

HONOURABLE Dr. JUSTICE B. SIVA SANKARA RAO

Criminal Revision Case No.2365 of 2014

ORDER:

The revision petitioners 1 to 3 are the accused in C.C.No.1468 of 2008 on the file of the learned I Addl.Chief Metropolitan Magistrate, Visakhapatnam for the offences punishable u/ sec. 420 r/w 34 IPC. It is outcome of the private complaint of the defacto-complainant, dt.15.05.2008. The cognizance by the learned Magistrate shows taken on file for the offence u/ sec. 420IPC against the A.1 to A.3. The private complaint averments show that the accused are the owners of the properties situated at Vepagunta to an extent of 591 sq.yards and 200sq.yards and they approached the complainant-builder and requested to construct housing complex in the vacant site of them which they purchased in Sy.No.72/ 2 and 23/ 5 of total extent of 791sq.yards situated at Main Road, Vepagunta, Visakhapatnam from N.Apparao under registered sale deed Nos.1575/ 93,dt.05.11.1990 and 1436/ 1993 on 07.08.1992 and the accused while in possession of the said vacant land, the complainant executed a development agreement on 13.08.2003 with the conditions that the complainant has to develop site by constructing building complex by obtaining necessary permissions that are required for development of the property at his cost and the accused are entitled to 40% share of the built up area in the proposed complex and the complainant is entitled to 60% in the land measuring 791sq.yards referred supra. It is at request of the complainant, the accused signed and executed papers for filing of the plans and other applications for layout and for the building construction and the VUDA approved the plan for the extent of 591sq.yards in Sy.No.72/ 2 but not for Sy.No.23/ 5 of 200sq.yards and they did not reveal the fact at the time of execution of the development agreement and the accused persons handed over two

sites of 591 + 200sq.yards supra for construction of the buildings. Even the 200sq.yards supra is under acquisition by non-disclosure of the fact from which they cheated the complainant to have wrongful gain by causing wrongful loss and the complainant without knowing the same believing their version in accepting for the construction and later came to know and after completion of the building complex, the complainant handed over 40% of the built up area as per the agreement to the accused which they sold including to their kith and kin by settlement deeds and received benefit and they mortgaged the land in bank and obtained the loan for the remaining and thereby the complainant was cheated by them for having no right to mortgage having given for development pursuant to the development agreement. Out of the two documents filed with the private complaint, one is Photostat copy of Encumbrance Certificate and the other is mortgage deed but dates not mentioned in the complaint. The learned Magistrate after following the procedure under section 200 CrPC, from the sworn statement of the complainant taken the complaint on file. After the accused were summoned, they appeared before the learned Magistrate and they filed CrI.M.P.No.4114 of 2014, seeking to discharge which ought to have been filed u/ sec. 245(2) CrPC, to file under Sec.239 CrPC, but mere quoting wrong provision no way fatal to consider. The averments in the discharge petition of them in brief are that while admitting the execution of the development agreement with 40% and 60% shares respectively after completion of the construction by the complainant in the site of the accused. They denied any allegation of the offence cheated or deception and stated that they already filed a civil suit against the complainant in O.S 119 of 2008 on the file of the VI Addl. District Judge, Visakhapatnam, for the relief of declaration directing the

complainant/defendant to hand over the flats for their share and the suit is pending and they also filed two more suits O.S.No.994 and 1691 of 2009 respectively pending before the VI Senior Civil Judge, Visakhapatnam. The complainant remained exparte in one of the matters in 2013 and anticipating criminal action against the complainant by the accused, he filed as a counterblast subsequent to the filing of the suits and the said private complaint of the flats were sold to the 3rd parties covered by the registered sale deeds to which also the complainant is a party referring to the sale consideration for which those alienated and the benefit received of 60% by the complainant and it is he who played fraud on the accused persons and not vice versa and it is purely a civil litigation and there is no offence of cheating and no ingredients for the offence under Section 415 of IPC even made out. Hence to discharge.

2. The complainant filed handwritten counter through advocate opposing the discharge petition by reiterating the complaint averments.

3. By the impugned order dated 19.06.2014, the learned Magistrate dismissed the discharge application. The impugned order reads that in the vacant site of 791sq.yards to develop that was developed by the complainant by constructing 25flats in G+4 floors whereunder 40% to be given to the land owners-cum-accused and remaining 60% to the developer-the complainant and subsequent to the development agreement there were disputes arose and started blaming one against the other in the course of construction and there were sale deeds executed under which the complainant also sold away all the flats representing his 60%share to the third parties and it shows the shares of the accused also sold by the complainant therein for which, when questioned he started blaming the accused of suppression of fact of the

mortgage of the vacant land in a bank and the accused filed civil suits referred supra. Once the main allegation of the complainant is that there is cheating for which the accused have to establish the dishonest intention of the fact of entering into development agreement and delivering the property for development and it is the matter to be decided after trial including as to the contention of the accused of the dispute is of civil nature for premature now to find.

4. The complainant/revision respondent even was served with notice it was returned as door locked after deposit for the required period, hence service held sufficient and taken as heard.

5. Heard the learned counsel for the accused-revisions petitioners and also the learned Public Prosecutor representing the State and perused the material on record.

6. The development agreement was undisputedly between the parties for 40%+ 60% to make constructions in the extent of 791sq.yards as described supra, dt.13.08.2003 is not in dispute. It is subsequently possession was taken and construction made and the complainant also for representing 60% share of him alienated to third parties by joining the accused as co-executors by sale transactions either directly or through G.P.A. as the case may be. The private complaint filed as referred supra was on 15.05.2008 nearly 5 years thereafter at the time of entering the Development Agreement. If at all there is any such representation of no proposal for acquisition of the 200sq.yards out of 791sq.yards made, the complainant also to verify as to lay out approval not given if at all on that ground for 200sq.yards. It is hardly believable of he bluntly without verifying if at all even such a representation entered the development agreement. He did not even show the date

when the accused mortgaged the property once it is a registered mortgage and reflects in encumbrance Certificate, he cannot say without even verification by obtaining encumbrance certificate also any alienations and encumbrances bluntly entered the Development Agreement. In fact, the civil suit firstly filed by the accused in 119 of 2008 against the complainant and subsequently thereto the private complaint filed by the complainant. There is no even any police report given and there were no any exchange of notices particularly from complainant and the accused and there is no mention as to when he came to know of the alleged cheating of the transaction of there is no limitation if at all offence is made out. The Development Agreement is not even filed much less contents mentioned if at all of any such representation by the accused and covered by the contents as to it is free from encumbrances and there is approved lay out plan which are the two considerations of any maintaining the private complaint. In fact, the Apex Court has referred by the lower Court also in the expression in B.Suresh Yadav Vs. Sharifa Bee¹ observed that when one civil suit already filed pending in the Court of the dispute between the parties, subsequent maintaining of the Criminal case for the alleged offences of cheating hardly believable but for an afterthought to wreck vengeance apart from the dishonest intention from entering into the contract made out as per the settled expressions and also to that extent placed reliance on the earlier expressions particularly G.Sagar Suri Vs. State of UP² and Indian Oil Corporation Vs. NEPC India Ltd.³ among the other expressions of where the dispute is outcome of civil nature hardly the criminal prosecution to convert the civil dispute into criminal proceedings is unsustainable. In view of that the dismissal of the

¹ 2007(3) ALT (CrI) 281 (SC)

² 2000(2) SCC 636

³ (2006) 6 SCC 736

discharge application by the impugned order herein by the trial Court is unsustainable.

7. Accordingly and in the result, the revision is allowed by setting aside the order impugned herein by discharging the revision petitioner. His bail bonds if any shall stand cancelled.

Consequently, miscellaneous petitions, if any, pending in this revision, shall stand closed.

Date:24.04.2017
Vvr.

Dr. B.SIVA SANKARA RAO J,

