BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Dated : 07.11.2019
CORAM
THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN
CRL.O.P (MD) No.9544 of 2018
and
Crl.M.P.(MD) Nos.4234 and 4235 of 2018

Ganapathy ... Petitioner

Vs

K.Balasubramaniam ... Respondent

PRAYER: Criminal Original Petitions filed under Section 482 of Cr.P.C, praying to call for the records relating to the impugned proceedings in C.C.No.220 of 2018 on the file of the Judicial Magistrate No.1, Trichy and quash the same.

For Petitioner : Mr.C.Jegannathan for M/s.Veera Associates
For Respondent : Mr.R.Anand For Mr.M.Saravanan

O R D E R

This petition has been filed to quash the private complaint filed by the respondent in C.C.No.220 of 2018 on the file of the Judicial Magistrate No.1, Trichy, having been taken cognizance for the offence under Section 420 of I.P.C. as against the petitioner herein.

2.The learned counsel appearing for the petitioner submitted that the respondent filed private complaint alleging that the petitioner and his father are the owner of the property situated in Varagupadi Village, Kunnam Taluk, Perambulur District. The respondent complainant was appointed as Mediator to alienate the said property and also for organising purchasers in terms of the written agreement dated 30.07.2000 and in the said agreement, the petitioner agreed for brokerage to the tune of Rs.33,10,000/- and a sum of Rs.1,00,000/- was paid as advance and the remaining amount of Rs.32,10,000/- is due from the petitioner. Thereafter, as per the agreement, the respondent/complainant arranged purchasers and the petitioner executed the sale deed on16.10.2001. However, instead of several demands made by the respondent, the remaining amount was not paid by the petitioner. Therefore, the respondent lodged a complaint before the City Crime Branch, for which, no action was taken and thereafter, he obtained a direction under Section 156(3) Cr.P.C., on the private complaint and though, the FIR has been registered, it was closed as mistake of fact. Thereafter, the respondent filed a private complaint and the same had been taken cognizance for the offence under Section 420 I.P.C.

3.The learned counsel appearing for the petitioner further submitted that the alleged agreement was executed on 30.07.2000, whereas the complaint has been filed only on 02.05.2007 before the Inspector General of Police, Trichy. There is no explanation for the delay in quashment of the original complaint. He further submitted that several complaints, representations were annexed along with the said complaint lodged before the Inspector General of Police, Trichy, as if, he lodged the complaint on 18.02.2002, for which, there is no proof for the lodgment of said complaint.

4.The learned counsel appearing for the petitioner further submitted that even assuming that the said agreement was executed by the petitioner, it is barred by limitation to file a suit for recovery on the strength of agreement. Therefore, the present complaint has been lodged after a period of 7 years without any explanation for the delay. He further submitted that as per the agreement, the respondent ought to have filed civil suit before the appropriate civil Court and he cannot move before the trial Court under the criminal law to convert the civil law into a criminal colour. He further submitted that at the time of entering in the agreement, there was absolutely no intention to cheat the respondent. Therefore, the offence under Section 420 I.P.C. is not at all attract as against the petitioner. In this regard, the learned counsel relied upon the following decisions:

> "1.***S.W.Palanitkar V. State of Bihar - (2002) 1 Supreme Court Cases 241.***
> ***2.Anil Mahajan V. Bhor Industries Ltd. - (2005)10 Supreme Court Cases 228.***
> ***3.ARCI V. Nirma Cerglass Technics (P) Ltd. - (2016) 1 Supreme Court Cases 348.***
> ***4.***Judgment of the Principal Seat of this Court dated ***19.11.2018*** made in ***Crl.O.P.No.5427 of 2017*** in the case of ***S.Anbazhagan V. The Sub Inspector of Police."***

5.Per contra, the learned counsel appearing for the respondent submitted that all the points raised by the petitioner can be gone into before the trial Court during the trial and the mixed question of fact cannot be considered under Section 482 of Cr.P.C. The petitioner raised the ground that the alleged document itself is a forged and fabricated one and he never executed a sale. On the other hand, he submitted that at the time of execution of the said agreement, there was absolutely no intention to cheat the respondent/defacto complainant. Therefore, the petition has been filed nothing but to drag on the proceedings and hence, he prayed for the dismissal of this petition.

6. Heard both sides and perused the materials available on records.

7.The respondent filed a private complaint and the same has been taken cognizance by the trial Court for the offence under Section 420 I.P.C. in C.C.No.220 of 2018 as against the respondent herein. Perusal of the records shows that the respondent lodged a complaint even as early as on 18.02.2002 before the concerned police and on the same, no action has been taken as against the accused persons. Thereafter, he also issued legal notice dated 13.11.2006 to the petitioner for which, the petitioner also sent reply notice dated 13.05.2007. When the petitioner denied the execution of the agreement dated 30.07..2000, he could have very well lodged the complaint before the police for fabrication of false documents and forging his signature. But, the petitioner failed to lodge any complaint so far even till today.

8.Further, according to the petitioner, at the time of execution of the alleged agreement, the respondent was working as Village Administrative Officer and he retired from service in the year 2015 and after his retirement, he lodged the complaint, which cannot be considered here, since, it is noway connected with the alleged agreement as well as the offence committed by the petitioner herein.

9.In the decision relied upon by the learned counsel appearing for the petitioner in ***S.W.Palanitkar V. State of Bihar - (2002) 1 Supreme Court Cases 241,*** the Hon'ble Supreme Court has held as follows:

> *"21.It is clear from the allegations made in the complaint and the sworn statements that Appellant 1 Company entered into an agreement with Respondent 2 on certain terms and conditions. It is alleged that Appellant 7 went to Patna and contacted Respondent 2 and induced him to enter into an agreement assuring him of huge profit. At the time of arriving at such an agreement, none of the other appellants either met Respondent 2 or induced him to enter into any agreement with a view to cheat him. The agreement was further renewed for a period of one year. It is not the case that there was no supply of goods at all as it has come on record that there was supply of 400 tons of fertilizer, may be it was far less than the required quantity,. The allegations made against the appellants other than Appellant 7 are very vague and bald. From the material that was placed before the Magistrate, even prima facie, it cannot be said that there was conspiracy or connivance between the other appellants and Appellant 7. If the appellants have committed breach of agreement, it is open to Respondent 2 to seek redressal in a competent court or forum to recover damages, if permissible in law in*

case he had sustained any loss. In order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating.".

In the decision in ***Anil Mahajan V. Bhor Industries Ltd. - (2005)10 Supreme Court Cases 228***, the Hon'ble Supreme Court has held as follows:

> *"6.The order of the Magistrate was challenged before the Court of Session. The learned Additional Sessions Judge, Pune, by order dated 19.10.2001 has set aside the order of the Magistrate issuing process. It has been stated by the learned Additional Sessions Judge in the order that:*
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> > *"In this case there is no allegation that the accused made unlawful representation. Even, according to the complaint, they entered into memorandum of understanding. Grievance seems to be that the accused failed to discharge obligations under the MOU. In the complaint, there was no allegations that there was fraud or dishonest inducement on the part of the applicant and thereby the opponent parted with the property."*
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> *Reliance has been placed, in that order, on various decisions of this Court holding that from mere failure of a person to keep up promise subsequently, a culpable intention right at the beginning, that is, when he made the promises cannot be presumed. A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the transaction."*

In the decision in ***ARCI V. Nirma Cerglass Technics (P) Ltd. - (2016) 1 Supreme Court Cases 348***, the Hon'ble Supreme Court has held as follows:

> *"15.The essential ingriedients to attract Section 420 IPC are: (i)cheating; (ii)dishonest inducement to deliver*

property or to make, alter or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security; and (iii) mens rea of the accused at the time of making the inducement, The making of a false representation is one of the essential ingredients to constitute the offence of cheating under Section 420 IPC. In order to bring a case for the offence of cheating, it is not merely sufficient to prove that a false representation had been made, but, it is further necessary to prove that the representation was false to the knowledge of the accused and was made in order to deceive the complainant..

22.By an analysis of the terms and conditions of the agreement between the parties, the dispute between the parties appears to be purely of civil nature. It is a settled legal proposition that criminal liability should not be imposed in disputes of civil nature. In ***Anil Mahajan v. Bhor Industries Ltd.****, this Court held as under:*

> *"6... A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the transaction.*
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> *8.The substance of the complaint is to be seen. Mere use of the expression 'cheating' in the complaint is of no consequence. Except mention of the words 'deceive' and 'cheat' in the complaint filed before the Magistrate and 'cheating' in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MoU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay .... We need not go into the question of the difference of the amounts mentioned in the complaint which is much more than what is mentioned in the notice and also the defence of the accused and the stand taken in reply to notice because the complainant's own case is that over rupees three crores was paid and for balance, the accused was giving reasons as above-noticed. The additional reason for not going into these aspects is that a civil suit is pending inter se the parties for the amounts in question.*

*23.In **Indian Oil Corpn. V. NEPC India Ltd.**, this Court observed that civil liability cannot be converted into criminal liability and held as under:*

> *"13.While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lendeers/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable breakdown of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discourages. In **G.Sagar Suri V. State of U.P.**, this Court observed:*
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>> *8..... 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 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 to otherwise to secure the ends of justice.*
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> *14.While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the court, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under Section 250 CrPC more frequently, where they discern malice or*

frivolousness or ulterior motives on the part of the complainant. Be that as it may."

Further, the Principal Seat of this Court dated 19.11.2018 made in Crl.O.P.No.5427 of 2017 in the case of ***S.Anbazhagan V. The Sub Inspector of Police***, it has been held as follows:

"8.It will be useful to refer to the judgment of the Hon'ble Apex Court in Dalit Kaur and Ors .Vs. Jagnar Singh and Anr. reported in [2017(3) MWN (Cr.) 335 (SC)]. It will be relevant to extract para 9 to 11 of the judgment is hereunder:

"9.The ingredients of Section 420 of the Indian Penal Code are :

"(i) Deception of any persons;

(ii) Fraudulently or dishonestly inducing any person to deliver any property; or

(iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit."

10. The High Court, therefore, should have posed a question as to whether any act of inducement on the part of the appellant has been raised by the second respondent and whether the appellant had an intention to cheat him from the very inception. If the dispute between the parties was essentially a civil http://www.judis.nic.in dispute resulting from a breach of contract on the part of the appellants by non-refunding the amount of advance the same would not constitute an offence of cheating. Similar is the legal position in respect of an offence of criminal breach of trust having regard to its definition contained in Section 405 of the Indian Penal Code. {See Ajay Mitra v. State of M.P. [(2003) 3 SCC 11]}.

11.There cannot furthermore be any doubt that the High Court would exercise its inherent jurisdiction only when one or the other propositions of law, as laid down in R. Kalyani v. Janak C. Mehta & Ors. [(2009 (1) SCC 516] is attracted, which are as under:

"(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a First Information Report unless the allegations contained therein, even if given face

value and taken to be correct in their entirety, disclosed no cognizable offence.

(2) For the said purpose, the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.

 (4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue."”

10.The Hon'ble Supreme Court of India categorically held that the essential ingredients to attract the offence under Section 420 of I.P,.C. are that there must be an intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating. But, in the case on hand, on one hand, the petitioner denied the very execution of the sale agreement itself. When it being so, the intention of the petitioner is very clear that after execution of the said agreement, now denied the very execution of the agreement itself. Therefore, the above judgments are not helpful to the case of the petitioner.

11.In this regard, it is relevant to rely upon the judgment of the Hon'ble Supreme Court of India passed in ***Crl.A.No.579 of 2019*** dated ***02.04.2019*** in the case of ***Devendra Prasad Singh Vs. State of Bihar & Anr.,*** as follows:-

" 12.So far as the second ground is concerned, we are of the view that the High Court while hearing the application under Section 482 of the Cr.P.C. had no jurisdiction to appreciate the statement of the witnesses and record a finding that there were inconsistencies in their statements and, therefore, there was no prima facie case made out against respondent No.2. In our view, this could be done only in the trial while deciding the issues on the merits or/and by the Appellate Court while deciding the appeal arising out of the final

order passed by the Trial Court but not in Section 482 Cr.P.C. proceedings.

13.In view of the foregoing discussion, we allow the appeal, set aside the impugned order and restore the aforementioned complaint case to its original file for being proceeded with on merits in accordance with law.

12.Recently, the Hon'ble Supreme Court of India held in respect of the very same issue in ***Crl.A.No.1572 of 2019 - Central Bureau of Invstigation Vs. Arvind Khanna, dated*** 17.10.2019 wherein, it has been held as follows:

"19.After perusing the impugned order and on hearing the submissions made by the learned senior counsels on both sides, we are of the view that the impugned order passed by the High Court is not sustainable. In a petition filed under Section 482 of Cr.P.C., the High Court has recorded findings on several disputed facts and allowed the petition. Defence of the accused is to be tested after appreciating the evidence during trial. The very fact that the High Court, in this case, went into the most minute details, on the allegations made by the appellant-C.B.I., and the defence put-forth by the respondent, led us to a conclusion that the High Court has exceeded its power, while exercising its inherent jurisdiction under Section 482 Cr.P.C.

20.In our view, the assessment made by the High Court at this stage, when the matter has been taken cognizance by the Competent Court, is completely incorrect and uncalled for."

13.Considering the above said judgments, this Court is of the view that there are specific allegations as against the petitioner. The points raised by the learned counsel appearing for the petitioner could be decided only at the time of trial. Further, the mixed question of facts can not be considered by this Court that too under Section 482 of Cr.P.C. Therefore, the above judgments are squarely applicable to this case and as such, the points raised by the petitioner cannot be considered by this Court under Section 482 Cr.P.C.

14.In view of the above discussions, this criminal original petition is dismissed. Consequently, connected miscellaneous petitions are closed. The trial Judge is directed to complete the trial and dispose of the case in C.C.No.220 of 2018 on the file of the Judicial Magistrate No.I, Trichy, within a period of nine (9) months from the date of receipt of a copy of this order. The personal appearance of the petitioner before the trial Court is dispensed with, except the dates on which, the trial Judge insisted the petitioner for his personal appearance.

Sd/-

Assistant Registrar (crl side)

// True Copy //

Sub Assistant Registrar(CS)

Arul

To

The Judicial Magistrate No.I, Trichy.

+1 CC to Mr.M.SARAVANAN, Advocate (SR-96926[F] dated 08/11/2019)

+1 CC to M/s.VEERA ASSOCIATES, Advocate (SR-97022[F] dated 08/11/2019)

Order made in
CRL.O.P (MD) No.9544 of 2018
07.11.2019

VB(05.12.2019) 10P 4C