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Crl.O.P.(MD).No.15262 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 07.08.2019

Delivered on : 22.08.2019

CORAM:

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Crl.O.P. (MD) .No.15262 of 2014
and
M.P. (MD) Nos.1 and 2 of 2014

Dawoodkhan : Petitioner/Accused

Versus

1.The State rep. by the
Inspector of Police,
District Crime Branch,
Madurai.
(In Crime No.68 of 2013).

: 1st Respondent/Complainant

2.Ramakrishnan

: 2nd Respondent/Defacto
Complainant

Prayer: Petition is filed under Section 482 of the Code of Criminal Procedure praying to call for the records relating to the charge sheet in C.C.No.239 of 2013 on the file of the Judicial Magistrate Court No.I, Madurai, pending disposal of above Criminal Original Petition.

For Petitioner : Mr.M.Ajmal Khan,
Senior Counsel,
For Mr.J.Sulthan Basha

For Respondent No.1 : Mr.K.K.Ramakrishnan,
Additional Public Prosecutor

For Respondent No.2 : Mr.S.Vinayak,
For Mr.N.Anandakumar

O R D E R

This petition has been filed to quash the criminal proceedings in C.C.No.239 of 2013, on the file of the Judicial Magistrate Court No.I, Madurai. The petitioner is the sole accused and he stood charged for the offences punishable under Sections 406, 420 and 447 of the Indian Penal Code.

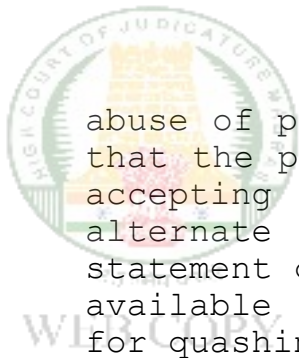


2. The case of the prosecution, in brief, is as follows:

One Mrs.Vairamani was the owner of the landed property in Re-Survey No.56/3H, to an extent of 5 cents at Vilangudi Village, Madurai. The second respondent, who is none other than the father of the said Vairamani and her power of attorney, has given a complaint alleging that, the petitioner/accused, is an adjacent house site owner in Re-Survey No.56/3I, and the petitioner encroached the second respondent property to an extent of 97 square metres. When the second respondent questioned the same, the petitioner disputed it. Hence, the second respondent measured the property with the help of a Surveyor and confirmed that there was an encroachment to an extent of 97 Square metres. Then, he approached the petitioner, and the petitioner also agreed that, he has encroached the property and he promised him to provide alternate site or pay the cost of the land. But, he failed to keep up his promise. Thereafter, the second respondent has given a complaint before the District Crime Branch Police, Madurai, and an enquiry has been conducted by them, wherein, the petitioner has admitted that he has encroached the second respondent property and also promised to give alternate site. But, he failed to provide alternate site. In the above circumstances, the complaint has been filed before the first respondent police. Based on that, a First Information Report was registered for the offences under Sections 447, 406 and 420 of the Indian Penal Code. After investigation, a final report has been filed, which was taken cognizance by the learned Judicial Magistrate No.I, Madurai, and now, pending trial in C.C.No.239 of 2013. To quash the same, the present petition has been filed by the petitioner.

3. Mr.M.Ajmal Khan, learned Senior Counsel appearing for the petitioner would contend that there is a dispute between the petitioner and the second respondent regarding the alleged encroachment of the second respondent property. The second respondent, based on some measurement made by a Surveyor, in his absence, claimed that the petitioner has encroached his property. The petitioner purchased the property in the year 1990, thereafter, he has obtained a planning permission from the Local Body in the year 1991 and put up a construction in the year 1993, and residing therein. Now, after 20 years, the second respondent filed a complaint as if the petitioner has encroached his property. Even assuming that the petitioner has encroached his property, it is only a civil dispute between the parties, the only remedy available to him is to approach the Civil Court concerned, and he cannot give a criminal flavour to the civil dispute and file the present complaint.

4. The learned Senior Counsel appearing for the petitioner further submitted that even assuming that the entire allegations made in the complaint are true, no case has been made out for the offences punishable under Sections 406, 420 and 447 of the Indian Penal Code, and the present complaint has been filed only in total



abuse of process of law. The learned Senior Counsel also submitted that the petitioner never made any promise to the second respondent accepting the alleged encroachment and promised him to provide alternate site or pay the cost of the land. Except the oral statement of the second respondent, absolutely, there is no material available on record to substantiate the same and hence, he prayed for quashing the criminal proceedings.

5. Per contra, Mr.S.Vinayak, learned counsel appearing for the second respondent vehemently contended that, the petitioner has encroached the property belonging to the second respondent to an extent of 97 square metres, and based on the measurement made by the Surveyor, the second respondent approached the petitioner and the petitioner has also accepted the encroachment and promised to pay the cost of the land or provide alternate site, but, failed to keep up his promise and thereby, cheated the petitioner. It is not a civil dispute, as alleged by the petitioner. The materials collected during investigation clearly make out an offence against the petitioner.

6. Mr.K.K.Ramakrishnan, learned Additional Public Prosecutor appearing for the first respondent contended that the materials available on record clearly make out an offence against the petitioner. The petitioner made a promise to pay the amount for the encroached land to the second respondent, but, thereafter, failed to keep up his promise, thereby cheated the petitioner and it is not a civil dispute, as alleged by the petitioner.

7. I have considered the rival submissions and also perused the materials available on record carefully.

8. The petitioner stood charged for the offences punishable under Sections 406, 420 and 447 of the Indian Penal Code. To hold a person guilty of cheating, it must be shown that the accused had a fraudulent or dishonest intention at the time of making representation or promise and there must be a culpable intention at the time of making a promise. The culpable intention cannot be presumed, merely because, he failed to keep up the promise subsequently.

9. The ingredients required for constituting an offence of cheating have been clearly laid down by the Hon'ble Supreme Court in Ram Jas v. State of U.P. [1970(2) SCC 740], which read as follows:

"(i) there should be fraudulent or dishonest inducement of a person by deceiving him;

(ii) (a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or

(b) the person so deceived should be intentionally induced to do or omit to do anything which he would not

do or omit if he were not so deceived; and



(iii) in cases covered by (ii)(b), the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property."

10. In *Medchl Chemicals & Pharma (P) Ltd., v. Biological E. Ltd* [2000(3) SCC 269], the Hon'ble Supreme Court, at Paragraph No.11, has held as follows:

"11..... In order to attract the provisions of Sections 418 and 420 the guilty intent, at the time of making the promise is a requirement and an essential ingredient thereto and subsequent failure to fulfil the promise by itself would not attract the provisions of Section 418 or Section 420. Mens rea is one of the essential ingredients of the offence of cheating under Section 420. As a matter of fact Illustration (g) to Section 415 makes the position clear enough to indicate that mere failure to deliver in breach of an agreement would not amount to cheating but is liable only to a civil action for breach of contract..."

11. To constitute an offence under Section 406 of the Indian Penal Code, the complainant should make out a case for criminal breach of trust, as defined in Section 405 of the Indian Penal Code and to satisfy the offence under Section 405 of the Indian Penal Code, the following ingredients should necessarily be established:

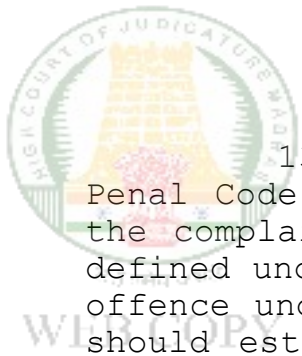
"(a) a person should have been entrusted with property, or entrusted with dominion over property;

(b) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or wilfully suffer any other person to do so; and

(c) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust."

12. In *Common Cause v. Union of India* [1999(6) SCC 667], the Hon'ble Supreme Court has held as follows:

"168. A trust contemplated by Section 405 would arise only when there is an entrustment of property or dominion over property. There has, therefore, to be a property belonging to someone which is entrusted to the person accused of the offence under Section 405. The entrustment of property creates a trust which is only an obligation annexed to the ownership of the property and arises out of a confidence reposed and accepted by the owner."



13. So far as the offence under Section 447 of the Indian Penal Code is concerned, to satisfy the offence under Section 447, the complainant should prove that there is a criminal trespass, as defined under Section 441 of the Indian Penal Code. To bring home an offence under Section 441 of the Indian Penal Code, the prosecution should establish, entering into or upon property in possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property and the aim or dominant intention of the accused must be proved for committing an offence or intimidation, insult or annoyance.

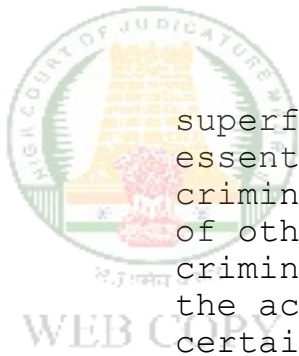
14. Keeping the above principles in mind, let us now consider the instant case, whether the materials available on record would constitute the offence, for which, the petitioner has been charged.

15. The specific case of the second respondent is that the petitioner has encroached his property and put up construction and thereafter, he accepted the encroachment and also promised to pay the cost of the land or provide alternate site. But, he failed to fulfil the promise, thereby, committed the offence of cheating punishable under Section 420 of the Indian Penal Code. It is also stated that earlier, a complaint has been given before the District Crime Branch police, Madurai, in which, enquiry has been conducted, wherein, the petitioner accepted the encroachment made by him and also promised to provide alternate site. But, absolutely, there is no material available on record to show that any such enquiry has been conducted earlier, where the petitioner made such promise, except the statement of the second respondent. That apart, to establish that there is an encroachment by the petitioner, there is absolutely no material. Though the second respondent has stated that a property has been measured by a Surveyor, but, the Surveyor concerned was not examined by the second respondent and no statement was recorded. The Surveyor report was also not collected during investigation. Even assuming that there is an encroachment, it is essentially civil in nature and the parties should resolve their dispute only through a Civil Court, and the second respondent cannot give a criminal flavour to the same, it is nothing but an abuse of process of law.

16. At this juncture, it is worthwhile to refer to the judgment of the Hon'ble Supreme Court in G.Sagar Suri v. State of U.P. [2000(2) SCC 636], wherein it has been held that the criminal proceedings is not a short cut remedy, when other remedies are available in law. The relevant portion of the judgment reads as follows:

"8. Jurisdiction under Section 482 of the Code has to be exercised with great care. In exercise of its

<https://hcservices.courts.gov.in/hcservices/> jurisdiction the High Court is not to examine the matter



superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of 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. This Court has laid down certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

17. Recently, the Hon'ble Supreme Court, in similar circumstances, in Criminal Appeal No.834 of 2017, decided on 08.08.2019 [The Commissioner of Police and Ors. vs. Devender Anand and Ors.] has held as follows:

"4. Having heard the learned counsel appearing on behalf of the parties at length and considering the material on record, we are of the opinion that the criminal proceedings initiated by Respondent No.1 - original complainant is nothing but an abuse of the process of law for settling a civil dispute.

4.1. Even considering the nature of allegations in the complaint, we are of the firm opinion that no case is made out for taking cognizance of the offence under Section 420/34 Indian Penal Code. The case involves a civil dispute and for settling a civil dispute, the criminal complaint has been filed, which is nothing but an abuse of the process of law."

18. Apart from that, for an offence under Section 406 of the Indian Penal Code, there is no material available on record to show that the petitioner has been entrusted with any property and he has misappropriated the same. Likewise, to bring home an offence under Section 447 of the Indian Penal Code, there is no material to show that the petitioner criminally trespassed into the second respondent's property or entered upon the property of the second respondent with an intention to commit an offence or to intimidate, insult or annoy.

19. Considering the above circumstances, I am of the considered view that a civil dispute has been given a criminal flavour and the complaint has been filed in total abuse of process of law. In the above circumstances, the entire criminal proceedings initiated against the petitioner in C.C.No.239 of 2013, on the file of the Judicial Magistrate Court No.I, Madurai, is liable to be quashed and accordingly, quashed.

<https://hcservices.ecourts.gov.in/hcservices/> 20. In fine, the Criminal Original Petition stands allowed.



Consequently, the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-II)

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Sub Assistant Registrar(CS)

To

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

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

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.N. ANANDA KUMAR, Advocate (SR-83439[F] dated
26/08/2019)

Order made in
Crl.O.P.(MD).No.15262 of 2014
Delivered on: 22.08.2019

SML

JMN(03.09.2019) 7P : 5C