of his dues in respect of Contract No. 6103037 dated 07.04.2009. The contract was executed between the complainant and the accused company for installation of pipelines across the river Teesta by HDD for NSPL expansion. After the Award was passed in favour of the complainant company and against the accused/company, the other accused persons on behalf of the accused company approached the complainant to settle the dispute and requested him not to proceed for execution. By their representation, the accused persons undertook to comply with the Award by reimbursing the Awarded amount of Rs.7,18,87,644/-.

It was represented that in respect of similar Arbitral Award, the accused company paid to M/s. Dewanch and Ramsaran Industries(P) Ltd. along with all applicable taxes and to that effect produced the relevant papers.

Relying upon such representations of the accused persons, the complainant reposed faith in them and entered into a Settlement Agreement dated 7th January, 2020. The said Agreement was signed by the S. K. Senapati (petitioner no.2) and the rest of the accused persons assured the complainant to comply with the terms and conditions of the Agreement.

A Tax Invoice bearing no. HI/2019-20/29 dated January 08, 2020 was raised by the complainant by keeping the base amount of Rs.7,18,87,644/- being the awarded amount. As per mandatory amount of the Central Goods and Services Tax Act, 2017 and the West Bengal Goods and Services Tax Act, 2017, 9% was charged in the said tax invoice.

The accused no. 3, Utpal K. Sharma vide e-mail dated 9th January, 2020 acknowledged the tax invoice and refused to pay the GST part over and above the awarded amount on the plea that the Award or Settlement Agreement does not contemplate any such amount and they pressurized the complainant to change the tax invoice which he refused. In various e-mails to the accused persons the complainant requested them to pay the GST bill which is statutorily applicable like TDS in tune with the Arbitral Award, there was no reply as the complainant has expressed his inability to revise the invoice and intimate the accused to treat his raised invoice as withdrawn and cancelled because the accused persons were not agreeable to pay as per invoice.

With utter shock and surprises, the complainant received the information from the banker on 10th January, 2020 that the accused persons

illegally and unilaterally processed the bill as per reverse calculation basis by deducting the base price to Rs.6,09,21,732.20/- instead of the settlement amount of Rs.7,18,87,644/- reducing the principal payable amount by Rs.1,09,65,912/- in willful disregard of the Arbitration Award and in gross violation with the terms and conditions of the said Settlement Agreement.

On inspection of the records, the complainant was shocked to learn that instead of returning cancelled tax invoice, the accused persons in a league, motivatedly and intentionally forged and altered the figures of the said withdrawn tax invoice without the permission or consent from the complainant, willfully altered and falsified his books of accounts to defalcate the amount of Rs.1,09,65,912/-payable to the complainant and used the forged and fabricated amount as genuine before various statutory authorities including the GST Authority and IT Authority to deceive the complainant as well as the Statutory Authorities.

On detection of such act of the accused persons, the complainant sent legal notices and demanded the accused persons to make payment of Rs.1,09,65,918/- together with interest accrued thereon but in spite of receiving those e-mails, letters and legal notices, the accused persons dishonestly withheld his money and as a result, the GST burden was shifted to the complainant for no fault on his part.

The complainant issued legal notices dated 01.12.2020 to the accused persons narrating the entire facts and circumstances and asking them to pay

Rs.1,31,07,012/- (principal amount due of Rs.1,09,65,912/- and the penal interest of Rs.21,41,100/-) within the seven days. But, after receipt of such notices, the accused persons did not comply with the same and denied the entire transactions. The complainant alleges that had he knew the accused persons would not pay the due amount under the Arbitral Award, he would have never entered into the Settlement Agreement dated 7th January, 2020.

The complainant alleged charges of conspiracy, cheating, forgery of a valuable security and using the forged documents as genuine before the Statutory Authority, falsification of accounts along with the criminal breach of trust causing wrongful gain to the accused persons and wrongful loss to the complainant in the petition of complaint on which the learned Chief Metropolitan Magistrate, Calcutta was pleased to take cognizance of the offences and transferred the case to the learned Metropolitan Magistrate, 13th Court, Calcutta. The learned Metropolitan Magistrate 13th Court, Calcutta after examining the complainant and another witness, namely, Dulal Das was pleased to issue process against the accused persons under Sections 120B/406/418/420/465/468/471/477A of the Indian Penal Code.

Mr. Chowdhury, learned advocate appearing for the petitioners submits that accepting the allegations in the complaint as a whole along with the initial deposition and accepting the same to be true, no offence is disclosed so far as the present petitioners are concerned.

According to the learned advocate there are two-fold issues which have been made out and there is an admitted position in the complaint itself.

Firstly, the complainant has received an amount of Rs.6,09,21,732/-, out of a sum of Rs.7,18,87,644/- which was the amount of the Arbitral Award. The rest of the sum of Rs.1,09,65,912/-, according to the complainant, was not to be paid by way of tax and was to be an integral part of the principal amount/decided amount/settled amount which was illegally withdrawn and shown as tax amount.

The complainant, as such, has claimed a sum of Rs.1,09,65,912/- along with the penal interest of Rs.21,41,100/- aggregating to a sum of Rs.1,31,07.012/-.

Secondly, it has been submitted by the learned advocate for the petitioner that the non-payment of GST is to be taken up with the Statutory Authority and the complainant has got nothing to do with the same except to bring it to the notice of the Statutory Authority.

So far as the non-payment of the amount which has been claimed by the complainant, the learned advocate submits that if the principal or decided amount was not paid to the complainant, then they should have proceeded for execution of the Arbitral Award.

Learned advocate for the petitioner relies upon a judgement of Rajeswar Tiwari & Ors. –versus- Nanda Kishore Roy reported in (2010) 8 Supreme Court

Cases 442 and draws the attention of this court to paragraph 36 which is set out as follows:-

> *"36. In the light of the abovementioned well-established principles, we are of the view that the High Court has committed an error, firstly, in not assigning any reason and passing a cryptic order and secondly, failed to exercise its jurisdiction under Section 482 when the complaint does not disclose any offence of criminal nature. For the sake of repetition, we reiterate, though the respondent had some grievance about his non-promotion, certain orders passed by the High Court including filing of contempt, etc., in view of the statutory provisions of the Income Tax Act, the assertion of the appellants that deductions were being made for all the persons who are liable to pay tax in terms of the Income Tax Act, the proper remedy for the respondent is to approach the authority/officer concerned and not by filing complaint as mentioned above. We have already adverted to the report of SI, Hirapur holding that the matter in issue is civil in nature."*

Additionally learned Advocate appearing for the petitioner also relied upon Bank of Baroda –versus- Govind Ram Agarwal reported in (2007) 3 CHN 60 and drew the attention of this court to paragraphs 12 & 13 which are set out as follows :-

> ***"12.** The averments of the complaint fails to make out any ingredient of offence under section 409/120B of the IPC against the petitioner bank. There was no entrustments of valuable property by the complainant to the accused bank consequent to relationship of trust existing between the complainant and the accused and there*

was no question of misappropriation of the said valuable property by the accused petitioner bank and conversion of the said amount to its own use. The complainant entrusted certain amount as fixed deposit with the bank and after maturity of the period he received back the amount of fixed deposits with interests accrued thereon. The amount deducted by bank as TDS was not a property over which the complainant O.P. had domain or, that he made entrustment of the same with the accused petitioner. The amount of interest deducted by petitioner bank as TDS was the property of the Government and complainant did not make any entrustment of that amount to bank. In view of the principle of law discussed above there was no relationship of trustee and beneficiary between the accused and the complainant and the relationship between the accused petitioner and complainant O.P. was that of creditor and debtor. The amount of TDS was not converted by the bank for its own use and I am told that the said amount was deposited with the Government of India long back and consequently there was no mis-appropriation of the said amount. It has been indicated above that the complainant has no authority to lodge the complaint for failure of the bank to deposit the amount of TDS with the Central Government and it is only the Income Tax Authority who is competent to take appropriate penal action against the bank in case of failure of the bank to deposit the amount deducted as TDS.

13. *Besides that, the provisions of IT Act and rules also make it clear that the complainant was not entitled to lodge any complaint against the bank authorities for alleged failure to deposit the amount deducted as TDS with the Income Tax Authority. Under section 194A of the IT Act bank has the authority to deduct tax at source in respect of payment of interest other than income by way of interest on securities. In the instant case the interest accrued on the basis of*

fixed deposits kept by the O.P. with the petitioner bank and it was liable to be deducted at source under section 194A of the IT Act. Section 203 of the Act prescribes issuance of certificate for tax deducted and according to O.P. he was not provided with such certificate though it is clear that the bank sent him advice showing deduction of income tax at source as TDS. It has already been mentioned earlier that the complainant could have submitted a prayer before the petitioner bank for issuance of a duplicate TDS certificate which was not done by the complainant. After going through the provisions of sections 203, 203AA, 205 of the IT Act I find that the complainant was not at all liable to pay the amount as tax which was deducted as TDS by the petitioner bank. Section 272A(2)(g) of the IT Act prescribes penalty for failure to furnish a certificate and section 276B of the Act prescribes punishment in case of failure to deposit the amount deducted as TDS to the Central Government. Section 279 of the Act prescribes that such a person shall not be proceeded with for an offence under section 276B except with the previous sanction of the Commissioner or the appropriate authority. Section 279 of the IT Act makes it clear that the complainant has no authority to initiate any proceeding for alleged failure by the petitioner bank to deposit the tax deducted at source with the Income Tax Authority. The above discussion makes it clear that there was no entrustment of any valuable property in the form of TDS by the complainant with the accused petitioner and that being the position there was no element of section 409 of the IPC read with section 120B of the IPC against the petitioner bank."

Per contra, Mr. Adhikari, learned appearing on behalf of the opposite party no.2/complainant submits that the accused company and its officers by

changing the tax invoice has made themselves liable for commission of offence under Section 463 of the Indian Penal Code.

According to the learned advocate for the complainant, the tax invoice is a valuable security and by striking of the principal amount and inserting a new base amount, the accused persons have committed offences for which they are liable to be prosecuted.

Learned advocate additionally submits that mere part payment will not exonerate the accused persons from the charges levelled against them.

Learned advocate draws the attention of this court to the paragraph 13 of the petition of complaint to emphasize on the factum of forgery and further submits that because of such illegal act, the complainant has been foisted with taxes which has resulted in wrongful gain to the accused company and wrongful loss to the complainant.

In order to substantiate his submissions, learned advocate also relied upon paragraphs 9 and 10 of the judgement of Rajesh Bajaj –versus- State NCT of Delhi & Ors reported in 1999 CRI. L. J. SC 1833 which is set out as follows:-

> *"**9.** It is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent. Splitting up of the definition into different components of the offence to make a meticulous scrutiny, whether all the ingredients have been precisely spelled out in the complaint,*

is not the need at this stage. If factual foundation for the offence has been laid in the complaint the court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence. In State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] this Court laid down the premise on which the FIR can be quashed in rare cases. The following observations made in the aforesaid decisions are a sound reminder: (SCC p. 379, para 103)

"103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

10. *It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions. One of the illustrations set out under Section 415 of the Penal Code, 1860 [Illustration f] is worthy of notice now:*

"(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly

induces Z to lend him money, A not intending to repay it. A cheats."

Learned advocate further relied upon a decision of S. P. Gupta –versus- Ashutosh Gupta reported in 2010 AIR SCW 3683. Drawing the attention of this court to the relevant part of paragraph 13 of the said judgement, learned advocate submitted that the accused persons cannot be exonerated from the liabilities because of the part payment being made. The relevant part of paragraph 13 relied upon by the learned advocate is set out as follows:-

"13. *Having carefully considered the submissions made on behalf of the respective parties and the complaint filed by the father of the respondent, we are inclined to agree with the views expressed by the High Court that a prima facie case had been made out to go to trial. There is a positive assertion in the complaint that an assurance had been given by the petitioner to the complainant that the property in question was free from all encumbrances and that Accused 1 was the sole owner of the property. It has been mentioned in the complaint that had not such a representation been made relating to the status of ownership of the property in question, the complainant may not have entered into the transaction at all. Whether or not the petitioner was truly mistaken with regard to the information given by him is a question of utmost importance in answering a charge of the nature indicated in the complaint. Merely because the petitioner had received part-payment of the consideration amount and had made over the same to Accused 1 and merely because possession of the land had been handed over by him to the complainant, cannot form the basis of a presumption that he had no knowledge that there was a dispute regarding the ownership of the property, as to*

whether the same belongs to an HUF or not. It is true, as pointed out by Mr Lekhi, that Section 415 IPC, which defines the offence of cheating, provides in Illustration (g) as follows:

"(g) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery, A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract."

However, the aforesaid provision clearly indicates that if at the very initiation of the negotiations it was evident that there was no intention to cheat, the dispute would be of a civil nature. But such a conclusion would depend on the evidence to be led at the time of trial.In the instant case, the complaint does not (sic) make out a prima facie case to go to trial. The petitioner may have discharged his functions as a constituted attorney for Accused 1 by acting as a liaison between Accused 1 and the father of the respondent, but that does not in itself indicate that he did not have any knowledge of the status of ownership of the land forming the subject-matter of the transaction."

Learned advocate for the opposite party complainant also relied upon a decision of Priti Saraf & Anr. –vs- State of NCT of Delhi & Anr. Reported in AIR 2021 Supreme Court 1531. Reference was made to paragraphs 23, 28 & 31 to remind this court regarding the care and caution to be exercised while invoking its jurisdiction under Section 482 of the Code of Criminal Procedure. The relevant paragraphs are set out as follows :-

*"**23.** It being a settled principle of law that to exercise powers under Section 482 CrPC, the complaint in its entirety shall have to be examined on the basis of the allegation made in the complaint/FIR/charge-sheet and the High Court at that stage was not under an obligation to go into the matter or examine its correctness. Whatever appears on the face of the complaint/FIR/charge-sheet shall be taken into consideration without any critical examination of the same. The offence ought to appear ex facie on the complaint/FIR/charge-sheet and other documentary evidence, if any, on record.*

***28.** It is thus settled that the exercise of inherent power of the High Court is an extraordinary power which has to be exercised with great care and circumspection before embarking to scrutinise the complaint/FIR/charge-sheet in deciding whether the case is the rarest of rare case, to scuttle the prosecution at its inception.*

***31.** Be it noted that in the matter of exercise of inherent power by the High Court, the only requirement is to see whether continuance of the proceedings would be a total abuse of the process of the Court. The Criminal Procedure Code contains a detailed procedure for investigation, framing of charge and trial, and in the event when the High Court is desirous of putting a halt to the known procedure of law, it must use proper circumspection with great care and caution to interfere in the complaint/FIR/charge-sheet in exercise of its inherent jurisdiction."*

I have considered the submissions advanced on behalf of the learned advocate appearing for the petitioners as well as the private opposite party/complainant, the following facts emerge from the records of the

revisional application as well as the submissions advanced by the learned advocates appearing for the parties :-

a) There was an Arbitration Award, which was passed in favour of the complainant.

b) There was a settlement agreement arrived at between the parties being complainant and the petitioner no.1/accused company through its officers.

c) The accused company is a public sector undertaking and they have disbursed more than 80% of the amount settled pursuant to the Arbitration Award.

d) There are no allegations that each of the Officers have personally benefited from the transactions.

e) There is a point of dispute between the complainant and the accused company regarding the fixation of principal amount/base amount as to whether the taxes would be calculated/included within the settled amount or the taxes would be paid over and above the settled amount.

f) Consequently, there is a dispute whether the complainant has received an amount of Rs.1,09,65,912/- less than the settled amount.

g) The fixation of the principal amount or the base amount is a policy decision of the accused company and cannot be changed by its officers according to their whims.

h) If there is a statutory violation, then it was incumbent upon the complainant to approach the Statutory Authorities as has been spelt out by the Hon'ble Supreme Court in the case of Rajeswar Tiwari & Ors. –versus- Nanda Kishore Roy(supra).

i) If there were an incomplete payment in respect of the settlement in a case where more than 80% has been paid, it would have been fit and proper to put the Arbitration Award into execution.

Having regard to the nature of the proceedings complained of and the emphasis on the change of tax invoice, I am unable to accept that the same was done with a motive, for the purposes of incurring any wrongful loss to the complainant company.

The accused company happens to be a public sector undertaking, as such none of the Officers which have been implicated in the case are presumed to have any personal benefit from the account of the company and that is not the case of the complainant also.

On an overall assessment of the factual aspects of the case, I am of the opinion that the present case has been initiated with a view to recover a part of the non-paid amount by giving a civil dispute the colour of a criminal proceeding which according to the opinion of this court, is an abuse of the process of law.

Having regard to the aforesaid observations, I am of the view that further continuation of the proceeding bearing no. CS 10938 of 2021 pending before the learned Metropolitan Magistrate, 13th Court, Calcutta would be an abuse of the process of the court and is bound to cause miscarriage of justice.

Accordingly, further proceedings of CS 10938 of 2021 before the learned Metropolitan Magistrate, 13th Court, Calcutta is hereby quashed including all orders passed therein earlier.

Accordingly, the present revisional application being CRR 1177 of 2021 is allowed.

Pending applications, if any, are consequently disposed of.

Interim order, if any, is hereby made absolute.

All concerned parties are to act in terms of a copy of this order duly downloaded from the official website of this court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)