

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.03.2015

CORAM

THE HON'BLE MR.JUSTICE S. MANIKUMAR

Criminal Revision Case Nos.806 and 1058 of 2011
M.P.No.1 of 2011 in
Criminal Revision Case Sr.No.7572 of 2011

A.Sambandam ... Petitioner in all the cases

Vs.

1. Narpath Bokadia Jain
2. Lalith Shahji
3. Premalatha
4. Deepika Bokadia

... Respondents 1 to 4 in Crl.R.C.806/2011/
Accused
Respondents 2 to 5 in Crl.R.C.1058/2011

5. The Inspector of Police,
District Crime Branch,
Tiruvallur.

... 1st Respondent in Crl.R.C.1058/2011
Respondent in Crl.R.C.Sr.7572/2011

Prayer in Crl.R.C.No.806 of 2011:- Petition filed under Section 397 r/w. 401 of Cr.P.C, praying to set aside the order dated 28.10.2010, made in C.M.P.No.4181 of 2010, on the file of the learned Judicial Magistrate No.I, Ponneri, dismissing the complaint and consequently, direct the learned Judicial Magistrate Court No.I, Ponneri, to take the complaint on file and issue summons on the respondents.

Prayer in Crl.R.C.No.1058 of 2011:- Petition filed under Section 397 r/w. 401 of Cr.P.C, praying to set aside the order dated 01.06.2011, made in C.M.P.No.2163 of 2011, in Crime No.37 of 2007 on the file of the learned Judicial Magistrate No.I, Ponneri.

Prayer in Crl.R.C.Sr.No.7572 of 2011:- Petition filed under Section 397 r/w. 401 of Cr.P.C, praying to set aside the order, dated 29.05.2008, closing Crime No.37 of 2007, as mistake of fact and direct the respondent to restore the complaint and make proper investigation and register a case against the alleged accused on the file of the District Crime Branch at Thiruvallur, as mistake of fact.

For Petitioner in all cases : Mr.K.S.Gnanasambanda

For Respondents 2& 3 in CrI.R.C.806/11 : Mr.S.Swaminathan

For 1st Respondent in CrI.R.C.1058/11 : Mr.P.Govindarajan,
Addl. Public Prosecutor

O R D E R

CrI.R.C.No.806 of 2011, is filed against the order, dated 28.10.2010, made in C.M.P.No.4181 of 2010, on the file of the learned Judicial Magistrate No.I, Ponneri, with a consequential prayer, directing the learned Judicial Magistrate No.1, Ponneri, to take the complaint on file, issue summons to the respondents, in the private complaint and to proceed further, in accordance with law.

2. CrI.R.C.No.1058 of 2011, is filed to set aside the order, made in C.M.P.No.2163 of 2011, dated 1st June 2011, on the file of the learned Judicial Magistrate No.1, Ponneri. CrI.R.C.Sr.No.7572 of 2011 has been filed, challenging the order of the Inspector of Police, District Crime Branch, Thiruvalluvar, dated 29.05.2008, closing the Police complaint, registered in Cr.No.37 of 2007, as mistake of fact. The last criminal revision case has been filed, with a delay of 911 days, in filing the revision case.

3. Material on record discloses that on 23.12.2007, the petitioner has preferred a complaint, to Thiruvallur Police Station, District Crime Branch. Police complaint has been registered as FIR.No.37 of 2007. Persons named in the Police Complaint, alleged to have committed offences, under Section 403, 406, 416, 417, 418, 420, 421, 422, 423 and 424 IPC., were (1) Narpath Bokadia Jain, (2) Lalith Shahji, (3) Premalatha, and (4) Deepika Bokadia.

4. Subsequently, Mr.Sambandam, petitioner herein, has filed CrI.O.P.No.25429 of 2009, both in his individual capacity and in the capacity of Managing Director of Cherry Chemicals Ltd., praying for a direction, to the Inspector of Police, District Crime Branch, Thiruvallur District, to investigate Cr.No.37 of 2007, registered under Sections 406, 420 and 424 IPC., r/w. 34 IPC., on the file of the Inspector of Police, District Crime Branch, Thiruvallur District, within a stipulated time. When the said direction petition came up for hearing, on the representation of the learned Government Advocate (CrI.Side) that the Police would complete the investigation and file a final report, within a period of three months, vide order, dated 04.12.2009, CrI.O.P.No.25429 of 2009, has been closed.

5. Material on record further discloses that contending inter alia, the Inspector of Police, District Crime Branch, Thiruvallur District, has not filed any report, before this Court or the learned Judicial Magistrate, Ponneri, contempt petition No.1105 of 2010, has been filed on 06.08.2010. In the contempt petition, the Inspector of Police, District Crime Branch, Thiruvallur District, has filed a counter affidavit, stating that on investigation, Crime No.37 of 2007, registered under Section 406, 420, 424 r/w. Section 34 IPC., was investigated by the then Inspector of Police, Thiru.Ettiyappan, on 28.11.2007, and later on, another Inspector of Police, Thiru.Sakthivel, had referred the case, as mistake of fact, on 29.05.2008, stating that the allegations were not proved. It was also submitted that since the petitioner had refused to accept the same, referred charge sheet was not served on the petitioner.

6. In the contempt petition, the then Inspector of Police, District Crime Branch, has also submitted that the Police had filed a final report, before the learned Judicial Magistrate No.1, Ponneri, as early as on 26.03.2010 and thus, the directions issued by this Court, in Crl.O.P.No.25429 of 2009, dated 04.12.2009, has been complied with. The then Inspector of Police, District Crime Branch, Tiruvallur District, has also submitted that the learned Judicial Magistrate No.1, Ponneri, has also taken note of the final report, vide Dis.No.1 of 2010, dated 27.06.2010.

7. On the averments made in the counter affidavit, vide order, dated 08th September, 2010, Contempt Petition No.1105 of 2010, has been closed. However, in the Contempt Petition, liberty has been given to the petitioner to move by way of private complaint and it was also made it clear that the directions issued to the petitioner, granting liberty to file a private complaint, shall not be read by the concerned Magistrate, as directions to entertain a complaint. While closing the contempt petition, this Court further observed that entertaining the complaint should be solely on the discretion of the Magistrate, and upon consideration of the merits of the case.

8. Thereafter, the petitioner has filed a private complaint, under Section 200 Cr.P.C., and the same was registered in C.M.P.No.4181 of 2010, on the file of the learned Judicial Magistrate No.1, Ponneri. In the private complaint, dated Nil., the petitioner has alleged that the accused therein have committed offences, under Section 403, 406, 417, 419, 420, 421, 422, 423, 424 r/w. 34 IPC. Sworn statement has been recorded on 04.09.2010. Three other witnesses have been examined on 18.09.2010, 27.09.2010 and 22.10.2010, respectively. Upon considering the complaint and the statements of the witnesses, including the complainant, the learned Judicial Magistrate No.1, Ponneri, vide order, dated 28th October, 2010, has dismissed the complaint, holding that there was

no prima facie material, against the accused. The said order is challenged in Crl.R.C.No.806 of 2011.

9. The petitioner has also filed Crl.R.C.Sr.No.7572 of 2011, challenging the order, dated 29.05.2008 of the Inspector of Police, District Crime Branch, Tiruvalluvar District, closing the complaint, as mistake of fact. Thus, it could be seen that all the three revision cases, relate to the same cause of action. Revision Case No.806 of 2011, is against the order, dated 28.10.2010, made in C.M.P.No.4181 of 2010, on the file of the learned Judicial Magistrate No.I, Ponneri, by which, the learned Judicial Magistrate No.I, Ponneri, has dismissed the private complaint. Crl.R.C.No.1058 of 2011, is against the order, dated 01.06.2011, passed in C.M.P.No.2163 of 2011, in Cr.No.37 of 2007, in the protest petition, filed by the petitioner. Crl.R.C.Sr.No.7572 of 2011, is against the order, dated 29.05.2008 in Cr.No.37 of 2007, on the file of the Inspector of Police, District Crime Branch, Thiruvallur District.

Heard the learned counsel for the parties and perused the materials available on record.

10. From the material on record, it could be deduced that by filing a revision case in Crl.R.C.Sr.No.7572 of 2011, with a delay of 911 days, the petitioner has questioned the correctness of the order, dated 29.05.2008 of the file of the Inspector of Police, District Crime Branch, Thiruvallur District, in closing the Cr.No.37 of 2007, as mistake of fact. He has also filed Crl.R.C.No.1068 of 2011, challenging the order, dated 01.06.2011, passed by the learned Judicial Magistrate No.I, Ponneri, in C.M.P.No.2163 of 2011, in Cr.No.37 of 2007, by which, the protest petition has been dismissed.

11. Taking it for granted that delay is condoned and if revision case in Crl.R.C.No.1058 of 2011, is also ordered, in favour of the petitioner, the consequential direction, which this Court can issue, is to the Inspector of Police, District Crime Branch, Thiruvallur, to conduct an investigation in Cr.No.37 of 2007, under Sections 406, 420 and 424 IPC., r/w. 34 IPC. Similarly, if Crl.R.C.No.806 of 2011, filed against the order, dated 28.10.2010, made in C.M.P.No.4181 of 2010, dismissing the private complaint, is also allowed, the consequential direction, which this Court can issue, is to the learned Judicial Magistrate No.I, Ponneri, to take the complaint on file, issue summons to the respondents and enquire into the matter.

12. Thus, the petitioner cannot seek for an order, directing the Police to investigate the matter afresh and on merits and simultaneously, seek for an order to the learned Judicial Magistrate No.1, Ponneri, to take the private complaint on file.

At this juncture, it is also to be noted that when the petitioner filed a Contempt Petition No.1105 of 2010, this Court, taking note of the fact that after completion of the investigation, a report, dated 26.03.2010, has been filed by the Inspector of Police, District Crime Branch, Tiruvallur, vide order, dated 08.09.2010, closed the same, granting liberty to the petitioner to file a private complaint and while doing so, this Court has also observed that filing of a private complaint, cannot be read by the concerned Magistrate, as the directions to entertain the complaint, but it should be decided on merits of the case. Accordingly, the petitioner has filed a private complaint in Crl.M.P.No.4181 of 2010, under Section 200 Cr.P.C.

13. Closure of the complaint, has been taken note of, by this Court. There cannot be two orders, one for a direction to the Inspector of Police, to investigate Crime No.37 of 2007 afresh and simultaneously, for another direction to the learned Judicial Magistrate No.1, Ponneri, to take the private complaint on file. Therefore, Crl.R.C.No.1058 of 2011 and Crl.R.C.Sr.No.7572 of 2011, have to be dismissed in limini and accordingly, dismissed.

14. As per Section 156(3) of the Code of Criminal Procedure, any Magistrate empowered under section 190 may order such an investigation as aforesaid. As per Section 190 of the Code, subject to the provisions of this Chapter, which deals with conditions requisite for initiation of proceedings, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence- (a) upon receiving a complaint of facts which constitute such offence; (b) upon a police report of such facts; (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed. Sub-Section (2) of Section 190 states that the Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

15. As per Section 200 of the Code, which deals with examination of complainant, a Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate. Proviso to the said Section, states that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or- purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192: Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

16. Let me consider the decisions relied on by the learned counsel for the petitioner.

17. In Anil Saran v. State of Bihar reported in 1995 (6) SCC 142, decision relied on by the learned counsel for the petitioner the Supreme Court, at Paragraphs 5, 8 and 10, held as follows:

"5.Though the Code defines "cognizable offence" and "non-cognizable offence", the word 'cognizance' has not been defined in the Code. But it is now settled law that the court takes cognizance of the offence and not the offender. As soon as the Magistrate applies his judicial mind to the offence stated in the complaint or the police report etc, cognizance is said to be taken. Cognizance of the offence takes place when the Magistrate takes judicial notice of the offence. Whether the Magistrate has taken cognizance of offence on a complaint or on a police report or upon information of a person other than the police officer, depends upon further taken pursuant thereto and the attending circumstances of the particular case including the mode in which case is sought to be dealt with or the nature of the action taken by the Magistrate.

8.Partnership firm is not a legal entity but a legal mode of doing business by all the partners. Until the firm is dissolved as per law and the accounts settled, all the partners have dominion in common over the property and funds of the firm. Only after the settlement of accounts and allotment of respective share, the partner becomes owner of his share. However, criminal breach of trust under s.406 is not in respect of the property belonging to the partnership firm, but is an offence committed by a person in respect of the property which has been specially entrusted to such a person under a special contract and he holds that property in fiduciary capacity under special contract. If he misappropriates the same, it is an offence.

10.Whether the offence has been made out, whether he is liable and what are the defences open to him are not matters at this stage for consideration. It is for the learned Magistrate to proceed with the trial and to deal with according to law."

18. In Sanghi Brothers (Indore) Ltd., v. Gurudev Singh Gyani & Sons reported in 2003 CrI.L.J. 931, at Paragraph 8, the Indore Bench of Madhya Pradesh High Court, held as follows:

"8. There is no force in the contention of the applicants that full transaction was the money transaction and it was hire-purchase agreement. Therefore, the case is purely of civil nature. The question whether the transaction was hire-purchase transaction or hire of machine, is the question to be decided in the trial. Merely because the transaction was commercial or money transaction, element of cheating would not allude from such transaction. For one transaction, the applicant may be held responsible for civil as well as criminal liability. In the catena of judgments, the Apex Court has held so. Reliance can safely be placed on the judgment reported in 1999 Cri LJ 1833 (SC) (Rajesh Bajaj v. State NCT Delhi; 2000 Cri LJ 1487 (SC) (Medchl Chemicals and Pharma Pvt. Ltd., v. Biologicial E. Ltd.); (2001) 1 MPWN SN 167 (Lalmuni Devi (Smt.) v. State of Bihar; (1999) 8 SCC 686 (Trisuns Chemical Industry v. Rajesh Agarwal and Meenakshi Sundaram Textile Ltd. v. Gokulchand Rakhachand (MCR No. 3651/ 2001 decided on 27-2-2002) : (2002 Cri LJ 4366) by this Court. In all these cases it has been held that criminal prosecution cannot be thwarted merely because civil proceedings are also maintainable or already filed. Aggrieved party can take recourse to both the proceedings."

19. In Rathinasabapathy v. State rep., by Inspector of Police, Theni Police Station reported in 2005 (1) LW (CrI.) 229, on the aspect of principles of natural justice, this Court has relied on a decision of the Apex Court in Bhagwant Singh v. Commr. Of Police reported in AIR 1985 SC 1285, wherein, the Apex Court held as follows:

".....We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under Sub-section (2)(i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. It was urged before us on behalf of the respondents that if in such a case notice is required to be given to the informant, it might result in unnecessary delay on account of the difficulty of effecting service of the notice on the informant. But

we do not think this can be regarded as a valid objection against the view we are taking, because in any case the action taken by the police on the First Information Report has to be communicated to the informant and a copy of the report has to be supplied to him under Sub-section (2)(i) of Section 173 and if that be so, we do not see any reason why it should be difficult to serve notice of the consideration of the report on the informant. Moreover, in any event, the difficulty of service of notice on the informant cannot possibly provide any justification for depriving the informant of the opportunity of being heard at the time when the report is considered by the Magistrate." in view of the observation made by the Supreme Court referred to above and also on the principles of natural justice, it is just and necessary that the informant/complainant should be given a copy of the police report filed under Section 173, Cri. P. C. Therefore, the learned Magistrate is directed to furnish copies of the documents required therein immediately.

20. Reverting to the case on hand, material on record discloses that the petitioner has filed a memo, dated 11.02.2015, to record the death of respondents 2 and 4 herein,, viz., Lalith Shahji and Deepika Bokadia, against whom, accusations have been made. While considering the case of the petitioner, in a private complaint in C.M.P.No.4181 of 2010, the learned Judicial Magistrate No.I, Ponneri, upon perusal of the complaint, sworn statement and the evidence of the witness recorded under 202 enquiry, observed that when the entire complaint was based on the Memorandum of Understanding entered between the complainant and the accused A1 and A2, no such Memorandum of Understanding was produced in the Court, as document.

21. The learned Judicial Magistrate No.I, Ponneri, has further observed that the defacto complainant produced various sale deeds, which relate to the sale commenced, after the purchase of the properties by the accused. The learned Judicial Magistrate has also observed that to bring an offence, under Section 406 IPC., the accused should have been entrusted with the property. Upon considering the materials on record, the learned Judicial Magistrate has observed that no memorandum was produced before this Court, nor there was any entrustment of the property.

22. Having regard to the ingredients for the offences, under Sections 417, 419 and 420 IPC., the Court below has also observed that there must be an intentional inducement of another person to deliver any property and such averments have not been stated in the complaint, nor the sworn statement was a pointer to the abovesaid

offences. Moreover, the learned Judge has also observed that the matter is of civil nature, the averments and the complaint, coupled with the statement on oath of the complainant and the materials, do not make out a prima facie case, to proceed against the accused.

23. While arriving at the abovesaid conclusion that the Court below has also considered the decision of the Hon'ble Apex Court in G.Sagar Suri and another v. State of U.P., reported in 2000 (2) SCC 636, wherein, the Apex Court held that it is the duty and obligation of the Criminal Court to exercise great caution in issuing process particularly when matters are essentially of civil nature. The learned Judge has also taken note of the decisions of this Court, wherein, it has been held that the practise of giving criminal colour to civil disputes has to be deprecated.

24. The contention of the petitioner that he has not been given sufficient opportunity to putforth his case, at the time of submission of final report, cannot be raised, at this juncture, when he has chosen to file a private complaint, when he had the opportunity to make out a prima case, by giving a statement of oath, with the support of materials. The decision in Sanghi Brothers (Indore) Ltd., 's case (cited supra) has only a persuasive value and it cannot be run against the decisions made in G.Sagar Suri's case (cited supra).

25. Though the decision in Anil Saran's case (cited supra), has set out the procedure to be followed, on the facts and circumstances of the case on hand, the Court below, after considering the averments and statement on oath in C.M.P.No.4181 of 2010, has found that when the complaint was based on a Memorandum of Understanding, the same was not even produced before the Court below and that there was no intentional inducement on the part of the accused, to charge them, under Sections 417, 419 and 420 IPC. In the light of the above discussion, and decisions stated supra, this Court is not inclined to interfere with the impugned order.

26. In view of the above, all the Criminal Revision Cases are dismissed. No costs.

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

skm

To

1. The Judicial Magistrate No.I,
Ponneri.

2. The Inspector of Police,
District Crime Branch,
Tiruvallur.

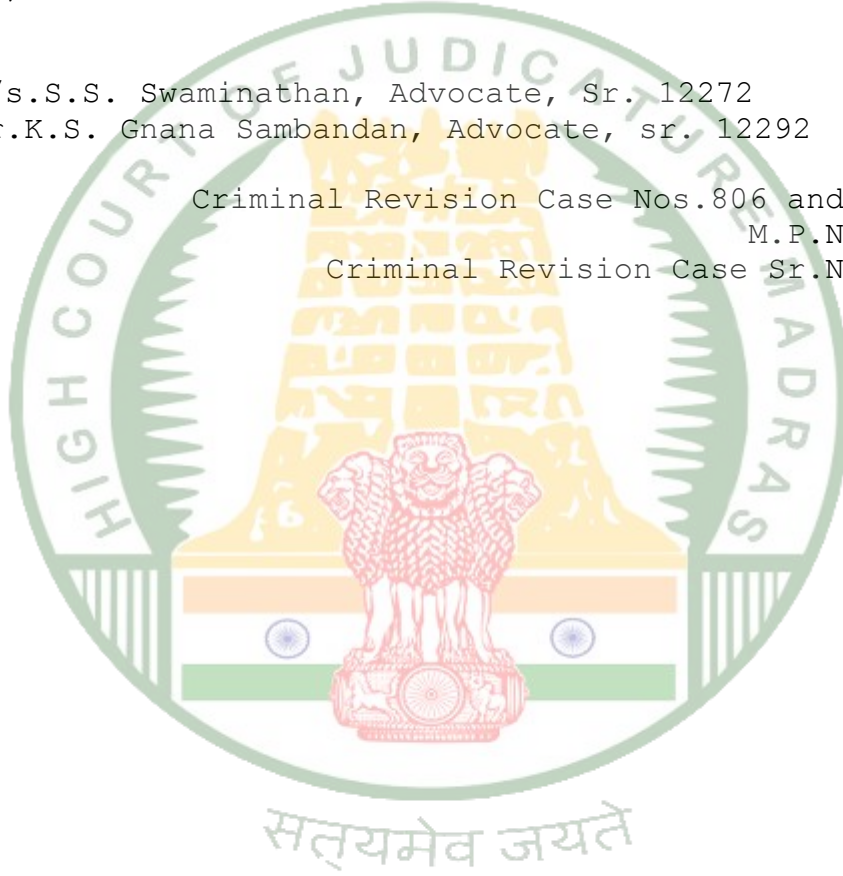
3. The Public Prosecutor,
High Court, Madras

1 cc to M/s.S.S. Swaminathan, Advocate, Sr. 12272

1 cc to Mr.K.S. Gnana Sambandan, Advocate, sr. 12292

Criminal Revision Case Nos.806 and 1058 of 2011
M.P.No.1 of 2011 in
Criminal Revision Case Sr.No.7572 of 2011

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