

Smt. Sitara Devi Jain and Others Vs. State Rep. by Its Inspector of Police, Team-i, Central Crime Branch, Egmore and Another

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Court : Chennai

Decided On : Nov-27-2012

Judge : A. Arumughaswamy

Appeal No. : Criminal Original Petition Nos.22037, 26094 of 2008, 2388, 7896 of 2010 and 22431 of 2011

Appellant : Smt. Sitara Devi Jain and Others

Respondent : State Rep. by Its Inspector of Police, Team-i, Central Crime Branch, Egmore and Another

Advocate for Pet/Ap. : For the Petitioners: R. Sriramulu S.C. for M/s. R. Karthikeyan, M/s K. Govindarajan, Abudu Kumar Rajaratnam Advocates. For the Respondents: R1, A.N. Thambidurai, Addl. Public Prosecutor (Crl.Side), R2, Shanmugasundaram, Senior Counsel & B. Kumar, Senior C

Judgement :

(Petitions filed under Section 482 of Cr.P.C., praying to call for the records in Crime No.308 of 2007 on the file of the respondent and quash the same.)

COMMON ORDER:

The petitioners are the Accused No.1, 2, 4, 5, 6, 7, and 8 in Crime No.308 of 2007 on the file of the Inspector of Police, Team-I, Central Crime Branch, Egmore, Chennai-600 008 and they have come forward with these petitions to quash the said complaint against them.

2. The allegations in the complaint are:- Accused No.1 is the Leasing Finance Limited, Mylapore, Chennai and its branch office situated at Mysore represented by its Manager and Authorized Signatory Mr.Kuldeep Jain. Accused No.2 and 3 are the Directors of the first Accused Company.

3. The complainant approached the Accused No.1 at their Chennai office for a financial assistance/management assistance of Rs.13,92,00,000/-. The accused agreed to deposit the said sum and as such Memorandum of Understanding dated 27.01.2004 was entered into between the accused and the complainant. As per Clause 8(a) of the MOU, the complainant was required to place the aforesaid sanctioned loan in a fixed deposit account either in London or Singapore to the entire satisfaction of the accused and the accused or its nominee shall be the sole signatory for such money. As per clause 8(b) of the said MOU at the instance of the complainant, the Accused No.1 has incorporated a company in United Kingdom namely Perk-Inn International Limited. It was agreed to open a current account of the Complainant company in a bank in United Kingdom and the Accused No.1 agreed to transfer the money into the complainant company's account in India and then to the said account in UK. The following are the main salient features

4. Accused No.2 represents the Accused No.1 company. The Accused Nos. 3 to 7 were the nominees of the Accused No.1 and were appointed as Directors in terms of the aforesaid MOU. Accused No.7 and 8 have been nominated by the Accused No.1 as Directors in the 100% subsidiary company of the complainant company viz., Perk Inn International Limited, at United Kingdom.

5. As per Clause 10(b) of the MOU, the accused or its nominee will have full control over the operations of the said account in London and also in the bank for placing deposits and Mr.Karunakaran or the confirming party under the aforesaid MOU or any other person whomsoever were to have no right/say or control

whatsoever over the said money/deposit.

6. As per the Clause 4(a) of the MOU, in case the complainant failed to obtain the foreign loan as he was expecting within 60 days from the date of depositing the money in the complainants company account in India, the period of financial assistance were to automatically get reduced to 60 days.

7. As per Clause Nos. 5 and 6 of the MOU the complainant paid to the accused a non-refundable sum of Rs.35,72,000/- at the time of signing the agreement and Rs.9,28,000/- towards documentation charges, which amounts have been acknowledged in the said MOU by the Accused No.1.

8. As per Clause 20 of the MOU the accused should get back Rs.13,92,00,000/- along with service charges of Rs.3,80,96,000/- amounting to Rs.17,72,96,000/- from the complainant. In case the complainant gets the first instalment of foreign fund, the total amount payable by the complainant to the Accused No.1 was agreed at Rs.22,27,20,000/-.

9. As per Clause Nos. 12(i), (ii) and (iii) of the MOU the complainant was to hand over the original title deeds of its various immovable properties to the accused. Accordingly, the complainant handed over to the Authorized Signatory of the Accused No.1 company the following documents at Chennai office on 03.02.2004 and it was acknowledged by them.

1. Xerox copies of passport of Mr.K.Karunakaran
2. Original land documents of land situated at Electronics City Phase II extent 11.37 acres along with encumbrance certificate and revised possession certificate (lease cum sale agreement and supplementary lease cum sale agreement).
3. Original land document of land situated at Electronics City Phase II extent of 5.07 acres along with encumbrance certificate and revised possession certificate (lease cum sale agreement and supplementary lease cum sale agreement).
4. Xerox copies of legal opinion, ROC papers etc.
5. Original certificate of Incorporation framed-181-7281.

6. Original certificate of commencement framed-181-7281.
7. Original certificate of consequent to change in name No. 181-7281.
8. Register of members.
9. Board resolution file
10. Income tax file
11. Registrar of Companies file
12. Income tax file
13. Land documents of Karunai Granite Private Limited and other documents.

10. As per the MOU the complainant received to its account Rs.13,51,00,000/- from the accused. Further, the complainant paid Rs.45,00,000/- to the Accused No.1 towards the service charges for the said loan before signing the MOU. Under Clause No.9(g) of MOU, the Accused No.1 must get all the documents from the bank after deposit been notarized in UK and produce to the complainant. But intentionally he did not do that. Due to internal illegal acts of the accused in performance of its part under the terms of the MOU, it did not succeed in getting the foreign fund for execution of its aforesaid project. Since the complainant did not succeed in getting the foreign funds within 60 days from the date of MOU, as per clause 24 of the MOU, the aforesaid money of Rs.13,92,00,000/- was to be refunded to the complainant within a period of two months after the expiry of the said 60 days. As per Clause No.8(d) of MOU the deposit period will be extended by the Accused No.1 for another period of 60 days maximum provided the complainant intimate in writing and pay Rs.34.8 lakhs per month 30 days in advance before the expiry of 60 days. In case, the complainant fails to pay the charges, the deposit shall be withdrawn forthwith.

11. The complainant started pursuing its demand of return of its aforesaid documents and statutory registers with the accused and after persistent reminders the accused demanded a payment of Rs.4,75,00,000/- to be deposited in their Chennai account for returning of all the aforesaid documents immediately. Even

after receipt of the aforesaid amount, the accused did not return the aforesaid documents to it and further did not return Rs.4.75 crore till date. The said complaint was registered by the first Respondent in Crime No.38 of 2007.

12. The Accused/petitioners have come forward with these Criminal Original Petitions to quash the said complaint against them on the following grounds:- The first ground agitated by the petitioners is that as per Clause 10(e) of the MOU, in the event of foreclosure of the deposit there will not be any change in charges and the complainant shall have to pay the service charge for the entire 60 days and for 13 months i.e. Rs.3,80,96,000/- to the first accused company at the end of the period of 13 months.

13. The second ground agitated by the petitioners is that as per Clause 12(v) of the MOU, in the event of the complainant failure to pay the amount borrowed on time, the first accused company can recover its dues along with due service charges and penal charges by sale/lease/letting out of the properties given as security as its sole and absolute discretion whether to outsiders or to itself or its nominees at rates decided at its own freewill and understanding.

14. The third ground agitated by the petitioners is that as per Clause 31 of the MOU, the complainant specifically and distinctively agreed that the first accused company is only helping by making financial assistance under the MOU and the complainant shall have no right to claim any amount whatsoever, and or any liquidated damages/specific performance from the first accused company or its nominees. The complainant have also specifically agreed that they do not have any right and shall not initiate any legal proceeding against the first accused company or its nominee whatsoever and withhold or cause to withhold in any manner whatsoever the deposited amount and service charges for any reason whatsoever.

15. The fourth ground agitated by the petitioners is that as per Clause 33 of the MOU, only the courts at Mysore has jurisdiction. As per clause 36 of the MOU, in the event of dispute between both the parties the same will be referred to arbitrator and his decision will be final and binding on all the parties and the petitioner was the arbitrator as per MOU.

16. The fifth ground agitated by the petitioners is that as per clause 22 of the MOU, if there is any delay or default in payment by the complainant, the first accused company shall not return the documents received as security till such time all the dues are discharged in full to the satisfaction of the first accused company.

17. The contention of the learned counsel appearing for the petitioners/accused is that as per the MOU dated 27.01.2004, entered into between them the accused/Company lent a sum of Rs.13,92,00,000/- to the Complainant/Promoter on depositing the company documents of several properties and shares as securities the complainant also issued post dated cheques. The loan sanctioned to be kept in an account either in London or Singapore and as such deposit shall be as per the laws of the Government and the complainant will be solely responsible for obtaining RBI clearance, etc., for the investment in abroad. The complainant/Promoter was to pay the service charges of Rs.3,80,96,000/- and interests to the accused/Company for 60 days and repay the loan in March 2005 in 13 months. As per Clause 20 of the MOU the accused/Company should get back Rs.13,92,00,000/- along with service charges of Rs.3,80,96,000/-amounting to Rs.17,72,96,000/- from the Complainant/Promoter. As per Clause 20 of the MOU, in case the complainant/Promoter gets the first instalment of foreign fund, the total amount payable by the complainant/Promoter to the accused/Company was agreed at Rs.22,27,20,000/-. The amount represents the service charges for 13 months. As per Clause 24 of the MOU the aforesaid money of Rs.13,92,00,000/- was to be refunded automatically to the account of the accused/Company without any reference to the complainant/Promoter. Under Clause 8(d) of the MOU the deposit period will be extended for a maximum of 2 months and that too the Complainant should intimate and pay the Accused Company 30 day in advance the service charge @ Rs.34.80 lakhs per month. In case the complainant/Promoter fails to pay the charges, the deposit shall be withdrawn. Since the amount paid by the accused/Company is with the complainant/Promoter's bank account the accused/Company could not take back the amount. When once the amount is in the Complainant/Promoter's bank account there is no question of cheating by the accused/Company. Hence, the offence under section 420 IPC against the accused/Company is not made out.

18. The next contention agitated by the learned senior counsel appearing for the accused is that as per Clause 33 of the MOU both the parties agreed that the MOU shall be under the jurisdiction of Courts at Mysore. As per Clause 36 of the MOU both the parties agree that in the event of dispute whatsoever they will refer the matter to Mr.V.K.Jain and his decision will be final and binding on all the parties. Hence, the complaint itself is not maintainable. The learned senior counsel further contended that already a similar complaint has been given against the accused/Company at Mysore and on the said complaint FIR was registered in Cr.No.76 of 2007 on the file of the Kuvempunagar Police Station at Mysore, on the same allegation the second complaint is not maintainable and it has to be quashed. The learned senior counsel for the accused/Company further contended that the accused/Company alone has advanced huge amount in the name of the company under the MOU and since it is a matter of civil in nature this cannot be converted as a criminal case. Hence, he prays that the complaint has to be quashed.

19. Both the learned senior counsels appearing for the complainant/Promoter/second respondent contended that initially a complaint was given to the police and since it was not taken on file by the police, the complainant filed CrI.O.P.No.1777 of 2007 before this Court seeking to direct the first respondent herein to register the case in respect of the complaint given by the Complainant/Promoter on 12.05.2007 and file the final report and this court by order dated 20.06.2007 directed the first respondent to register the FIR on the basis of the complaint and pursuant to the order passed by this court, FIR has been registered against the accused/Company in Crime No.38 of 2007. Aggrieved by the order passed by this Court in CrI.O.P.No.17771 of 2007 dated 20.06.2007, the accused/Company preferred SLP CrI.No.3774 of 2007 before the Supreme Court and the Apex Court after hearing the elaborate arguments advanced by the parties, dismissed the said SLP by order dated 18.08.2008. Hence, the present petition to quash the complaint is not maintainable in law and it is against the judicial discipline and hence it has to be dismissed.

20. The next contention of the learned senior counsel for the complainant/Promoter is that the complainant/Promoter already parted away a

sum of Rs.8.00 Crores as per the MOU and after the MOU the accused inducted two more persons as Directors of the accused/Company and as soon as they becoming as Directors of the accused/Company, the complainant/Promoter could not exercise his powers and he become powerless. The other Directors taken away the money for which the Reserve Bank of India has launched prosecution against them. These are the matters to be decided by the trial Court at the time of trial. Hence, this petition has to be dismissed.

21. Heard Mr.B.Sriramulu, learned senior counsel appearing for the petitioners/accused No.1, 4 and 7 in Crl.O.P.Nos. 22037 of 2008 and 26094 of 2008, Mr.Abudu Kumar Rajaratnam, learned counsel appearing for the petitioner/Accused No.2, 5, 6 and 8 in Crl.O.P. Nos. 2388 of 2010, 7896 of 2010 and 22431 of 2011, Mr.A.N.Thambidurai, learned Additional Public Prosecutor, appearing for the first respondent in all Crl.O.Ps. Mr.R.Shanmugasundaram and Mr.B.Kumar, learned senior counsels appearing for the second respondent in Crl.O.P.Nos. 2388 of 2010 and 7896 of 2010 and perused the materials available on record.

22. It is not in dispute that the Complainant was originally a Promoter and approached the accused/Company for financial assistance of Rs.13,92,00,000/- for which MOU has been entered into between the parties and as per Clause No.4 of the MOU the accused/Company agrees to give a sum of Rs.13,92,00,000/- bearing front ended charges of Rs.3,80,96,000/- aggregating to Rs.17,72,96,000/-. and if the Promoter fails to obtain the foreign loan within 60 days from the date of depositing the money in the Promoter's company account in India, the period of financial assistance will be automatically reduced to 60 days and the Promoter shall have to pay the service charges for the entire 13 months. In the event of foreign loan sanctioned and released to the Promoter, the service charges payable by them will be Rs.8,35,20,000/- together with documentation charges of Rs.9,28,000/-. The Promoter has agreed to pay Rs.35,72,000/- at the time of signing of this agreement and Rs.9,28,000/- towards documentation charges and this amount is not refundable for any reason whatsoever. As per the MOU, the entire amount of Rs.13,92,00,000/- be placed as Fixed Deposit in a specified bank either in London or Singapore to the entire satisfaction of the Company for a

maximum period of 13 months, which will be free from any lien, and encumbrances whatsoever over the said deposit and the Company/its nominee will be the sole depositor. The Complainant/Promoter has given those amounts by way of two instalments viz., Rs.3,80,976,000 Crores immediately after the expiry of 60 days period and Rs.4.75 Crores on 12.01.2007 also not in dispute.

23. From the rival submissions it is also seen that amount could not be mobilized by the Complainant/Promoter up to the satisfaction of the the authorities in the abroad and therefore, the company could get loan as they expected. Then trouble started when the accused company demanded refund of money as per MOU. Now, we will analyse one by one.

24. The first submission made by the learned senior counsel for the Complainant/Promoter is that the quash petition is not maintainable in view of the orders passed by the Apex Court in SLP CrI.No.3774 of 2007 dated 18.08.2008. From the perusal of the records it is seen that at the first instance the Complainant/Promoter approached the local police for registration of the FIR and since the FIR was not registered by the local police, he filed CrI.O.P.No.17771 of 2007 before this Court seeking to direct the first respondent herein to register the case in respect of the complaint given by the Complainant/Promoter on 12.05.2007 and file the final report and this court by order dated 20.06.2007 directed the first respondent to register the FIR on the basis of the complaint. The relevant portion of the order passed by this Court runs as hereunder:

"Considering the submissions of both sides, the petitioner is directed to furnish a fresh copy of the complaint dated 12.05.2007 to the third respondent police and the third respondent is directed to receive the fresh copy of the complaint, consider the same and if the allegation contained in the complaint constitutes commission of cognizable offence, should register the case as per the mandatory provision under Section 154 of Cr.P.C. and investigate the same in accordance with law and file the final report as expeditiously as possible and more particularly within a period of three months from the date of receipt of a copy of this order."

25. Pursuant to the order passed by this court, FIR has been registered by the Inspector of Police, Central Crime Branch, Team I, Egmore, Chennai-8 on

21.06.2007, against the accused/Company in Crime No.38 of 2007. The last portion of the FIR runs as hereunder:

"Sir,

On this complaint, as per the orders of the Hon'ble High Court in Crl.O.P.No.17771/2007 dated 20.6.2007, I have registered a case today 21.6.2007 at 18.30 hours in X.Cr.No.308/2007 U/s.420 IPC and took up investigation."

26. Aggrieved by the order passed by this Court in Crl.O.P.No.17771 of 2007 dated 20.06.2007, the accused/Company preferred SLP Crl.No.3774 of 2007 before the Supreme Court and the Apex Court after hearing the elaborate arguments advanced by the parties, dismissed the said SLP by order dated 18.08.2008. The relevant portion of the order of the Apex Court runs as hereunder:-

"Though the case was placed under the heading "Incomplete After Notice Matters" but learned counsel appearing on behalf of the parties made a prayer that the matter should be heard on merit.

Having heard the learned counsel for the parties at length, we are of the view that it is not a fit case for interference with the impugned order.

The special leave petition is, accordingly, dismissed. "

27. Now, the contention Mr.B.Kumar, learned senior counsel appearing for the Complainant/Promoter is that since SLP filed by the accused/Company has been discussed at length and scrutinized by the Apex Court and it has been dismissed, the petitioners/accused are not entitled to file quash petition.

28. The learned senior counsel appearing for the petitioners/accused Company contended that the Apex Court has confirmed the order passed by this Court. Therefore, this Court can hear the present petition on merits and walk through in this petition.

29. From the perusal of the records it is seen that with due respect, originally, this Court has passed an order in Crl.O.P.No.17771/2007 dated 20.6.2007 directing

the first respondent to register the FIR, against which the accused preferred SLP Crl.No.3774/2007 before the Apex Court and the Apex Court has dismissed the said SLP confirming the earlier order passed by this Court in Crl.O.P.No.17771/2007 dated 20.6.2007, directing the first respondent to register the FIR and that aspect alone has been scrutinized by the Apex Court. The interpretation given by the learned senior counsel for the Complainant/Promoter that once the matter has been taken as SLP before the Apex Court and on that basis the Apex Court passed an order confirming the order passed by this Court, the accused cannot file the quash petition before any of the Court will not hold good and there is no force in the said argument. The Apex Court has confirmed the order passed by this Court in Crl.O.P.No.17771/2007. Even in the impugned order this Court has said that the allegations contained in the petition constitute the commission of cognizable offence the police has been directed to inquire the matter. This order alone has been confirmed by the Hon'ble Supreme Court. It will not mean that the allegations are correct and the offence against the accused is deemed to be proved. Hence I am of the view that this ground agitated by the respondent will not hold good and I reject this contention.

30. The next contention of the learned counsel for the complainant/Promoter is that after the MOU the accused company has inducted two more Directors and they had withdrawn the money and walked away. Hence, the complainant/Promoter is entitled to pursue the complaint.

31. From the perusal of the records it is seen that MOU entered into between the parties is not in dispute. As per the MOU the accused company has to deposit the amount and in turn he has deposited the amount. The complainant/Promoter could not fulfill the requirements upto the satisfaction of the authorities of abroad, he could not get the fund is also not in dispute. The complainant/Promoter has paid the service charges to the accused company in two instalments viz., Rs.3,80,96,000 Crores immediately after the expiry of 60 days and Rs.4.75 Crores on 12.1.2007 as agreed by them in the MOU which represents the charges for the entire 13 months period also not in dispute and it shows the conduct of the complainant/promoter that he is scrupulously followed the MOU and on that basis only he has made the payment towards service charges of the accused company.

32. The short point for my consideration is: Whether the amount is still in the company or not. Prima facie the accused company has produced the documents which shows the letter of RBI which indicate that still the amount is with the Complainant/Promoter's company account. Unless the complainant gives nod to withdraw the amount the petitioners/accused company could not get back the amount also has to be seen from the letter of RBI, which runs as hereunder:

"RESERVE BANK OF INDIA

PE.BG.ODI No.499/11.01.197/2007-08

The Authorised Signatory

ShivalikaLeasing and Finance Ltd.

No.5-D, Mookambika Complex,

No.4, Lady Desikachari Road,

Mylapore, Chennai-600 004.

Dear Sir,

Closure of the WOS in UK-M/s Perkinn International

Please refer to your letter dated July 28, 2007 on the captioned subject. In this connection, we regret our inability to accede to your request for the closure of the above company and to bring back the fund. The request has to be forwarded by M/s Perkinn International Ltd., through their Authorised Dealer to whom the Identification Number was allotted by Central Office.

Yours faithfully,

Sd/. xxx

(H.Gopalakrishnan)

Manager. "

As per the RBI letter "amount is with the bank of Singapore". Therefore, from this it is very clear that unless the Complainant/Promoter gives authorisation the amount will not be released by the Reserve Bank of India has to be seen and without concurrence of RBI the amount cannot be withdrawn by the accused also has been proved. Further it is seen as per the MOU arbitration clause and the jurisdiction of the complaint also has been specified with the Mysore Police. As on today the deposit made by the accused company is still in Reserve Bank of India that is the reason the Reserve Bank of India issued Show Cause Notice to the complainant regarding the non-utilization of Indian money at the Abroad Country. The accused money is under the deposit of the company there is no question cheating arise. In fact the complainant has not paid the service charges of Rs.34.80 Lakhs for every month from 2007 has also been admitted. Unless the principal amount is paid by the company, the promoter is bound to pay the service charges of Rs.34.80 lakhs for every month. To avoid further financial burden for every month, the complainant is directed to address a letter to the Reserve Bank of India after fulfilling their formalities enable the petitioners/accused to withdraw a sum of Rs.13,92,000 which was deposited in the bank at abroad. At the same time, the petitioners/accused are also directed to return those documents to avoid further confusion. For the left out claim both the parties can avail their remedy before the Civil forum within six months thereafter as per MOU. Once a sum of Rs.13,92,00,000/- deposited by the petitioners company is lying in the account of the Promoter's company in abroad where is the question of satisfying the ingredients of Section 420 of IPC. Hence, I am of the view that no ingredients much less the ingredients of Section 420 of IPC. has been made out against the petitioners/accused.

33. Therefore, under this juncture directing the petitioners/accused to face the ordeal of trial is waste of judicial time. Further from the perusal of the records and from the arguments advanced by the learned counsel appearing on either side, it is very clear that it is a case arising out of MOU which can be decided only by the Civil Court on each and every aspect of the case. In a similar fact situation, the Hon'ble Apex Court has laid down a proposition in the case of *Thermax Limited and others vs. K.M.Johny and others* reported in (2012) 2 SCC 450 : (2011) 13 Supreme Court Cases 412 and it is useful to extract the relevant portion which

runs as follows:-

".....If there is a flavour of civil nature, the same cannot be agitated in the form of criminal proceeding. If there is huge delay and in order to avoid the period of limitation, it cannot be resorted to as a criminal proceeding.

The essential ingredient for an offence under Section 420 IPC, is that there has to be dishonest intention to deceive another person. The relevant allegations in the complaint and perusal of the same clearly shows that no such dishonest intention can be seen or even inferred inasmuch as the entire dispute pertains to contractual obligations between the parties. Since the very ingredients of Section 420 are not attracted, the prosecution initiated is wholly untenable. Even if we admit that allegations in the complaint do make out a dispute, still it ought to be considered that the same is merely a breach of contract and the same cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right from the beginning of the transaction. Inasmuch as there are number of documents to show that the appellant Company had acted in terms of the agreement and in a bona fide manner, it cannot be said that the act of the appellant Company amounts to a breach of contract. "

As per the dictum laid down by the Hon'ble Supreme Court of India, the case in hand also yet another example to show that the case gives to civil flavour which cannot be decided in the Court other than the civil forum.

34. While considering the facts and circumstances of the case, as per the Clause 33 of the MOU the jurisdiction lies only at Mysore. Further, from the records it is seen that already FIR has been registered by the Kuvempunagar Police at Mysore in FIR No.0076, dated 16.08.2007. Therefore, viewing from all the angles the complainant has not established any allegations made against the accused are prima facie proved. Hence, the complaint is hereby quashed and the quash petition is allowed. The parties are directed to work out their remedy before the civil forum.

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