IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.09.2018
Pronounced on : .03.2019

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.O.P.Nos.25041 & 2010 & 594 of 2011 and
Crl.M.P.Nos.1 of 2010 & 1 of 2011

1.Kanak Surana
Director of Elfotech Electro Chemicals Ltd.,
Factory at Plot No.84, Opp. PIPDIC Industrial Estate,
Kirumampakkam, Bahor, Commune,
Puducherry – 607 402.
... Petitioner in Crl.O.P.No.25041 of 2010

2.Bhagirathi Ariya
Elfotect Electro Chemicals Ltd.,
Bhura,
407, Kalbadevi Road,
Mumbai.
... Petitioner in Crl.O.P.No.594 of 2011

Vs.

1.Vinodkumar Jain @ V.K.Jain.

2.SHO Kirumampakkam Police Station,
Puducherry.
... Respondents in Both Crl.OP's

COMMON PRAYER : Criminal Original Petitions are filed under Section 482 of the Code of Criminal Procedure, to call for the records of the Judicial Magistrate No.I, Pondicherry in C.C.No.261 of 2010 and quash the further proceedings in so far as it relates to the petitioners herein.



In both Crl.OP's
For Petitioner : Mr.S.Ashokkumar,
Senior Counsel for
Mr.A.Sasidharan

For R1 : Mr.V.Karthick,
Senior Counsel for
Mr.S.C.Vishwanth

For R2 : Mr.D.Bharatha Chakravarthy
Public Prosecutor (Pondicherry)

* * * * *

COMMON ORDER

These Criminal Original Petitions are filed praying to quash the proceedings in C.C.No.261 of 2010 pending on the file of the Judicial Magistrate No.I, Pondicherry. The petitioner in Crl.O.P.No.25041 of 2010 is the 2nd accused and the petitioner in Crl.O.P.No.594 of 2011 is the 1st accused in C.C.No.261 of 2010.

2.The short facts of the case as follows:-

The defacto complainant/1st respondent lodged a complaint before the Inspector of Police, Kirumampakkam Police Station, Puducherry, alleging that the petitioners, by making false representation and promise, induced the defacto complainant to purchase the company viz., M/s.Elfotech Electro Chemicals Limited and made him to pay the huge amount and thereby, cheated and caused heavy financial loss to him. Hence, the complaint.

3.Mr.S.Ashok Kumar, learned Senior Counsel representing for Mr.A.Sasidharan, counsel on record for the petitioners would submit that the 1st respondent herein purchased the Factory by name viz., M/s.Elfotect Electro Chemicals Limited at Pondicherry, which is manufacturing calcium carbide and a Memorandum of Understanding dated 21.03.2005 was entered into between the 1st petitioner, Kanak Surana being the Director of the company, as transferor, and the 1st respondent/V.K.Jain and his wife Shashi Jain, as transferees. The possession of the factory was handed over to the 1st respondent on 29.03.2005. Thereafter, the production commenced and he was selling the finished goods to various customers, but he failed to pay the balane amount, as per the Memorandum of Understanding, as a result of which, closure of Factory and disconnection of Electricity. The Board of the company, by resolution, dated 19.12.2005, removed 1st respondent from the Directorship of the company and took possession of the Factory on 24.12.2005.

4.Thereafter, the petitioners found that vital documents, records of Central Excise, Account Books, Bank Account and UTI Bank Cheque Book, cash and other valuable securities of the company, which were entrusted to the 1st respondent were not available and the same were removed by him, while he acted as Executive Director of the company. Such removal caused wrongful loss to the company. Hence, the petitioners preferred a complaint against the 1st respondent, which was registered in Crime

No.177 of 2006. As a counterblast to the said complaint, the 1st respondent had preferred a complaint before the same respondent Police, alleging that the petitioners, by making false representation and promise, induced the defacto complainant, to purchase the company viz., M/s.Elfotech Electro Chemicals Limited and made him to pay the huge amount and thereby, cheated and caused heavy financial loss to him, which was registered in Crime No.195 of 2006.

5.Mr.V.Karthick, the learned Senior Counsel representing for Mr.S.C.Vishwanth, counsel on record for the 1st respondent would submit that the petitioners, by making a false representation and promise, induced the defacto complainant, to purchase the company viz., M/s.Elfotech Electro Chemicals Limited and made him to pay the huge amount and thereby, cheated and caused heavy financial loss to him. Despite receipt of major portion of money, they have not acted as per MOU, transferred the property and struck out and interpolated the letter submitted to the bank without authorsization. Hence, he prayed for dismissal of the petition.

6.Mr.D.Bharatha Chakravarthy, the learned Public Prosecutor, appearing for the 2nd respondent would submit that the petitioner had lodged a complaint against the 1st respondent and a case has been registered in Crime No.177 of 2006. The defacto complainant/1st respondent, had lodged a complaint before the Inspector of Police, Kirumampakkam Police Station, Puducherry in Crime No.195 of 2006 alleging that the petitioners, by making a false representation and promise, induced the defacto complainant to purchase the company Viz., M/s.Elfotech Electro Chemicals Limited and made him to pay huge amount and thereby, cheated and caused heavy financial loss to him. There are case in counter. The Station House Officer, Puducherry, after obtaining legal opinion from the Director of Prosecution, the Magistrate had concluded that there is seller and purchaser relationship, as per the terms of MOU and referred the cases as Civil in nature.

7.After receipt of notice, both the petitioners and the defacto complainant filed protest petitions before the learned Judicial Magistrate No.I, Puducherry, who in turn, by common order, dated 28.05.2010 in Crl.M.P.Nos.3614 of 2018 in Crime No.177 of 2006 and Crl.M.P.No.3612 of 2008 in Crime No.195 of 2006 concluded that a prima facie case has been made out against Mr.V.K.Jain in Crime No.177 of 2006 under Section 420 of

IPC and a prima facie case was made out against the petitioners in Crime No.195 of 2006, for the offence under Section 420 r/w 34 of IPC, and ordered that cognizance to be taken for the said offence. In pursuance of the said orders, process has been issued against the petitioners, to conduct trial before the learned Magistrate in C.C.No.261 of 2010.

6.I have heard the learned counsels appearing on either side and perused the materials available on record.

7.It is seen that the entire case reveals around the MOU entered into between the petitioners and the 1st respondent dated 21.03.2005. In the MOU, it is found that the Board of Directors of M/s.Elfotech Electro Chemicals Limited held their meeting on 03.03.2005 and decided to change the ownership of the company, and the entire shares were to be transferred in favour of the 1st respondent. In the MOU, the petitioners were referred as Transferor and the 1st respondent as the Transferee. As per the MOU, the sale consideration agreed is Rs.3.65 Crores (Rupees three crores and sixty five lakhs only) and the schedule and mode of payment have been enlisted. It is further found that, the entire shares shall be effected on the receipt of final settlement. It is also found that, if the 1st respondent fails to make payment as per the schedule, he has to forfeit his claim for transfer of the shares and also forfeit the amount already remitted. The possession of the factory was handed over to him on 29.03.2005 on making an initial payment, submission of Bank Guarantee.

8.Further, it is found that, if any liability accruing thereafter, the responsibility will be on the 1st respondent. Further, liabilities are found towards the Electricity Department, the Sales Tax Department and others have been clearly stated. Further, an indemnity clause is also been found in furtherance to the MOU and the Possession was handed over and it was recorded by way of possession letter dated 29.03.2005.



9.It is an admitted case that, the 1st respondent was put in possession of the factory and carrying on business, till, he was removed from the post of Executive Director on 19.12.2005. Failure of payment agreed upon, resulted in closure of the factory by an order from the Puducherry Pollution Resolution Committee dated 22.11.2005 and the disconnected of power supply by the Electricity Board. The petitioners had sent a letter dated 13.12.2005 to the 1st respondent to deliberate about the contingencies and called him for board meeting to be held on 19.12.2005. On receipt of the notice of Board Meeting, the 1st respondent chosen not to attend the board meeting on 19.12.2005. Thereafter, the 1st respondent was removed from the Executive Directorship.

10.The petitioners founds that the vital documents have been steathly removed by the 1st respondent. The vital documents of records such as Central Excise, Account Books, Bank Account and UTI Check book, cash and other valuable securities of the company have been removed, which were entrusted to the 1st respondent in the capacity of Executive Director. Thereafter, Manager D.Karthikeyan informed on 27.12.2005, calling for the records, the said D.Karthikeyan in his reply on 29.12.2005 had categorically stated, it is the 1st respondent, who had taken in possession of all the documents. The removal of the 1st respondent from the post of Executive Director of the company was published in the 'Dinamalar' and 'The Hindu' on 02.01.2006 and 04.01.2006. The 1st respondent has failed to full fill his obligation under the MOU and hence, the amounts were forfeited and the same was intimated on 17.01.2006. On the other hand, the 1st respondent using the said documents filed the complaint under Section 138 of the Negotiable Instruments Act against the petitioners, for which a case in Crime No.195 of 2006 was registered. The petitioners as a counter blast to the same, preferred a complaint to the 2nd respondent, which was registered in Crime No.177 of 2006.

11.The 1st respondent stated his complaint, he was lured by the petitioners, entered into MOU, this was the first occasion such allegations have been made against the petitioners. In fact, the complaint by the 1st respondent is also based on the MOU dated 21.03.2005 in some and substance of the case against the petitioners is non fulfilment implementation of MOU.

12.The lower court had given the finding that cases in Crime No.177 of 2006 and Crime No.195 of 2006 arise out of Memorandum of Understanding dated 21.03.2005. The findings of the lower Court is based on the analysis of the said Memorandum of Understanding and the lower Court interprets about the Memorandum of Understanding and finds that liabilities were fastened on the 1st respondent and the Memorandum of Understanding is not a balanced one between the parties and gone further and given its interpretation as follows:-

> “it can be understood in the event of non payment or part payment the purchaser

can waive the interest or can lose the merger amount but not an amount of more than a crore and it oppose to the public policies and also against the natural justice. So in the agreement itself both parties were not given the same footing and it is not a balanced as already discussed. So Prima facie it is be seen that the agreement is not given same footing to the purchaser and seller and in the event of non payment one party will enrich unjust and unlawful gain and other party will loss and put to unlawful loss and it is oppose to public policies and as well as against the natural justice."

12.The lower Court questioned the manner in which the MOU was drafted. It is seen that the 1st respondent from the year 2005 neither approached arbitration nor approached the Company Law board for his grievance. Finally, on finding that the Memorandum of Understanding was drafted in a fraudulent manner gave a finding that the petitioners are liable to prosecute for the offences under Sections 420 of IPC r/w 34 of IPC. Thereafter, the case was taken on file as C.C.No.261 of 2010 and the petitioners are arraying as 1st and 2nd accused and summons have been issued.

13.It is seen from the order passed by the Court below, there is nothing to show that there was any mis-representation or fraudulent act, at the time of inception. The 1st respondent is a business man, who is aware of the business proceedings and it modulates were entered into MOU dated 21.03.2005 and aware of the clauses and obligations till he was removed from the post of Executive Director on 19.12.2005. The 1st respondent stated that the petitioners mis-represented and induced to enter into the MOU and cheated for his removal from Executive Directorship. Further the grievance of the 1st respondent seems to be with regard to discharge of obligations and MOU. There is no specific allegation, that there are fraudulent and dishonest inducement on the part of the petitioners thereby made the 1st respondent to buy the property.

14.It is to be seen in this matter, which is essentially civil in nature and it is given cloak of criminal offence. The Criminal proceedings are not a short cut for other remedies available in law. Before issuing process, a criminal Court has to exercise a great deal of caution. For the accused, it is a serious matter and the Hon'ble Apex Court in the case of Anil Mahajan Versus Bhor Industries Limited and another reported in (2005) 10 SCC and in the case of All Cargo Movers (India) Private Limited and others Versus Dhanesh Badarmal Jain and another reported in (2007) 14 SCC had laid these principles.

15.It is settled law, by a catena of decisions, establishing the 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. In this case there is an absence of dishonest and fraudulent intention, the question of committing offence under Section 420 of the Penal Code does not arise.

16.Therefore, the present case is a civil dispute between the parties. There is no material to make out a case of cheating for the affirmation reason.

17.For the aforesaid reasons, the continuation of the proceedings before the Court below will result in abuse of process of Court. In the result the proceedings in C.C.No.261 of 2010, pending on the file of the Judicial Magistrate Court No.I is hereby quashed and accordingly, this Criminal Original Petitions are allowed. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS iv)

//True Copy//

Sub Assistant Registrar

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To

1.The Judicial Magistrate Court No.I,
Puducherry.

2.The SHO Kirumampakkam Police Station,
Puducherry.

+2cc to Mr.A.Sasidharan , Advocate SR.No. 24061,24063
+1 cc to Government Pleader SR.NO. 25432,25430

Crl.O.P.Nos.25041 & 2010 & 594 of 2011

A.SK(15/04/2019)