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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 18.03.2015

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THE HONOURABLE MR.JUSTICE R.S.RAMANATHAN

Crl.R.C.No.89 of 2015
and M.P.Nos.1 and 2 of 2015
and Crl.O.P.No.1896 of 2015
and M.P.Nos.1 and 2 of 2015

1.M/s.Housing and Development
Finance Corporation,
Rep. By its Regional Manager,
Mr.Joseph Mathew.

2.Mr.Joseph Mathew

.. Petitioners in
both the petitions

vs.

1.State Rep. By its
The Sub-Inspector of Police
Team-XI-A, EDF,
Central Crime Branch,
Greater Chennai Police,
Egmore, Chennai - 600 220.
Crime No.623/2011

2.Mr.Kishore Kumar Menon

.. Respondents in
both the petitions

Criminal Revision Case is filed under Section 397 r/w 401 Cr.P.C. praying to call for the records in Crl.M.P.No.2988 of 2013 in C.C.No.539 of 2013 and to set aside the order dated 30.12.2014 on the file of the learned XI Metropolitan Magistrate, Saidapet.

Criminal Original Petition filed under section 482 of Criminal Procedure Code praying to call for the records in C.C.No.539 of 2013 on the file of the learned XI Metropolitan Magistrate, Saidapet and to quash the same.

For Petitioners: Mr.N.R.Elango,
Senior Counsel for
Mr.R.Veivekananthan

For Respondents: Mr.M.Maharaja,
(In both the petitions) Addl. Public Prosecutor for R1
Mr.A.Ragunanathan,
Senior Counsel for
Mr.M.Mohammed Rafi for R2



COMMON ORDER

The petitioners are A3 and A4 in C.C.No.539 of 2013 on the file of XI Metropolitan Magistrate, Saidapet. The first respondent filed the charge sheet against the petitioners and two others on the basis of the complaint given by the 2nd respondent and the petitioners are charged for offence under Sections 406, 418, 420 r/w 120(b) IPC.

2. Mr.N.R.Elango, learned Senior Counsel appearing for the petitioners submitted that a reading of the charge sheet and the statement of witnesses would reveal that no offence has been made out against the petitioners, who are the Housing and Development Finance Corporation and the Regional Manager representing the Housing and Development Finance Corporation. The learned Senior Counsel further submitted that the case of the prosecution as seen from the charge sheet is that the second respondent and his brothers entered into a Joint Development Agreement on 13.12.2014, 17.12.2014 and Supplement Agreement on 29.03.2006 with A1, represented by its Managing Director and A2 for the purpose of developing the property belonging to the 2nd respondent and his brothers situated at New No.165, Old No.110, St. Mary's Road, Chennai-118. As per the agreement, A1 and A2 should construct building on behalf of the complainant and his brothers at their own costs and on completion of the construction, the complainant is entitled to 50% of the super built up area and the remaining 50% has to be taken by A1 and A2. It is also admitted that at the request of A1 and A2, the complainant and his brothers were ready to provide financial assistant and gave power to A1 and A2 to raise funds by mortgaging the property to the maximum of Rs.7.50 crores. However, contrary to the specific authorisation given in the power, A1 and A2 deposited the title deeds of the property of the 2nd respondent and his brother with the petitioners and the petitioners knowing fully well that the power was given to A1 and A2 to raise a loan only for a sum of Rs.7.50 crores, granted a loan of Rs.22 crores and therefore, the petitioners conspired with A1 and A2 in causing wrongful loss to the defacto complainant and by reason of the conspiracy committed by the petitioners all the accused gained wrongful gain and therefore, the case was charged against the petitioners, A1 and A2 under Sections 406, 418, 420 r/w 120(b) IPC.

3. The learned Senior Counsel submitted that the entire loan has been repaid by A1 and A2 and therefore, there is no loss to the defacto complainant and therefore, there is no purpose in prosecuting the petitioners. The learned Senior Counsel further submitted that as per the Joint Development Agreement entered into with the 1st accused company, the land owners viz., the defacto complainant and his brothers agreed to convey free of encumbrances an undivided 50% share in the schedule property to the 1st accused or its nominees(s), 1st accused agrees to develop the schedule property and construct residential/commercial building on the schedule property at their own costs and expense and deliver to the land owners, free of costs and charges, 50% of total super built up



area in the buildings to be put up on the schedule property along with 50% covered/open car parking area, terrace areas, garden areas and all other facilities, free from all encumbrances and liabilities. It is also made clear in the Joint Development Agreement that 1st accused is entitled to the remaining 50% of the total super built up area. Therefore, as per the Joint Development Agreement, the 1st accused is entitled to 50% of the undivided share of the land and 50% of the total super built up area and power was given to the 1st accused to create mortgage on the property up to the maximum amount of Rs.7.50 crores and on the basis of power, the first accused representing the owners deposited the title deeds of the property and availed loan of Rs.22 crores. He further submitted that as per the Memorandum of Deposit of Title Deeds dated 31.05.2006, mortgage was created only in respect B schedule property, which represented 50% of the undivided share of the 1st accused and therefore, no breach of trust or cheating has been committed by the petitioners as the 1st accused was otherwise entitled to 50% of the undivided share in the property as per the Joint Development Agreement and the mortgage was created only in respect of 50% of the undivided share in the property. He therefore, submitted that no offence of breach of trust or cheating has been committed. He further submitted that even assuming that the petitioners sanctioned loan in excess of the power given to the 1st accused by the owners, the owners can very well refute the liability in excess of 7.50 crores and therefore, no offence has been committed by the petitioners. He therefore, submitted that the case is liable to be quashed as against the petitioners.

4. On the other hand, Mr.A.Ragunathan, learned Senior Counsel appearing for the 2nd respondent submitted that the petitioners filed Clr.M.P.No.2988 of 2013 in C.C.No.539 of 2013 for discharge before the learned XI Metropolitan Magistrate, Saidapet, and the petition was dismissed and without challenging the said order, the petitioners filed Crl.O.P.No.1896 of 2015 invoking Section 482 Cr.P.C., to quash the proceedings and therefore, Crl.O.P.No.1896 of 2015 is not maintainable in law. He further submitted that Crl.R.C.No.89 of 2015 filed by the petitioners challenging the order passed in Crl.M.P.No.2988 of 2013 is also not maintainable in law having regard to the plea taken before the trial Court and the plea now taken in this revision. He further submitted that while filing an application for discharge, the main plea taken was that the entire loan was discharged and therefore, the case has to be quashed and rejecting the same, the trial Court dismissed the application and while challenging the said order of dismissal, the petitioners cannot set up a new case and raise a new point and therefore, the revision is to be dismissed.

5. The learned Senior Counsel further submitted that admittedly power was given to the 1st accused for raising a loan of Rs.7.50 crores by mortgaging the property belonging to the defacto complainant and his brothers and the petitioners are also aware the power given to the 1st accused to the extent of 7.50 crores. Nevertheless, in connivance with the accused 1 and 2, the petitioners sanctioned loan of Rs.22 crores to the 1st accused and



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made the 1st accused to execute the memorandum of title deeds for the entire sum of Rs.22 crores availed by the 1st accused and therefore a clear case of cheating is made out. He further submitted that the 1st accused is the agent of the defacto complainant and therefore, the 1st accused was entrusted with the property and he converts to his own use the property by creating a mortgage over and above the limited sanctioned by the principal and therefore the accused 1 and 2 committed the offence punishable under Section 409 IPC and the petitioners conspired with the accused 1 and 2 in creating mortgage by allowing the 1st accused to deposit the title deeds for the entire loan of Rs.22 crores. And therefore, all the accused have committed the offence punishable under Sections 406, 418, 420 r/w 120(b) IPC and in a petition to quash the charge sheet, this Court has to see whether any prima facie case is made out and once prima facie case has been made out, this petition has to be dismissed. He also relies upon the judgments reported in 2014-1-L.W. (Crl.) 781 (State of Tamil Nadu V. N.Suresh Rajan and others), AIR (37) 1950 Madras 49 (C.N.29) (Kotamsath Appanna V. Appalaraju), (2010) 2 SCC 398 (P.Vijayan Vs. State of Kerala and another), AIR 1978 Supreme Court 1 (Thakur Das (dead) by Lrs., V. State of M.P. and another), 2014 CRI.L.J.4879 (State of Maharashtra Through CBI V. Vikram Anantrai Doshi) and CDJ 2014 MHC 6151 (Sri Ganesh V. State Rep. By Inspector of Police, Washermenpet, Chennai & another) in support of his contention.

6. The contention of the learned Senior Counsel Mr.A.Ragunanathan is that the present petition filed by invoking the inherent jurisdiction of this Court under Section 482 of the Cr.P.C., is not maintainable as the petitioner filed Crl.M.P.No.2988 of 2013 before the learned XI Metropolitan Magistrate, Saidapet for discharge and that was dismissed and without challenging the same, the present petition is not maintainable.

7. According to me, the argument of the learned Senior Counsel appearing for the 2nd respondent cannot be accepted having regard to the judgments reported in (1998) 8 Supreme Court Cases 770 in the matter of Jitender Kumar Jain Versus State of Delhi and others and (1997) 4 Supreme Court Cases 241 in the matter of Krishnan and another Versus Krishnaveni and another.

(a) In the judgment reported in (1998) 8 Supreme Court Cases 770 supra, it is held as follows:-

2. The appellant had moved the High Court of Delhi in a petition under Section 482 of the CrPC invoking its inherent jurisdiction. The High Court assumed the petition to be as if one under Section 397(2) [sic 397(3)] of the CrPC, which according to it did not lie since the revision petition preferred by the appellant had been dismissed by the Court of Session. We are of the view that the High Court failed to distinguish its separate powers under Section 397 of the CrPC as also under Section 482 of



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the said Code. It is true that a second revision petition does not lie before the High Court when one is dismissed by the Court of Session. Still the Court of Session is a court subordinate to the High Court and, as such, its proceedings are open to scrutiny by the High Court in exercise of its inherent power under Section 482 of the CrPC. The High Court in these circumstances, should not have dismissed the petition of the appellant on the premise as it has done. It is otherwise open to the High Court not to interfere in a matter when examining a case under Section 482 of the CrPC. In this view of the matter, we set aside the impugned order of the High Court and remit the matter back to the High Court for reconsideration. It is ordered accordingly.

(b) In the judgment reported in (1997) 4 Supreme Court Cases 241 supra, it is held as follows:-

10. Ordinarily, when revision has been barred by Section 397(3) of the Code, a person accused/complainant - cannot be allowed to take recourse to the revision to the High Court under Section 397 (1) or under inherent power of the High Court under Section 482 of the Code since it may amount to circumvention of the provisions of Section 397 (3) or section 397(2) of the Code. It is seen that the High Court has suo motu power under Section 401 and continuous supervisory jurisdiction under Section 483 of the Code. So, when the High Court on examination of the record finds that there is grave miscarriage of justice or abuse of process of the courts or the required statutory procedure has not been complied with or there is failure of justice or order passed or sentence imposed by the Magistrate requires correction, it is but the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensue. It is, therefore, to meet the ends of justice or to prevent abuse of the process that the High Court is preserved with inherent power and would be justified, under such circumstance, to exercise the inherent power and in an appropriate case even revisional power and in appropriate case even revisional power under Section 397 (1) read with Section 401 of the Code. As stated earlier, it may be exercised sparingly so as to avoid needless multiplicity or procedure, unnecessary delay in trial and protraction of proceedings



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11. In Madhu Limaye V/s. The State of Maharashtra [(1977) 4 SCC 551], a three-Judge Bench was to consider the scope of the power of the High Court under Section 482 and Section 397 (2) of the Code. This Court held that the bar on the power of revision was put in order to facilitate expedient disposal of the case but in Section 482 it is provided that nothing in the Code which would include Section 397 (2) also, shall be deemed to limit or affect the inherent powers of the High Court. On a harmonious construction of said two provisions in this behalf, it was held that though the High Court has no power of revision in an interlocutory order, still the inherent power will come into play when there is no provision for redressal of the grievance of the aggrieved party.

Therefore, the petitioners are entitled to file the petition by invoking the inherent jurisdiction of the Court even though they have not challenged the order passed in CrI.M.P.No.2988 of 2013.

8. According to me, the Court below erred in entertaining the complaint against the petitioners and erred in dismissing the application filed by the petitioners for discharge. As stated supra, the petitioners are the Bank, which provided finance to A1 and A2 and as per the Joint Development Agreement entered into between the second respondent and his brothers with A1 and A2, the 1st accused is entitled to 50% of the undivided share of the land and also 50% of the super built up area. As per the power given by the owners, A1 and A2 are entitled to create mortgage for a total sum of Rs.7.50 crores. Admittedly, mortgage was created for Rs.22 crores and it is seen from the Memorandum of Title Deeds, mortgage has been created only in respect of 50 % of the undivided share of the property and after the construction was over, they are also entitled to 50% of the super built up area. Therefore, considering the fact that A1 and A2 are entitled to 50% of the undivided share in the land and 50% of the super built up area, the bank has provided additional finance. Therefore, according to me, there is no question of criminal breach of trust or cheating committed by the petitioners, who are the bankers who provided finance to A1 and A2. According to me, even if the loan amount was not repaid by A1 and A2, no offence is said to have been committed by the petitioners by advancing Rs.22 Crores to A1 and A2. As rightly submitted by Mr.N.R.Elango, the learned Senior Counsel, the bank cannot proceed against the owners for more than 7.50 crores, for which power was given to A1 and A2 and it is not the case of the prosecution and the owners that the bank has filed any suit for recovery against the owners for recovery of Rs.22 crores and it is an admitted case that the entire loan amount was repaid. Though by repaying the entire loan amount, the accused cannot seek quashing



of the case, having regard to the facts of the present case, the said proposition cannot be applied to the petitioners as they have not availed the loan and they only advanced the loan to A1 and A2 on the basis of Joint Development Agreement as well as on the basis of power of attorney.

9. In the judgment reported in (2005) 1 SCC 568 (State of Orissa Vs. Debendra Nath Padhi), the Honourable Supreme Court held that only in rare cases, the Court can consider unimpeachable evidence of sterling quality produced by the accused while quashing the complaint and in other cases, the Court has to proceed on the basis of the materials furnished by the prosecution.

10. In 2014 CRI.L.J.4879 (State of Maharashtra Through CBI V. Vikram Anantrai Doshi), the Supreme Court having regard to the facts of the case held as follows:

"It is a social wrong and it has immense social impact. It is an accepted principle of handling of finance that whenever there is manipulation and cleverly conceived contrivance to avail of these kind of benefits it cannot be regarded as a case having overwhelmingly and predominanting of civil character. The ultimate victim is the collective. It creates a hazard in the financial interest of the society. The gravity of the offence creates a dent in the economic spine of the nation. The cleverness which has been skillfully contrived, if the allegations are true, has a serious consequence. A crime of this nature, in our view, would definitely fall in the category of offences which travel far ahead of personal or private wrong. It has the potentiality to usher in economic crises. Its implications have its own seriousness, for it creates a concavity in the solemnity that is expected in financial transactions. It is not such a case where one can pay the amount and obtain a "no due certificate" and enjoy the benefit of quashing of the criminal proceeding on the hypothesis that nothing more remains to be done. The collective interest of which the Court is the guardian cannot be a silent or a mute spectator to allow the proceedings to be withdrawn, or for that matter yield to the ingenious dexterity of the accused persons to invoke the jurisdiction under Article 226 of the Constitution or under Section 482 of the Code and quash the proceeding. It is not legally permissible."

In the aforesaid case, the bank was defrauded by the borrower and on the complaint of the bank official, the case was registered against the borrower and in that context, the Honourable Supreme Court observed as stated above. In this case, the facts are converse and as stated supra, the bank advanced loan to A1 and A2



on the basis of Joint Development Agreement and merely because the bank has granted loan in excess of the power given to A1 and A2 by the owners it cannot be presumed that the bank has Colluded with A1 and A2.

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11. In the judgment reported in AIR 1978 Supreme Court 1 (Thakur Das (dead) by Lrs., V. State of M.P. and another) the facts are entirely different and the Honourable Supreme Court considered the scope of revisional jurisdiction conferred upon the High Court under Sections 397 and 401 of the Cr.P.C. and held that the revisional power can be exercised only in exceptional cases where the interest of public justice require interference for the correction of a manifest illegality or the prevention of a gross miscarriage of justice. In this case as stated supra, there was no financial loss to the bank and the bank advanced loan on the basis of the security of 50% undivided share to which A1 and A2 were entitled to as per Joint Development Agreement.

12. In the judgment reported in (2010) 2 SCC 398 (P.Vijayan Vs. State of Kerala and another), scope of Section 227 of Cr.P.C. has been discussed and there is no quarrel about the same.

13. In the judgment reported in AIR (37) 1950 Madras 49 (C.N.29) (Kotamsath Appanna V. Appalaraju) the accused took the gold jewel from P.W.1 for showing to his wife for placing an order for a similar jewel and latter failed to return the same. The defence was that P.W.1 owned some debts to the accused and therefore, the accused retained the jewel. In that context, it was held that whenever a thing is utilised for a purpose not intended and also against an express agreement or implied understanding, an offence under section 406 I.P.C. is made out. In this case, the power was given for the purpose of securing the finance of Rs.7.50 crores and in addition to the power the 1st and 2nd accused are entitled in their own right to 50% undivided share in the property and considering the same, the bank has advanced Rs.22 crores and therefore, it cannot be stated that the bank has committed the offence punishable under Section 406 I.P.C.

14. In the judgment reported in 2014-1-L.W. (Crl.) 781 (State of Tamil Nadu V. N.Suresh Rajan and others) the Honourable Supreme Court held that if the trial Court is satisfied that a prima facie case is made out, charge has to be framed. According to me, trial Court erred in holding that prima facie case is made out, in view of the terms of the Joint Development Agreement the accused 1 and 2 are entitled to have 50% of the undivided share in the property as well as 50% of the super built up area. Therefore, the judgments cited by the learned Senior Counsel appearing for the second respondent cannot be applied to the facts of the case.

15. As stated supra, the petitioners have only advanced money to the accused 1 and 2 on the basis of Joint Development Agreement as well as the power given by the accused 1 and 2 and the mortgage was created only in respect of 50% of the undivided share



of the land to which A1 and A2 are also entitled as per the Joint Development Agreement and the fact that the amount has already been repaid to the petitioners by A1 and A2 and no wrong full loss was caused to the defacto complainant and no wrong full gain was obtained by the petitioners by A1 and A2 and hence, no offence is made out by the petitioners. Therefore, Crl.R.C.No.89 of 2015 is allowed. Having regard to the fact that Crl.O.P.No.1896 of 2015 is partly allowed. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

To

- 1.The Sub-Inspector of Police
Team-XI-A, EDF,
Central Crime Branch,
Greater Chennai Police,
Egmore, Chennai - 600 220.
- 2.The XI Metropolitan Magistrate,
Saidapet.
- 3.The Public Prosecutor,
High Court, Chennai.
- 4.The Chief Metropolitan Magistrate,
Egmore, Chennai.

+2 cc to M/s.R.Vivekananthan, Advocate,SR.16002

+1 cc to M/s.M.Mohammed Rafi, Advocate,SR.15644.

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Crl.R.C.No.89 of 2015
and
Crl.O.P.No.1896 of 2015