

THE HONOURABLE SRI JUSTICE D.RAMESH

CRIMINAL PETITION No.315 of 2021

ORDER: -

This criminal petition is filed under Section 482 Cr.P.C. seeking to quash the F.I.R.No.374/2020 dated 12.8.2020 registered on the file of the Dwaraka police station, Visakhapatnam District under section 420 of IPC.

2. The petitioners are accused in Crime No.374/2020 of Dwaraka police station, Visakhapatnam city. The defacto complainant/R2 made a complaint to the Inspector of police, Dwaraka police station, Visakhapatnam city on 12.8.2020 and the respondent-police have registered a case under section 420 IPC. Assailing the said F.I.R, the present petition is filed under section 482 Cr.P.C to quash the same.

3. The main grounds raised in assailing the F.I.R.No.374/2020 is that the petitioners are the Managing Director and Director Finance of Newton Engineering & Chemicals Ltd, the amounts are transferred to the account of the company i.e. Newton Engineering & Chemicals limited that the defacto complainant made a complaint against the petitioners without making the company as a party which is contrary to the ratio decided by the Hon'ble Apex Court in catena of judgments.

4. The second ground raised by the petitioners is that the defacto complainant has already invoked civil jurisdiction and filed a civil suit on the file of XII Additional District Judge's court at Visakhapatnam and the same was numbered as O.S.No.41/2020 against the petitioners for recovery of amounts to a tune of Rs.1,76,05,352/-. While pending the said suit, making present complaint is nothing but abuse of process of law. Further the complaint does not disclose or attract the

ingredients of section 415 of IPC. The complaint is vague and baseless. They themselves further stated in the complaint that they learnt that the petitioners have connived with each other and deliberately making false representation to the defacto complainant that they need money to settle the company's claims of sub-contractor. That itself discloses that they do not have first hand information. Further the allegation made in the complaint is that the petitioners never intend to pay to the sub-contractor but by using the clout and network came out of Kuwait without making any payment to sub-contractor. The said allegations are nothing to do with the defacto complainant. Even according to the averments made in the suit, they have paid amounts to the company and the said amounts were not repaid to the defacto complainant despite their request. Hence they filed present complaint for repayment of amounts.

5. Learned counsel appearing on behalf of the petitioner to substantiate her contentions has relied on the contents of the F.I.R which reads as follows:

...I S.Divakar, am a resident of Door No.43-23-4, Dondaparthi, Visakhapatnam, I and my wife Smt. S.Ratnamala have accounts in Andhra Bank, Dwarakanagar, Visakhapatnam.

N.Gopinath, Managing Director, Newton Engineering & Chemicals Ltd., was my classmate in Pre-University Course (now equal to final year Intermediate Course) in Mrs. A.V.N.College, Visakhapatnam during 1964-65. Later he studied B.E. (Mech.) Course in A.U.Engineering College. Thereafter he went to Baroda (Vadodara), Gujarat and has been doing Mechanical Contracts. He established a Company NEWTON ENGINEERING & CHEMICALS LTD. His wife Smt. N.Vijayalaxmi is Director (Finance) of the said company. His two sons N.Vikram and N.Vishal are Vice Presidents of the company.

While so, during the year 2014-15 he secured a contract of laying pipeline etc., as a sub-contractor for "FINESCO" Company. FINESCO Company is the main Contractor for Kuwait Oil Company (KOC), Kuwait.

While executing the work, one Sub Contractor filed a case against Newton Engineering & Chemicals Ltd., for certain payments allegedly due to them from Newton Engineering & Chemicals Ltd. Thereupon the Government of Kuwait ordered Mr. Gopinath not to leave Kuwait till the case is disposed off. (Travel Ban). When Mr. Gopinath was in that difficult situation he and his wife Smt. N.Vijayalaxmi made frantic phone calls to me seeking my help to bail out Mr. Gopinath from the mess. They requested me to arrange money for their company to clear N.Gopinath's case in Kuwait which would ensure Mr.Gopinath to return to India. They also promised to give back money by selling some properties in Mumbai, Hyderabad etc. as and when Mr.Gopinath returns to India. All through this troubled times both of them requested my intervention to secure his safe release. In view of our past association, I was motivated to get him released from Kuwait.

I took money from my two brothers, friends and sent an amount of Rs.42,10,000/- (Rupees forty two lakhs ten thousand only) on dates as shown separately. I also took over draft by pledging my wife's house and sent an amount of Rs.90,50,000/- (Rupees ninety lakhs and fifty thousand only) on dates as shown separately.

I started sending amounts from 13.02.2017. I sent the amount based on their representation that the money was needed to pay to third party claimants who were behind the case and responsible to detain Mr. Gopinath in Kuwait by getting the Travel Ban imposed against him. Mr. Gopinath and his wife have been informing that the amounts sent by me were being utilized to pay the claims of the sub-contractor who complained against Mr. Gopinath's default. At the end of 2017, Mr. Gopinath returned to India.

As promised Mr. Gopinath, his wife and their company did not repay the amount taken from me by selling their properties or otherwise.

I learnt that they did not use the amounts to clear the dues of sub-contractor in Kuwait; on the contrary they utilized the money sent by me for improving their own business in India. Now that I learnt that Mr. Gopinath and his wife have connived with each other and duped me by deliberately making false representations to me that they needed money to settle company's claims of sub-contractor to get Mr. Gopinath out of Kuwait, although they did not intend to make any payment to the said third party contractor. They received the money for a specific purpose i.e. to pay to sub-contractor who complained against him.

Subsequent events revealed that Mr. Gopinath and his wife never intended to pay to the claimant sub-contractor but they used the issue to evoke sympathy gullible friends and relations like me to make a wind fall gain. Ultimately Mr. Gopinath by using his clout and network came out of Kuwait without making any payment to claimant sub-contractor.

In spite of the requests to return my money, he is not properly responding and more over avoiding to return the money with a malafide intention to cheat me.

Thus it is evident from the conduct of Mr. Gopinath and his wife Smt. Vijayalakshmi that with dishonest and fraudulent intention made false representations they informed that travel ban was imposed because of sub-contractor's claim and they needed money urgently to settle the said claims and thereby secure freedom to leave Kuwait and that once he comes back he would dispose of his properties and repay the amount to me, fully knowing that the money sent to Mrs. & Mr. Gopinath was, contrary to their representations and understanding with me appropriated by them for wrongfully gaining themselves. Thus both of them breached my trust and confidence reposed in them, thereby putting me to wrongful loss.

I therefore request you to kindly investigate into the matter and initiate action against the above persons for the offences of criminal conspiracy, cheating and criminal breach of trust. The following are the details of payments made by me:

<i>S.No.</i>	<i>Date</i>	<i>Amount in lakhs</i>	<i>Mode of payment</i>
	<i>1. S.Divakar</i>		
<i>1</i>	<i>13-02-2017</i>	<i>10</i>	<i>Online remittance</i>
<i>2</i>	<i>25-04-2017</i>	<i>10</i>	<i>Online remittance</i>
<i>3</i>	<i>02-05-2017</i>	<i>10</i>	<i>Online remittance</i>
<i>4</i>	<i>17-06-2017</i>	<i>2.10</i>	<i>Online remittance</i>
<i>5</i>	<i>10-05-2017</i>	<i>5</i>	<i>Online remittance</i>
	<i>2.S.Ratnamala</i>		<i>Online remittance</i>
<i>1</i>	<i>25-04-2017</i>	<i>10</i>	<i>Online remittance</i>
<i>2</i>	<i>11-05-2017</i>	<i>55</i>	<i>Online remittance</i>
<i>3</i>	<i>30-05-2017</i>	<i>10</i>	<i>Online remittance</i>
<i>4</i>	<i>03-06-2017</i>	<i>3</i>	<i>Online remittance</i>
<i>5</i>	<i>15-06-2017</i>	<i>2</i>	<i>Online remittance</i>
<i>6</i>	<i>27-07-2017</i>	<i>2</i>	<i>Online remittance</i>
<i>7</i>	<i>14-09-2017</i>	<i>5</i>	<i>Online remittance</i>
<i>8</i>	<i>10-10-2017</i>	<i>3.50</i>	<i>Online remittance</i>
	<i>3. A.Ratnamala</i>		
<i>1</i>	<i>18-09-2017</i>	<i>5</i>	<i>Online remittance</i>

6. The allegations made in the F.I.R is that the petitioners had borrowed amounts from the defacto complainant to settle the financial discrepancies with sub-contractors at Kuwait. They made them believe that they would repay the same after they return from Kuwait to India by disposing of the assets at Hyderabad and Mumbai. On perusal of the allegations made in the complaint is mainly on the basis of non-payment of the amounts which were paid to the petitioner for the same already the defacto complainant has approached the concerned civil court and filed a suit for recovery of the amount and the said suit is pending for consideration.

7. In an identical matter fell for consideration before the Apex Court reported in between **Prof. R.K.Vijayasathy and another vs. Sudha Seetharam and another**¹ where in also the defacto complainant has also instituted a civil suit for recovery of amounts. Thereafter they have filed complaint against the accused under section 405, 415 and 420 IPC alleging that the accused colluded to siphon away said money from the defacto complainant and the complaint was filed after long lapse of time. In the said matter, the court has observed as follows:

The jurisdiction under [Section 482](#) of the Code of Criminal Procedure has to be exercised with care. In the exercise of its jurisdiction, a High Court can examine whether a matter which is essentially of a civil nature has been given a cloak of a criminal offence. Where the ingredients required to constitute a criminal offence are not made out from a bare reading of the complaint, the continuation of the criminal proceeding will constitute an abuse of the process of the court.

In the present case, the son of the appellants has instituted a civil suit for the recovery of money against the first respondent. The suit is pending. The first respondent has filed the complaint against the appellants six years after the date of the alleged transaction and nearly three years from the filing of the suit. The averments in the complaint, read on its face, do not disclose the ingredients necessary to constitute offences under [the Penal Code](#). An attempt has been made by the first respondent to cloak a civil dispute with a criminal nature despite the absence of the ingredients necessary to constitute a criminal offence. The

¹ (2019) 16 Supreme Court Cases 739

complaint filed by the first respondent against the appellants constitutes an abuse of process of court and is liable to be quashed.

Even in the instant case according to the complaint, the respondent/defacto complainant has paid the amounts in the year 2017 and instituted the suit in the year 2020 and after lapse of more than three years they have made the present complaint. Hence the facts are identical to the above said judgment.

8. In another case reported in **Sharad Kumar Sanghi vs Sangita Rane**² wherein the Hon'ble Apex Court held that:

In the case at hand as the complainant's initial statement would reflect, the allegations are against the company, but the company has not been made arrayed as a party. Therefore, the allegations have to be restricted to the Managing Director. As we have noted earlier, allegations are vague and in fact, principally the allegations are against the company. There is no specific allegation against the Managing Director. When a company has not been arrayed as a party, no proceeding can be initiated against it even where vicarious liability is fastened on certain statutes. It has been so held by a three-Judge Bench in [Aneeta Hada v. Godfather Travels and Tours Private Limited](#)⁶ in the context of [Negotiable Instruments Act, 1881](#).

At this juncture, it is interesting to note, as we have stated earlier, that the learned Magistrate while passing the order dated 22.10.2001, had opined, thus :-

"It appears prima-facie from the complaint filed by the complainant, documents, evidence and arguments that accused company has committed cheating with the complaint by delivering old and accidented vehicle to her at the cost of a new 5 (2013) 4 SCC 505 6 (2012) 5 SCC 661 truck. Accordingly, prima-facie sufficient grounds exist for registration of a complaint against the accused U/s. 420 of [I.P.C.](#) and is accordingly registered."

When the company has not been arraigned as an accused, such an order could not have been passed. We have said so for the sake of comp 4leteness. In the ultimate analysis, we are of the considered opinion that the High Court should have been well advised to quash the criminal proceedings initiated against the appellant and that having not been done, the order is sensitively vulnerable and accordingly we set aside the same and quash the criminal proceedings initiated by the respondent against the appellant.

The relief sought in the said suit reads as follows:

...Plaintiffs therefore pray for a decree against the defendants jointly and severally as follows:

² 2015 (12) SCC 781

For Rs.1,76,05,352/- together with interest on Rs.1,32,60,000/- at 12% per annum from the date of suit till the date of realization.

For cost and such other reliefs as the Honourable Court deems fit in the circumstances of the case.

9. Learned counsel for the petitioner has submitted that the petitioners have paid the amount through RTGS accounts to the Newton Engineering and Chemicals Limited. To substantiate the said contentions he has relied on the bank statements filed along with the petition, it clearly disclose that the amounts were transferred to the company's accounts through RTGS knowing fully well they have made the payment to company and then they filed a suit against the company for recovery of the amounts but for strange reasons without making the company as a party, now the present complaint is made which cannot be taken into consideration as per the observations of the above judgment. After notice, the defacto complainant had represented through Advocate and he submits that the request made by the petitioner being a classmate and believing the words that in view of the complaint made by the sub-contractors, the petitioners have struck at Kuwait and unless and until they settle the issues with sub-contractors they are unable to move from Kuwait. Hence they requested for huge amounts, though the defacto complainant is not having such amount, he borrowed some amounts from friends and also he has requested some of the friends to bail out the petitioners and send the amounts to the petitioners to pay the debts to the sub-contractors. After receipt of the amounts instead of repaying the same to the sub-contractors, he used the said amount for their business purpose and he has not repaid the amount despite repeated requests. They came to know that only to deceive the defacto complainant, the petitioners have stated that they need money to repay the debts to the sub-contractors and hence

believing their words, huge amounts were transferred which is nothing but cheating. Hence the said action of the petitioners would squarely attracts the definition under section 415 of IPC. In view of the same, though they have filed a civil suit for recovery of the amount but the intention of the petitioners to cheat the defacto complainant is criminal motive. Hence they have made a complaint to the police and basing on the contents in the complaint, the authorities have rightly registered a crime under section 420 IPC.

10. To support the contentions, the petitioners have relied on the judgment of the Hon'ble Supreme Court reported in between ***Priti Saraf and another vs State of NCT of Delhi and another***³ where in it is recited that though the civil disputes are pending between the parties, the Hon'ble High Court has quashed the criminal proceedings. As against it went up to Apex Court and the Apex Court has observed that the High Court was not justified in quashing the criminal proceedings in exercise of inherent jurisdiction and observed in many times offence of cheating is committed in the course of commercial transaction hence the same should be decided only after full fledged trial. Hence even in the instant case, though the civil proceedings are pending but the intention and motive of the petitioners is only to cheat the defacto complainant. Hence the petitioners are liable for criminal prosecution.

11. A perusal of the record and on hearing the parties, no doubt the petitioners have filed a suit and complaint made by the defacto complainant no specific averments with regard to cheating. There are no specific proof to support the said allegations made in the complaint. The respondents in its complaint itself clearly states that basing on

³ Criminal Appeal No(s) 296 of 2021

some information, the petitioners have not paid the amounts to the sub-contractors and utilized for the benefit of the business. That itself shows that the allegations are made bold and baseless. As per the ratio decided by the Hon'ble Apex Court reported in ***Sharad Kumar Sanghi vs Sangita Rane*** (referred to above) it is clear that once a transaction is made with the company, the company being a legal entity, unless and until the company is made as co-accused, the complaint is not maintainable. On this ground alone, the complaint required to be quashed. On perusal of the record and considering the facts of the case, it is purely a civil dispute and there are no allegations or supporting material to substantiate that the petitioners have cheated the defacto complainant.

12. Accordingly, the criminal petition is allowed and the F.I.R.No.374/2020 dated 12.8.2020 registered on the file of the Dwaraka police station, Visakhapatnam District under section 420 of IPC against the petitioners is hereby quashed.

As a sequel, pending miscellaneous petitions, if any, shall stand closed.

JUSTICE D.RAMESH

Date: 22.3.2022
RD

THE HONOURABLE SRI JUSTICE D.RAMESH

CRIMINAL PETITION No.315 of 2021

Dated 22.3.3022

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