

**IN THE GAUHATI HIGH COURT**  
**(THE HIGH COURT OF ASSAM; NAGALAND; MIZORAM AND ARUNACHAL PRADESH)**

**ITANAGAR PERMANENT BENCH NAHARLAGUN**

**Criminal Petition No. 36(AP) of 2017**

1. **Mr. Sushil Sethi,**
2. **Mr. Anil Sethi,**  
Both are sons of Late Punam Chand Sethi,  
Residents of 113 Park Street,  
Kolkata-700016

..... **Petitioners.**

**-VERSUS-**

1. The State of Arunachal Pradesh, through the learned Public Prosecutor, Government of Arunachal Pradesh.
2. The Department of Hydro Power Development, Govt. of Arunachal Pradesh.
3. The Department of Power, Govt. of Arunachal Pradesh, represented through Executive Engineer (E), Tawang Electrical Division, Vidyut Bhavan Itanagar, Arunachal Pradesh

.....**Respondents.**

**::BEFORE::**

**THE HON'BLE MR JUSTICE AJIT BORTHAKUR**

**Date of hearing : 28.08.2018**

**Date of judgment : 07.09.2018.**

**By Advocates:**

For the **petitioners:** Mr. B. Deb, learned Sr. counsel,  
Ms. Panchali Bhattacharya.

For the **respondents:** Mr. K. Tado, learned P.P for the State of Arunachal Pradesh, Ms. M. Tang, learned Addl. P.P for the State of Arunachal Pradesh.

## **JUDGMENT & ORDER**

Heard Mr. B. Deb, learned Senior counsel, assisted by Ms. Panchali Bhattacharya, learned counsel appearing for the petitioners and Mr. K. Tado, learned Public Prosecutor, assisted by Ms. M. Tang, learned Additional Public Prosecutor, appearing for the State respondents.

**2.** By this petition, under Section 482 of the Code of Criminal Procedure (for short 'Cr.P.C'), the petitioners have prayed for quashing of the proceeding being G.R Case No.05/2000/294, under Section 120B/420 of the Indian Penal Code (for short 'IPC'), pending in the Court of learned Judicial Magistrate, First Class, Tawang, Arunachal Pradesh and all orders passed therein along with the FIR being Jang P.S. Case No.05/2004, dated 26.09.2000.

**3.** The petitioners' case, in a nutshell, is that the petitioner No.1 is the Managing Director of the M/s SPML Infra Ltd., previously known as Subhash Project Marketing Ltd. and the petitioner No.2 is the Director of the said M/s SPML Infra Ltd. and both of them are brothers. It is a public limited company, incorporated under the Companies Act, 1956 and having its registered Office at New Delhi. A contract was signed, on 18.03.1993, between the M/s SPML Infra Ltd. and the Government of Arunachal Pradesh for construction, supply and commissioning of the Nuranang Hydel Power Project at a cost of Rs.24,96,05,690/-, and the project was due to be completed by 15.04.1996.

**4.** The petitioners have contended that there was no dispute being raised by the respondent No.3, the Department of Power, Govt. of Arunachal Pradesh (for short 'DOP') with regard to completion and commissioning of the project including commissioning of the 3(three) Power Generating Units. The Chief Engineer of the respondent No.3 issued a certificate, dated 30.09.1997, to the petitioners certifying satisfaction over the execution of the said project and its commissioning in July, 1996 and further, thereby confirmed that in the project, besides other equipments and machineries, the company supplied and erected structural steel works for construction of power house, switchyard and other structural works and also that the overall performance of their work was very good. The Chief Engineer of the respondent No.3/DOP issued another certificate, dated 21.09.1998, certifying the company's work performance as very satisfactory noting further that their technical team of experts executed the works efficiently to the satisfaction of the Engineers of

the DOP. By the said certificate, it was stated that M/s SPML Infra Ltd. was also entrusted with the maintenance of the power plant of the 3(three) Units and that the project generated 90 Lac KW Units of electricity and that the job done by the Company was very satisfactory.

**5.** It is the contention of the petitioners that since the project was commissioned in July, 1996, the defect liability period for M/s SPML in the project expired after 18(eighteen) months i.e., in January, 1998 as per terms of the contract and after expiry of the said defect liability period. i.e., the warranty period, another certificate was issued by the Chief Engineer of the respondent No 3/DOP expressing full satisfaction with regard to commissioning of the project and its maintenance. However, the respondent No.3/DOP, Arunachal Pradesh refused to make any payments against the work of maintenance.

**6.** The petitioners have further contended that the respondents categorically admitted that the power plant was in a stage of handing over after performance test, in the Minutes of the meeting, held on 06.11.1997, in the Office of the Chief Engineer, DOP, Arunachal Pradesh. However, on 15.12.1998, the respondents acknowledged the claim of M/s SPML Infra Ltd. towards the maintenance of the project, but requested the company to forgo the maintenance cost claim for the last two years vide the Minutes of the meeting held on 15.12.1998 at the office chamber of the Minister (Power), Govt. of Arunachal Pradesh. Therefore, the M/s SPML Infra Ltd. issued a notice to the respondents to take over the Nuranang Project by on or before 31.03.2000, else the company will treat that the DOP has taken over the project from them w.e.f. 01.04.2000 and no risk shall be fastened on the company after 01.04.2000, which was, of course, after almost 18 months since the second certificate, dated 21.09.1998 was issued and almost 4(four) years from the date of commissioning of the project.

**7.** The petitioners have also contended that the respondents, in spite of being aware of all these facts and circumstances and even appreciating that the entire matter of disputes pertained to contractual disputes and as such, civil in nature, which the petitioners were trying to resolve the disputes by way of arbitration, deliberately made effort to convert the same into a criminal liability by way of filing a complaint, at a belated stage, before the Deputy Commissioner, Tawang district, which was subsequently registered as an FIR, dated 26.06.2000, and thereupon, Jang P.S. Case No.05/2000, under Section 420 of the IPC, dated 26.06.2000 was

registered, without the knowledge of the petitioners and after purported investigation submitted charge-sheet No.03/2004, dated 28.05.2004, which also remained not known to them till the year 2017.

**8.** The petitioners have further contended that the contractual disputes between the parties were adjudicated by the learned Arbitral Tribunal and the Tribunal passed an award, dated 05.11.2016 rejecting most of the claims of the claimant being M/s SPML Infra Ltd. Against the said Award, the company preferred a petition under Section 34 of the Arbitration and Conciliation Act, 1996 being Arbitration Case No. 02/2017 before the Court of learned District Judge, Western Division, Yupia, Arunachal Pradesh and the learned District Judge suspended the operation of the arbitral award, dated 05.11.2016 and the effect of the said order has been extended from time to time. According to the petitioners, the disputes between the parties regarding the discharge of contractual obligations are purely civil in nature and the same are duly adjudicated by a Civil Court of competent jurisdiction.

**9.** The petitioners have also contended that from the FIR, it transpires that the respondent No.3/DOP had sent the samples of the 'runner bucket' in question which was commissioned by the petitioners' company in July, 1996, for testing after the same had broken down during the year 2000, after the liability period under the terms of the contract expired in January, 1998. The petitioners have stated that from the perusal of the FIR, it appears that the respondent No.3/DOP has agitated that the analysis reports of the test, conducted by them upon the sample of the broken 'runner bucket' did not match with the test reports submitted by M/s SPML Infra Ltd. and the petitioners were unaware about any collection of samples by the police from the defective runner bucket, which was otherwise in the custody of M/s SPML Infra Ltd. Therefore, the petitioners have contended that no ingredient of any criminal offence has been made out and/ or reported by the respondent No.3/DOP to the police. The petitioners have stated that at best the disputes being arising out of alleged breach of the terms of the contract which are already pending adjudication in the two arbitrations proceeding, in one of which proceedings, the Hon'ble Supreme Court has stayed the proceeding and the other proceeding is presently pending in the Court of learned District Judge, Western Division, Yupia. Consequently, the filing of the charge-sheet over the contractual disputes between the parties is not sustainable in law. Hence, the instant proceeding under Section 482 of the CrPC, praying for quashing of the criminal proceeding..

**10.** The respondents No.1, 2 and 3, in their common affidavit-in-opposition contested the petition, on the grounds, *inter alia*, that in the Nuranang Project as per the terms of the agreement in respect of the equipments testing at pre-commissioning stage, series of testings were made since June 1996, but various components failed in the trial operations, for which the plant was never ready for final commissioning test and therefore, the respondents/DOP physically inspected the plant. In course of physical inspection of the plant, the DOP found that three Runner buckets viz., Units 1, 2 and 3 were cracked and damaged. Pursuant thereto, the damaged components were sent for testing to the National Test House, Kolkata. After testing, the National Test House submitted its report. In the aforesaid report, the chemical composition of the broken runner was found containing 5.28% Nickel and 7.54% Chromium, which composition was contrary to the specification, as per agreement. As per terms of the agreement, the composition ought to have been Nickel 4% and Chromium 14%. The respondents/DOP, therefore, have taken the stand that the petitioners' company supplied substandard runner buckets (turbines) containing components of material which were not upto the specification provided in the agreement, which resulted in frequent damage of the runner buckets (turbines). A team of experts from the Bharat Heavy Electrical Ltd.(BHEL), Ranipur also visited the plant for technical inspection of the damaged units and furnished its report in July, 2000 to the effect that (i) the materials (runner turbines) were of substandard; (ii) lower thickness of runner bucket ring mating with hub flange and (iii) possibly poor quality of casting. The deliberate act of supply of substandard materials to the plant was being contrary to the specifications incorporated in the agreement, it is apparent that the petitioners' company had knowingly and with a malafide intention supplied the substandard runner buckets (turbines) with a motive to dupe the Govt. of Arunachal Pradesh of huge public money, exposing the petitioners to criminal prosecution for the offences punishable under Sections 120B/420 of the IPC. Therefore, the respondent No.3, the Executive Engineer(Electrical), Tawang Electrical Division filed an FIR, dated 26.06.2000, before the Officer-in-Charge, Jang P.S. through the Deputy Commissioner, Tawang and thereupon, Jang P.S. case No.05/2000 under Section 420 of the IPC was registered against the petitioners and subsequently, the said case was handed over to the Crime Branch(SIT), PHQ, Chimpu for further investigation. After completion of investigation, the Investigating Authority submitted the charge-sheet against the petitioners and others under Sections 120B/420 of the IPC to the Court of learned Judicial Magistrate, First Class, Tawang.

It has been contended that the runner is the heart of the Hydro-Power Plant and all the turbines manufactured all over the world ensure highest safety factors in runners. Hence, it is prayed to dismiss the petition.

**11.** I have gone through the rival contentions made by both the parties along with the documents produced in support of their respective contentions.

**12.** Mr. B. Deb, learned Sr. Counsel appearing on behalf of the petitioners, submitted that the petitioners' company, M/s SPML Infra Ltd. is a reputed company, which deals in the supply and construction of water supply schemes and hydel projects and for excellent services rendered, received many prestigious awards and accolades from different reputed bodies, the list of which is given in paragraph No.4 of the petition. Mr. Deb submitted that the allegations made in the FIR and after completion of the investigation in the charge-sheet are related to contractual disputes and civil in nature, on which two different sets of Arbitration proceedings are pending.

**13.** According to Mr. Deb, learned Sr. counsel, the whole matter pertains to the contract which was signed between the company and the Govt. of Arunachal Pradesh for construction, supply and commissioning of Nuranang Hydel Project in Arunachal Pradesh, involving three Power Generating Units. Mr. Deb submitted that there was no dispute or whisper from the side of the respondent No.3/DOP over successful completion and commissioning of the project including commissioning of the three Power Generating Units. The Chief Engineer (Power) of the respondent No.3/DOP issued two certificates in regard to satisfactory completion and commissioning of the project by the company. However, after handing over of the project to the authority on 01.04.2000, disputes arose between the company and the Government officials over non-payment of dues payable on account of maintenance of the project and therefore, in a diabolical manner, criminal charges have been brought against the petitioners, who are directors in-charge of the affairs of the M/s SPML Infra Ltd. on false and fabricated stories, when the warranty period itself expired before that. According to Mr. Deb, learned Sr. counsel, if the proceeding in question is allowed to be continued, that would amount to abuse of the process of the law and also would defeat the ends of justice by way of converting the civil liability, if any to criminal liability over contractual disputes. Mr. Deb in support of his argument at length relied upon the ratio of the judgments delivered by the Hon'ble Supreme Court in the case

of *Devendra & Ors., Vs. State of Utter Pradesh & Anr.* and *V. Y. Jose & Anr. Vs. State of Gujarat & Anr.*, reported in (2009) 3 SCC 78.

**14.** *Per contra*, Mr. K. Tado, learned Public Prosecutor appearing for the State respondents, submitted that although certain contractual disputes have been referred for alternative disputes redressal forums, that is, for arbitration, the test code of the project failed due to poor quality of materials supplied and commissioned the turbines by the petitioners' company in connivance with the manufacturing company, engineers of the department concerned, which have given rise to their criminal liability. Mr. Tado further submitted that perusal of the contents of the FIR and after completion of the investigation, the filing of the charge-sheet thereon clearly reveal that the allegations made out therein have the elements of commission of offences punishable under the penal provisions of the IPC and as such, to meet the ends of justice, the petition is not sustainable in law.

**15.** In Criminal Appeal No.940/2009 arising out of SLP(Crl.) No.4998/2008 (*Devendra & Ors., Vs. State of Utter Pradesh & Anr.*), the Hon'ble Supreme Court held:-

***"...it is now well-settled that the High Court ordinarily would exercise its jurisdiction under Section 482 of the Code of Criminal Procedure if the allegations made in the First Information Report, even if given face value and taken to be correct in their entirety, do not make out any offence. When the allegations made in the First Information Report or the evidences collected during investigation do not satisfy the ingredients of an offence, the superior courts would not encourage harassment of a person in a criminal court for nothing."***

**16.** In *V. Y. Jose & Anr. Vs. State of Gujarat & Anr.*, reported in (2009) 3 SCC 78, held as herein below:-

***"15. 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."***

***We may reiterate that one of the ingredients of cheating as defined in Section 415 of the Indian Penal Code is existence of an intention of making initial promise or existence thereof from the very beginning of formation of contract."***

***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.***

***It is one thing to say that a case has been made out for trial and as such the criminal proceedings should not be quashed but it is another thing to say that a person should undergo a criminal trial despite the fact that no case has been made out at all.***

***16. In Hira Lal Hari Lal Bhagwati v. CBI [(2003) 5 SCC 257], this Court held :***

***40. It is settled law, by a catena of decisions, that for establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. From his making failure to keep promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed. It is seen from the records that the exemption certificate contained necessary conditions which were required to be complied with after importation of the machine. Since the GCS could not comply with it, therefore, it rightly paid the necessary duties without taking advantage of the exemption certificate. The conduct of the GCS clearly indicates that there was no fraudulent or dishonest intention of either the GCS or the appellants in their capacities as office-bearers right at the time of making application for exemption. As there was absence of dishonest and fraudulent intention, the question of committing offence under Section 420 of the Indian Penal Code does not arise. We have read the charge-***

***sheet as a whole. There is no allegation in the first information report or the charge-sheet indicating expressly or impliedly any intentional deception or fraudulent/dishonest intention on the part of the appellants right from the time of making the promise or misrepresentation. Nothing has been said on what those misrepresentations were and how the Ministry of Health was duped and what were the roles played by the appellants in the alleged offence. The appellants, in our view, could not be attributed any mens rea of evasion of customs duty or cheating the Government of India as the Cancer Society is a non-profit organisation and, therefore, the allegations against the appellants levelled by the prosecution are unsustainable. The Kar Vivad Samadhan Scheme certificate along with Duncan and Sushila Rani judgments clearly absolve the appellants herein from all charges and allegations under any other law once the duty so demanded has been paid and the alleged offence has been compounded. It is also settled law that once a civil case has been compromised and the alleged offence has been compounded, to continue the criminal proceedings thereafter would be an abuse of the judicial process.***

***17. Recently, in Vir Prakash Sharma v. Anil Kumar Agarwal [(2007) 7 SCC 373], noticing, inter alia, the aforementioned decisions, this Court held:***

***3. The ingredients of Section 420 of the Penal Code are as follows:***



- (i) Deception of any persons;**
- (ii) Fraudulently or dishonestly inducing a person to deliver any property; or**
- (iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.**

**No act of inducement on the part of the appellant has been alleged by the respondent. No allegation has been made that he had an intention to cheat the respondent from the very inception.**

**18. 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 functionings of the trial courts.**

**19. An offence of cheating may consist of two classes of cases: (1) where the complainant has been induced fraudulently or dishonestly. Such is not the case here; (2) When by reason of such deception, the complainant has not done or omitted to do anything which he would not do or omit to do if he was not deceived or induced by the accused.**

**20. It is in that sense, a distinction between a mere breach of contract and the offence of cheating should be borne in mind. We, having regard to the facts and circumstances of the case, are of the opinion that no case has been made out and against the appellant so as to hold that he should face the criminal trial.**

**17.** Perusal of the FIR, dated 26.06.2000, lodged by one Sri G. Doje, the Executive Engineer (Electrical), Tawang Electrical Division, Arunachal Pradesh, through the Deputy Commissioner, Tawang revealed the allegations that M/s SPML Infra Ltd. installed substandard turbine materials which did not conform to the specifications given in the contract agreement which resulted in sequential failure of the runners of all the three turbines of the power plant. The said FIR was registered as Jang P.S. Case No.05/2000, under Section 420 of the IPC and after completion of investigation having found *prima facie* evidence that the M/s SPML Infra Ltd. had cheated the DOP, Arunachal Pradesh by submitting false report in regard to the percentage of chemical compositions of Nickel and Chromium in the turbines and thereby, supplied substandard materials at an exorbitant rates. The said report and act of supply of sub-standard materials induced and misled the department to part with the payment at an exorbitant rate quoted vide Jang P.S. C.S. No. 03/04, dated 28.05.2004, filed against the petitioners and 5(five) others. The charge-sheet has been annexed with copy of MOU book executed between the DOP and M/s SPML

Infra Ltd., statement of the witnesses and related 34 numbers of documentary evidence in support of the *prima facie* incriminating evidence.

**18.** It is pertinent to be mentioned that in general, a company is in the same position in relation to criminal liability as a natural person and may be convicted of statutory offences including those requiring *mens rea*. Criminal liability of a company arises where an offence committed in the course of the company's business by a person in control of its affairs to such a degree that it may fairly be said to think and act through him so that his action and intent are the actions of the company itself. All these factors depend on all the related facts and circumstances of an individual case. When quality of product supplied does not conform to the product specification in the contract agreement, the prosecution is to show the specific role attributed to the accused and that the accused was in any way responsible or in charge of the affairs of the company to be made vicariously liable.

**19.** In the instant petition, it is noticed that the charge-sheet is submitted against the accused persons namely, 1. Sri S. K. Sethi, Managing Director, M/s SPML, Kolkata 2. Sri Anil Sethi, Director, M/s SPML, Kokata, 3. Sri Pulok Deb, the then Chief Engineer(Power), Itanagar, 4. Sri Tomi Ete, the then Superintending Engineer (Civil), Itanagar, 5. Sri K. Kumaravel, Director of M/s Beacon Neyrpic, Chennai, 6. Sri S. R. Krishnan, Director of M/s Kartik Steels, Chennai and 7. Dr. J.D. Sharma, Director AHEC, Roorke, Uttaranchal. The aforesaid list of the accused persons mentioned in the charge-sheet shows that not only the persons connected to the affairs of the M/s SPML Infra Ltd., but other connected company executives and engineers of the Govt. of Arunachal Pradesh are roped into the alleged act of criminal conspiracy amongst themselves in the supply of sub-standard runner turbines and receiving the sub-standard runner turbines which were not in conformity with the specified standard as it has come to light, after thorough investigation into the FIR. Therefore, it is not the case concerning the petitioners or their company namely, M/s SPML Infra Ltd. only, but the other responsible persons concerned thereto, for which it is not factually possible to segregate only the petitioners' case. On the other hand, the co-accused persons have not come-up with a similar petition under Section 482 CrPC and facts raised, are being disputed by the State respondents, the same cannot fairly be adjudicated in the instant petition filed by the petitioners invoking the inherent jurisdiction of this Court for quashing of the proceeding pending in the Court of the learned Judicial Magistrate, First Class at Tawang. This Court has taken note of the

two certificates of excellence in connection with the satisfactory performance of the contract execution and project maintenance, dated 30.09.1997 and 21.09.1998, issued by the Chief Engineer (Power), Govt. of Arunachal Pradesh, prior to filing of the FIR, dated 26.06.2000 and further, the claim of the petitioners that the said FIR was lodged after the defect liability period i.e., the warranty of performance of the turbine materials expired are apparently questions fact which can be determined by way of appreciation of some amount of quality evidence. Therefore, this Court is of the considered opinion that it is pre-mature at the present stage of the case to say conclusively as to whether there was any fraudulent, dishonest and deceitful intention or act on the part of the petitioners acting on behalf of the company M/s SMPL Infra Ltd., within the meaning of Sections 415/418/420 of the IPC in the backdrop of facts alleged, where departmental engineers and turbine manufacturing company were also allegedly involved in criminal conspiracy for wrongful gain and thereby causing wrongful loss to the Govt. of Arunachal Pradesh and further, when contractual disputes are still subject of adjudication in two arbitral proceedings. When the allegations of criminal conspiracy and cheating are made against the petitioners in their individual capacity, although they are officials of M/s SMPL Infra Ltd., at the present stage of the proceeding, this Court is restrained from considering their defence version. Therefore, the benefits of the ratios of the judgments delivered by the Hon'ble Apex Court in *Devendra(supra)*; *V. Y. Jose(supra)*; *Hira Lal Hari Lal Bhagwati (supra)* and *Vir Prakash Sharma (supra)* could not be extended to the petitioners at the present stage of the proceeding where they are arrayed as accused. The matter needs to be left to the judicial consideration of the learned trial Court.

**20.** Consequently, the petition stands dismissed.

**21.** Be it mentioned here that by this judgment and order, this Court has not expressed any opinion on the merit of the criminal proceeding, which is sought to be quashed by the present petitioners. The learned trial Court shall make an endeavour to dispose of the criminal case as expeditiously as possible, as the matter is pending since the charge-sheet was submitted on 28.05.2004.

Send back the LCRs.

**JUDGE**

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