

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

MONDAY, THE 6TH DAY OF JULY 2015/15TH ASHADHA, 1937

Cr1.MC.No. 3726 of 2014

AGAINST THE ORDER IN CRL.RP. NO. 8/2012 of SESSIONS COURT, THODUPUZHA DATED 31-07-2013

AGAINST THE ORDER IN CMP 6234/2011 of C.J.M's. COURT, THODUPUZHA DATED 04-07-2012

PETITIONER(S)/APPELLANT/COMPLAINANT:

SONU SEBASTIAN, AGED 29 YEARS,
W/O.JAYAN, KUTTICHAKKU HOUSE, CHALAKKUDY DESOM,
CHALAKKUDY VILLAGE, MUKUNDAPURAM TALUK,
THRISSUR DISTRICT.

BY ADVS.SRI.P.SANTHOSH (PODUVAL)
SMT.R.RAJITHA
SRI.K.D.SREEVISAKH

RESPONDENT(S)/RESPONDENTS/ACCUSED NO.2 & 3/STATE:

1. JOSE DEVASSIA,
KOTTARATHIL HOUSE, KUMARAMANGALAM VILLAGE,
VENGALLUR KARAYIL,
THODUPUZHA TALUK, IDUKKI DISTRICT-685 608.

2. BOBBY JOSE,
S/O.JOSE, NAYAPPUZHA KARAYIL, THAZHATHU VEETIL,
KALLURKADU VILLAGE, MUVATTUPUZHA TALUK,
ERNAKULAM DISTRICT-686 668.

3. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682 031.

R2 BY ADV. SRI.UNNIKRISHNAN.V.ALAPATT
R3 BY PUBLIC PROSECUTOR SRI. JUSTINE JACOB

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY
HEARD ON 06-07-2015, THE COURT ON THE SAME DAY PASSED
THE FOLLOWING:

APPENDIX

PETITIONER(S) ' EXHIBITS

ANNEXURE-A: TRUE COPY OF PRIVATE COMPLAINT BEFORE THE
CHIEF JUDICIAL MAGISTRATE COURT, THODUPUZHA.

ANNEXURE-B: CERTIFIED COPY OF SWORN STATEMENT OF THE
COMPLAINANT IN CMP 6234/2011 ON THE FILE OF CHIEF
JUDICIAL MAGISTRATE COURT, THODUPUZHA.

ANNEUXRE-C: CERTIFIED COPY OF THE ORDER DATED 4.7.12
IN C.M.P 6234/2011 ON THE FILE OF CHIEF JUDICIAL
MAGISTRATE COURT, THODUPUZHA.

ANNEXURE-D: CERTIFIED COPY OF THE ORDER DATED 31.7.13
IN CRL.R.P 8/2012 ON THE FILE OF SESSIONS COURT,
THODUPUZHA

ANNEXURE-E: TRUE COPY OF REPLY NOTICE SENT BY THE
ACCUSED NOS 2 AND 3 DATED 22.7.2011

//true copy//

P.S. to Judge

K. HARILAL, J.

Crl.M.C. No. 3726 of 2014

Dated this the 6th day of July, 2015

ORDER

The petitioner herein is the complainant in C.M.P. No.6234 of 2011 on the files of the Chief Judicial Magistrate's Court, Thodupuzha, filed under Secs.190 and 200 of the Code of Criminal Procedure against the respondents 1 and 2 herein alleging the offences punishable under Secs.417, 420 and 423 of the Indian Penal Code. The case of the complainant is that she has, in her ownership, 40 cents of property and the 1st accused is her father and accused 2 and 3 are her close relatives. The 1st accused wanted her to mortgage the above said property, so that he might raise fund for his business. On 24/4/2006, 16/4/2007

and 8/6/2007 he obtained her signatures in certain documents at the Office of the Sub Registrar, Thodupuzha, after making her to believe that they were mortgage deeds. Later, she came to know that those documents are not mortgage deeds and the same were Power-of-Attorney got registered in favour of the 1st accused by way of misrepresentation and using the said Power-of-Attorney, he had sold away the said property in favour of the 2nd and 3rd respondents in furtherance of a conspiracy. It is also alleged that it was by misrepresentation and fraud, he obtained her signatures. Thus, all of them have committed the offences mentioned above.

2. After conducting enquiry under Sec.202 Cr.P.C., the trial court dismissed the complaint as against the 2nd and 3rd accused on a finding that the allegations in the complaint do not disclose the offence alleged against the 2nd and 3rd accused. Aggrieved by the said order, the complainant/

petitioner preferred Crl.R.P. No.8 of 2012 before the Court of Sessions, Thodupuzha. After considering the legality and propriety of the findings, whereby the trial court dismissed the complaint against the 2nd and 3rd accused, the learned Sessions Judge dismissed the Crl. R.P. after endorsing the views of the learned Magistrate. The legality and propriety of the findings whereby the learned Sessions Judge concurred with the findings of the trial court are under challenge in this Crl. M.C.

3. Heard the learned counsel for the petitioner and the learned counsel for the respondents 1 and 2.

4. The sum and substance of the arguments advanced by the learned counsel for the petitioner is that the averments in the complaint supported by the oral version of the complainant made under Sec.202 enquiry are sufficient to disclose the offence alleged against the 2nd and 3rd accused. But the courts below concurrently failed to appreciate the evidence

in its correct perspective. Per contra, the learned counsel for the respondents 1 and 2 submitted that even if the averments in the complaint as well as the statements on oath made by the complainant are admitted at its entirety, they do not disclose the offence alleged against the 2nd and 3rd accused. Therefore, the courts below can be justified in dismissing the complaint against the 2nd and 3rd accused.

5. The short question that arises for consideration is, whether there is any illegality or impropriety in the findings whereby the court below concurrently arrived at a finding that the allegations in the complaint as well as the statements made on oath do not disclose the offences alleged against the 2nd and 3rd accused.

6. Going by the complaint, it is seen that the allegations levelled against the 2nd and 3rd accused are mainly stated in paragraphs-6 and 8 in the complaint. It is true that the complainant has stated that the

accused colluded together and the offences committed in furtherance of a conspiracy. But, as rightly noted by the appellate court, no particulars of the alleged commission of conspiracy is stated in the complaint. It is not disclosed why she has made the allegations against them. As rightly noted by the court below, the mere adoption of the terms or expressions which are employed in the sections which constituted the ingredients of the offence in the section is not sufficient to disclose the facts which would constitute an offence. According to Sec.3 of the Indian Evidence Act, 'fact' means and includes anything, state of things or relation of things capable of being perceived by senses. Adoption of the expressions or words used in the section to constitute the offence is not a substitute for the thing which perceived by the complainant by her senses. As rightly held by the court below, this bald allegations do not constitute the offences. According to Section 190(a),

the Magistrate may take cognizance of any offence upon receiving a complaint of 'facts' which constitute such offence. The above view of the court below is supported by the decision laid down in *Neelu Chopra v. Bharti* [2009) 10 SCC 184], wherein the Supreme Court held that unless particulars are mentioned in the complaint, the Magistrate cannot proceed against the accused. Similarly, there is no allegation to the effect that the 2 and 3rd accused entered into the agreement with the 1st accused at the beginning of the transaction with a dishonest intention to cheat the complainant. In *Vesa Holdings Pvt. Ltd., v. State of Kerala* [2015 (2) KLT SN 131 (Case No.157) SC], the Supreme Court reiterated the earlier decision that every breach of contract does not amount to cheating. To constitute an offence of cheating it is required to be shown that the accused had fraudulent or dishonest intention at the beginning of the transaction itself. Going by the allegations in

paragraph-6, the allegation is that the 1st accused entered into the transaction with an intention to cheat the complainant; but the presence of such dishonest intention at the beginning of the transaction is not attributed against 2nd and 3rd accused. That apart, the Power-of-Attorney under the guise of mortgage deed was allegedly executed in the year 2006; but the sale deeds in favour of the 2nd and 3rd accused were executed in the year 2010 and there is no allegation in the complaint that the 2nd and 3rd accused colluded with the 1st accused to get the Power-of-Attorney fraudulently executed in the year 2006. It is not possible to believe that she came to know the execution of the documents in favour of the 1st accused in March, 2011, when she obtained the Encumbrance Certificate from the Office of the Sub Registrar. I find that even though the averments contain bald statements reiterating the expressions 'conspiracy' and 'fraudulent transaction', the facts

constituting the said acts are not stated or disclosed either in the complaint or in the statement on oath given under Sec.202 Cr.P.C.

7. The learned counsel for the petitioner submits that the learned Magistrate dismissed the complaint by a non-speaking order; but the appellate court also has not considered the averments in the petition as statements meticulously. But I find that even though the learned Magistrate dismissed the complaint by a non-speaking order, the learned Sessions Judge meticulously considered the averments and raised two points: (i) Are there sufficient grounds for proceeding against the respondents 1 and 2? (ii) Whether the order of the lower court by which it dismissed the complaint as far as the respondents are concerned is liable to be set aside? After raising the said points, the learned Sessions Judge meticulously considered the above points and rendered the order dismissing the complaint. I am fully satisfied with the manner in

which the learned Sessions Judge considered the grounds raised in this Crl. M.C. Therefore, the said contention will also stand dismissed.

This Crl.M.C. is dismissed accordingly.

Sd/-
(K. HARILAL, JUDGE)

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P.S. to Judge