



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 27.11.2019

CORAM:

THE HONOURABLE MR.JUSTICE **G.R.SWAMINATHAN**

Crl.O.P (MD) .No.9388 of 2016

and

Crl.M.P. (MD) Nos.4707 and 4708 of 2016

WEB COPY

1.K.M.Mohammed Shariff
2.V.Ramasamy
3.R.Jothi

... Petitioners/Accused 1 to 3

Vs.

D.Simon Emmanuel Jeyara

... Respondent/complainant

Prayer: Criminal Original Petition filed under Section 482 of Cr.P.C. to call for the records in C.C.No.195 of 2016, on the file of the learned Judicial Magistrate No.II, Tiruchirapalli and quash the same.

For Petitioners

: Mr.A.Padmanaban

For Respondent

: Mr.T.Lajapathi Roy

ORDER

The petitioners herein are shown as accused in C.C.No.195 of 2016, on the file of the learned Judicial Magistrate No.II, Tiruchirapalli. It is a private complaint filed by the respondent herein. The case of the respondent is that he intended to purchase the land in question from the first petitioner/K.M.Mohammed Sharief in the year 1991 itself. The respondent herein paid a sum of Rs.1,87,000/- to the first petitioner from the month of March to September 1991. The first petitioner had also acknowledged the receipt of the said sum from the respondent herein in writing. That the understanding between the first petitioner and the respondent was that the first petitioner will execute a sale deed in favour of the Tamil Nadu Housing Board. But without doing so, the first petitioner had executed a power of attorney in favour of the second petitioner Ramasamy, who executed a sale deed in favour of the third petitioner, who is none other than the wife of Ramasamy.

2.With these allegations, the complainant had approached the Central Crime Branch, Trichy, way back in the year 1994. It appears that eventhough FIR was registered, no further action was taken. The case bundle also went missing. The complainant moved the High Court and obtained a direction for filing a final report within a certain time frame. This Court had given a direction that the Central Crime Branch should file the final report before the Jurisdictional Court. Aggrieved by the same, the second petitioner herein appears to have moved the Hon'ble Supreme Court. Be that as



it may, the Central Crime Branch eventually filed the report closing the case as a 'mistake of fact'. Therefore, the complainant was left with no other option, but to file the impugned private complaint. The learned Trial Magistrate took cognizance of the offences under Sections 406, 420 and 120(B) of IPC and issued summons to the petitioners herein. To quash the same, this Criminal Original Petition came to be filed. During the pendency of this petition, the first petitioner Thiru.K.M.Mohammed Sharief passed away.

3.The learned counsel appearing for the petitioners also produced the death certificate in respect of the first petitioner. The same is taken on record. Thus, the impugned proceedings stand abated against the first petitioner.

4.Before arguing the case on merits, the learned counsel appearing for the petitioners 2 and 3 submitted that irrespective of the outcome of this petition, the second petitioner would deposit a sum of Rs.3,00,000/- to the credit of C.C.No.195 of 2016, on the file of the learned Judicial Magistrate No.II, Tiruchirapalli, without prejudice to their rights and to give a quietus to the issue. This undertaking is placed on record. The learned counsel for the respondent contended that no case for quashing has been made out and called upon this court to dismiss this petition.

5.On a careful perusal of the complaint averments, it is obvious that the primary transaction had taken place only between the complainant and the first petitioner/K.M.Mohammed Sharief. It is true that Mr.K.M.Mohammed Sharief executed a power of attorney in favour of Ramasamy, second petitioner herein. But then, the sale deed dated 31.05.1993 in favour of Jothi was executed not by Thiru.Ramasamy, but by one Gunasekaran, who also acted as the power agent of Mr.K.M.Mohammed Sharief. Interestingly, the said Gunasekaran is nowhere figuring in the picture. Thus, there is absolutely no privity of contract between the third petitioner Jothi and the complainant herein. In any event, Jothi is only a purchaser of the property. She has not played any other role. Therefore, the very institution of the impugned complaint against the third petitioner herein can only be characterized as an abuse of legal process. There is absolutely no material whatsoever for passing any kind of penal liability on the third petitioner. The impugned prosecution stands quashed as far as the third petitioner herein.

6.Coming to the second petitioner again, it is seen that except taking a power of attorney from the first petitioner, he has not done anything else. Even the said power of attorney, dated 27.09.1991 was not acted upon. It came to be cancelled later. The complainant is fully aware that the first petitioner had issued a fresh power of attorney in favour of one B.Gunasekaran. The awareness and knowledge of the complainant can be inferred from the



fact that the said document has been enclosed as document No.6 along with the complaint.

7.The case of the complainant is that the petitioners have indulged in breach of trust and cheating. Only if there is an element of entrustment, the offence under Section 406 of IPC can be attracted. In this case, the complainant had paid a sum of Rs.1,87,000/- to the first petitioner as sale consideration for purchasing the loan in question. Subsequently, the complainant had second thoughts and instructed the first petitioner to execute a sale deed in favour of his nominee, namely, Tamil Nadu Housing Board. Thus, this is a purely commercial transaction. Therefore, the basic ingredients of Section 406 of IPC are absent in this case.

8.Again to make out the case of cheating, the de-facto complainant must establish the presence of dishonest intention from the inception. In this case, no such intention is discernible from the materials placed on record. As rightly pointed out by the learned counsel for the petitioners, if the first petitioner had not acted in terms of the agreement, the complainant ought to have filed a suit for specific performance. He had not done so. Instead, he had been knocking the doors of the police station all these years. The respondent did have a strong case against the first petitioner herein. But then, the petitioners cannot do anything. The first petitioner had already departed for his heavenly abode.

9.Recording the undertaking of the second petitioner that he would deposit a sum of Rs.3,00,000/- to the credit of C.C.No.195 of 2016, on the file of the learned Judicial Magistrate No.II, Tiruchirapalli, within four weeks from the date of receipt of this order copy. Accordingly, the impugned prosecution stands quashed and the Criminal Original Petition is allowed. Consequently, connected miscellaneous petitions are closed.

10.The respondent had exhibited a disinclination to compromise the matter. Hence, the second petitioner is directed to deposit the amount in question; it is open to the complainant to withdraw the same thereafter.

11.The learned counsel is instructed to file a memo before the Registry of this Court indicating the compliance of the undertaking given by the second petitioner.

Sd/-

Assistant Registrar (co)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)



sjj

To

The Judicial Magistrate No.II, Tiruchirapalli.

+1 CC to Mr.T. LAJAPATHI ROY, Advocate (SR-102118[F] dated 28/11/2019)

+1 CC to Mr.A. PADMANABAN, Advocate (SR-102443[F] dated 29/11/2019)

Crl.O.P(MD) . No.9388 of 2016
27.11.2019

VB(13.02.2020) 4P 4C