

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 22.09.2016

PRONOUNCED ON: 30.09.2016

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

Crl.O.P. No.26345 of 2009 & M.P. No.1 of 2009

1 A.G. Sambath

2 G. Anbalagan Petitioners/Accused 1 and 2

vs.

1 The Sub Inspector of Police
Central Crime Branch/II
Egmore, Chennai 600 008

2 C. Sabesan

3 C.T. Saraswathi Achi

4 Rathna Sabesan

5 Dr. Parameswaran Sabesan

6 Dr. Priyadarshini Sabesan Respondents

(RR 3 to 6 impleaded as per order dated
08.03.2016 passed in Crl.M.P. No.1608 of
2016)

Criminal Original Petition filed under Section 482, Cr.P.C.
seeking to call for the records and quash FIR No.525 of 2009 on the
file of the first respondent police.

For petitioners Mr. V. Gopinath, Sr. Counsel
for Mr. V. Srinivasa Babu

For R1 Mr. C. Emalias
Addl. Public Prosecutor

For RR 2 to 6 Mr. B. Harikrishnan

ORDER

This Criminal Original Petition has been filed seeking to call
for the records and quash FIR No.525 of 2009 on the file of the first
respondent police.

2.1 Sambath (A1), Anbalagan (A2), Thilakavathy (A3), Mallika
(A4) and Elangovan (A5) owned the property in Plot No.3529, I Main

Road, Anna Nagar, Chennai, which they had mortgaged with Indian Bank and availed loan. Since they were not able to repay the loan to the bank, recovery proceedings were initiated against them in T.A. No.28 of 2001 before the Debts Recovery Tribunal, Chennai. Apart from this, SARFAESI proceedings was also initiated against them for recovery of Rs.15,61,07,738-.

2.2 At that critical juncture, they approached Sabesan, the de facto complainant to bail them out and accordingly, Sabesan agreed to purchase the property for a total sale consideration of Rs.5 crores, pursuant to which, the accused and Sabesan entered into two agreements dated 03.10.2007 and 06.10.2007, under which, Sabesan agreed to pay a total sum of Rs.5 crores towards the price of the property and Rs.2.50 crores towards development, thus, totalling Rs.7.50 crores.

2.3 Under the said agreement, Sabesan paid a sum of Rs.77 lakhs directly to Indian Bank. In the meantime, the accused had already paid about Rs.23 lakhs under No Lien Account to Indian Bank, pursuant to a conditional order passed by the Debts Recovery Tribunal to stay the auction sale. Thus, totally, a sum of Rs.1 crore had already been paid to Indian Bank towards loan amount, of which, Rs.77 lakhs has been paid by Sabesan and Rs.23 lakhs has been paid by the accused. The accused also gave a letter to Indian Bank authorising the de facto complainant's advocate to receive the original title deeds relating to the property on settlement of the entire dues to Indian Bank. The accused entered into an One Time Settlement with Indian Bank agreeing to pay Rs.200 lakhs as full and final settlement. This was informed to the de facto complainant, who gave Rs.20 lakhs on 02.12.2008 directly to Indian Bank and in the sale agreement dated 03.10.2007, the same has been recorded and six months time has been extended for the payment of the balance amount demanded by Indian Bank. Before the expiry of the period of 6 months, the accused quietly sold the property to one Ganapathy for Rs.1.85 crores who is stated to have paid the amount directly to Indian Bank and obtained the original documents.

2.4 Aggrieved by this, Sabesan lodged a police complaint alleging that the accused had cheated him by promising to sell the property and asking him to pay Indian Bank, pursuant to which, he had paid a total sum of Rs.97 lakhs, but, the accused had neither returned the money nor transferred the property. Based on the said complaint, the first respondent police registered a case in Crime No.525 of 2009 on 24.10.2009 under Section 420 read with Section 34 IPC, challenging which, Sambath (A1) and Anbalagan (A2) are before this Court.

3 Heard Mr. V. Gopinath, learned Senior Counsel appearing for the petitioners, Mr. C. Emalias, learned Additional Public Prosecutor appearing for the first respondent State and Mr. B. Harikrishnan, learned counsel for respondents 2 to 6.

4 The learned Senior Counsel appearing for the petitioners/accused submitted that the petitioners/accused had no intention to cheat the de facto complainant at all and that they had validly entered into an agreement to sell the property to the de facto complainant, but, since, the de facto complainant did not make payment within the stipulated period, they were forced to sell the property to Ganapathy in order to satisfy the One Time Settlement arrived at with Indian Bank. He relied upon the judgment of the Supreme Court in Vesa Holdings P. Ltd. and another vs. State of Kerala and others [(2015) 8 SCC 293], wherein, the Supreme Court has held at paragraph no.8 as under:

"8 From the decisions cited by the appellant, the settled proposition of law is that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In other words for the purpose of constituting an 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. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out."

5 Per contra, Mr. Harikrishnan, learned counsel for respondents 2 to 6 submitted that right from inception, the accused had acted only with the intention of cheating the de facto complainant by asking him to pay the money directly to Indian Bank, but, selling the property for a song to Ganapathy even before the expiry of period of six months that was agreed to between the parties. He also submitted that in order to avoid repayment of Rs.97 lakhs, the accused issued a notice demanding Rs.5 crores as damages from the de facto complainant for breach of contract and followed it up by filing a suit on the Original Side of the High Court by limiting the claim to Rs.1.50 crores towards loss, damages and mental agony, on payment of less Court fee when compared to the Court fee that is payable in the ordinary Civil Court. He also submitted that the de facto complainant died in the mean time and the suit for recovery of money was filed by his legal heirs and by a common judgment dated 18.01.2016, C.S. No.933 of 2009 filed by the accused was dismissed and C.S. No.1027 of 2010 filed by the de facto complainant was decreed.

6 This Court gave its anxious consideration to the rival submissions.

7 It is true that for maintaining a prosecution for an offence of cheating, there should be deception at inception and therefore,

this Court should carefully examine if this element is present in a given case. In *Lalmuni Devi vs. State of Bihar and others* [2001 AIR SCW 2504] and *Rajesh Bajaj vs. State NCT of Delhi and others* [(1999) 3 SCC 259], the Supreme Court has held that many a cheating are committed in the course of commercial and money transactions and therefore, complaints should not be quashed easily. The relevant passages from the said judgments are as under:

➤ *Lalmuni Devi vs. State of Bihar and others*:

"8. There could be no dispute to the proposition that if the complaint does not make out an offence it can be quashed. However, it is also settled law that facts may give rise to a civil claim and also amount to an offence. Merely because a civil claim is maintainable does not mean that the criminal complaint cannot be maintained. In this case, on the facts, it cannot be stated, at this prima facie stage, that this is a frivolous complaint. The High Court does not state that on facts no offence is made out. If that be so, then merely on the ground that it was a civil wrong the criminal prosecution could not have been quashed."

➤ *Rajesh Bajaj vs. State NCT of Delhi and others*:

"10. It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheating were committed in the course of commercial and also money transactions. One of the illustrations set out under Section 415 of the Indian Penal Code [Illustration f] is worthy of notice now:

"(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats."

8 At the first blush, the argument of the learned Senior Counsel appearing for the petitioners that the transaction is simply civil in nature did sound appealing. But, on a careful scrutiny of the facts, it is seen that the accused had agreed to sell the property for Rs.5 crores to the de facto complainant and made the de facto complainant pay Rs.97 lakhs to Indian Bank. Without even waiting for the expiry of the period of six months that was agreed to, the petitioners/accused, without intimating the de facto complainant, had sold the property for a song to Ganapathy, which does appear very surreal. Had they stopped with that, still, the benefit of doubt can go to them on the strength of the judgment in *Vesa Holdings Pvt. Ltd. (supra)*, relied on by the learned Senior Counsel appearing for the petitioners. The guilty intention got manifested when they issued a notice to the de facto complainant claiming Rs.5 crores in order to preempt him from claiming his money of Rs.97 lakhs. This indeed makes one infer that the accused never had the intention to sell the property to the de facto complainant,

but, had only wanted him to make huge payments to Indian Bank and cheat him. Further, when the de facto complainant had agreed to purchase the property for Rs.5 crores, the accused have executed the sale in favour of Ganapathy for Rs.1.85 crores, which makes this Court think that it is a sham transaction entered into, in order to cheat the de facto complainant. Thus, since there are prima facie materials for the investigation to proceed, this Court is of the considered view that this is not a fit case to quash the FIR.

In the result, this Criminal Original Petition is dismissed with a direction to the first respondent police to conduct and complete the investigation as expeditiously as possible. Connected M.P. is closed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

cad

To

1 The Sub Inspector of Police
Central Crime Branch/II
Egmore, Chennai 600 008

2 The Public Prosecutor
Madras High Court
Chennai 600 104

+1cc to Mr.V.Srinivasa Babu, Advocate Sr.56119

+1cc to Mr.B.Harikrishnan, Advocate Sr.56715

सत्यमेव जयते

Cr1.O.P. No.26345 of 2009

SCD (CO)
RVR 26/10/2016

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