IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.10.2018

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

CRL.O.P.Nos.26178 to 26184 of 2011
and
M.P.Nos.1 to 1 and 2 to 2 of 2011 (14 MPs)

Jayashree .. Petitioner in all Crl.O.Ps.

Vs

The State,
rep. by The Inspector of Police,
District Crime Branch,
Tiruppur .. Respondent in all Crl.O.Ps.

COMMON PRAYER: Petitions filed under Section 482 of the Code of Criminal Procedure to call for the records in C.C.Nos.101, 102, 103, 99, 98, 100, and 97 of 2010 on the file of the Judicial Magistrate No.I, Tiruppur and quash the same.

(In all Crl.O.P.s) : Mr.M.Velmurugan
For Petitioner
For Respondent : Mr.P.Govindarajan
Addl. Public Prosecutor

COMMON ORDER

These Criminal Original Petitions have been filed by the petitioner to call for records in C.C.Nos.101, 102, 103, 99, 98, 100, and 97 of 2010 on the file of the learned Judicial Magistrate No.I, Tiruppur and quash the same.

2. The petitioner herein has been arrayed as second accused in C.C.Nos.101, 102, 103, 99, 98, 100, and 97 of 2010 on the file of the learned Judicial Magistrate No.I, Tiruppur for the offence punishable under Section 408 read with 34 and 120B IPC.

3. The case of the prosecution against the petitioner herein is that the petitioner and her husband (first accused)

were started Jem Knit Garments with an intention to cheat the defacto complainant. From 17.9.2003 to 3.12.2007, the said Jem Knit Garments had purchased yarn through 19 invoices. For those transactions, the first accused Senthilkumar made several entries which were all bogus and false entries. The third accused viz., Venkatesh, commission agent of Aswin Tex, had intermediated the transaction. Hence, all three accused were committed offence under Section 408 read with 34 and 120B IPC.

4. I heard Mr.M.Velmurugan, learned counsel for the petitioner and Mr.P.Govindarajan, learned Additional Public Prosecutor for the respondent in all the Criminal Original Petitions and also perused the materials available on record.

5. Learned counsel for the petitioner submitted that the petitioner herein neither clerk, nor servant of the complainant and she never been entrusted with any properties of the complainant and the prosecution has clandestinely implicated the petitioner by adding common intention with the first accused. He would submit that the petitioner was the owner of J.M. Garments and she had purchased the yarn and paid the consideration through Bank transaction and it was absolutely, a business transaction. Therefore, it cannot be construed as criminal act as alleged by the prosecution and prayed for quashing of the criminal proceedings against the petitioner.

6. Per contra, the learned Additional Public Prosecutor submitted that the petitioner and other accused have committed the offence punishable under Section 408 IPC with common intention. He would submit that the petitioner and other accused have misappropriated the complainant's money to their own and committed the offence. The learned Additional Public Prosecutor contended that there is no need to quash the criminal proceedings as prayed for by the petitioner.

7. The defacto complainant Selvaraj, who was the Managing Director of Aswin Textiles lodged a complaint stating that the accused 1 and 2 are husband and wife and 3rd accused was the friend of 1st accused and commission agent of Aswin Textiles. 1st accused was working as Accounts Manager in Aswin Textiles and was looking after the accounts and day-to-day activities. The 1st accused was also directly looking after the accounts of sister concern of Aswin Textiles. Taking advantage of the position, the 1st accused misappropriated the goods. By creating false records, all three accused have misappropriated the goods.

8. Admittedly, there was no specific complaint against the petitioner herein and the only thing is she is the wife of the 1st accused. There is no whisper in the complaint that the petitioner is neither clerk, nor servant of the complainant and

she was never entrusted with any property of the complainant. But the prosecution has implicated the petitioner by adding common intention with the 1st accused, who is her husband.

9. The respondent police filed charge sheet against the petitioner and other accused for the offence under Section 408 read with 34 and 120B IPC.

10. Section 408 IPC provides:

"408. Criminal breach of trust by clerk or servant

Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

11. Section 405 IPC provides:

"405. Criminal breach of trust

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

Explanation [1]. -A person, being an employer of an establishment whether exempted under section 17 of the Employees' Provident funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Explanation 2. -A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

12. Thus, as per Sections 408 and 405 IPC, to bring home the charge against the accused, the following things must be fulfilled by the prosecution:

(a) Accused must be a clerk or servant.
(b) There must be a dominion over property or entrustment.
(c) Dishonest, misappropriation or conversion into his own use by violation of any direction.
(d) Wilfully poaching the trust.
(e) Wilfully allow other to do so.

13. In the case on hand, admittedly, nothing has been produced by the prosecution to implicate the petitioner into the alleged crime. Merely because the petitioner is wife of the 1st accused, she had been implicated in the crime. The prosecution has failed to show the common intention of the petitioner with the other accused.

14. Section 34 IPC reads as under:

"34. Acts done by several persons in furtherance of common intention
When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

15. Common intention is dealt with Section 34 IPC and provides that when a criminal act is done by several persons in

furtherance of the common intention of all, each of such person is liable for that act in the same manner as if it was done by him alone. Common intention denotes action in concert and necessarily postulated a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character. But must be actuated by the same common intention, which is different from same intention or similar intention. The sine qua non for bringing in application of Section 34 IPC that the act must be done in furtherance of their common intention to do criminal act. The expression "in furtherance of their common intention" as appearing in Section 34 IPC related to intention to commit criminal act. Thus, as rightly argued by the learned counsel for the petitioner the servants or clerks of the complainant alone have common intention to commit the act/offence of criminal breach of trust and cannot be prosecuted for the alleged commission of offence punishable under Section 408 IPC.

16. In so far as criminal conspiracy alleged by the prosecution, the admitted case of the prosecution is that the first accused and the commission agent i.e., accused No.3 have committed the alleged offence under Section 408 IPC. On a reading of the complaint, it is seen that the petitioner was running a business and due to loss in the business, she sold her properties to the complainant and the petitioner had also received the consideration and after that the petitioner and her husband have not turned for duty. Nothing has been produced by the prosecution to show that the petitioner was an employee of the complainant. It appears that there were business transaction between the complainant and the accused and the same cannot be construed as criminal act as alleged by the prosecution. Even if it is admitted that the complainant sold yarn to the petitioner and she had failed to pay the amount, the complaint has to initiate civil action for recovery of the value of the goods sold to her.

17. According to the petitioner, she had also lodged a complaint against the complainant on 23.1.2008, 30.1.2008 and finally on 2.2.2008. Though the respondent police has registered the F.I.R. in Crime No.7 of 2008 on 9.2.2008, thereafter, on 22.12.2008, the petitioner's complaint came to be closed as mistake of fact, which would clearly establish that the respondent police have not properly investigated the case.

18. As stated supra, only for the reason that the petitioner is the wife of the 1st accused, she had been arrayed as accused in the aforesaid Calender Cases. Mere relationship or association is not enough to establish the conspiracy.

19. For the foregoing reasons, this Court is inclined to

allow these Criminal Original Petitions. Accordingly, these Criminal Original Petitions are allowed and the criminal proceedings against the petitioner in C.C.Nos.101, 102, 103, 99, 98, 100, and 97 of 2010 on the file of the learned Judicial Magistrate No.I, Tiruppur, are quashed. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

vs

To

1.The Judicial Magistrate No.I,
  Tiruppur.

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

3. The Public Prosecutor,
   High court, Madras.

+1cc to Mr.Velmurugan, Advocate, S.R.No. 71736

CRL.O.P.Nos.26178 to 26184 of 2011
and
M.P.Nos.1 to 1 and 2 to 2 of 2011 (14 MPs)

GJII(CO)
GN(02/11/2018)